

# JOINT COMMITTEE ON PRIVACY AND INJUNCTIONS

## Privacy and Injunctions

### Oral and written evidence

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## **BBC—Written evidence**

We welcome the opportunity to put forward evidence to the Joint Committee.

The evidence we give below is confined to a limited number of key points and we have endeavoured to keep our submissions as brief as possible. We would be willing, of course, to address any particular issues which the Joint Committee thinks particularly pertinent, or to amplify our submissions, if requested.

In setting out our evidence below, we have adopted the basic structure used by the Joint Committee in its call for evidence.

### **Section I. How the statutory and common law on privacy and the use of anonymity injunctions and super-injunctions has operated in practice.**

Two broad issues are raised by this heading. The first concerns how in practise the Court protects information that is said to be private or confidential from disclosure. This directly impacts on freedom of expression. The second issue concerns the circumstances in which the court uses its powers to prohibit publication of details about a case, including the identity of parties. Whilst freedom of expression is again impacted, there is in addition an interference with the principles of open justice.

With regard to the first issue, concerns have been expressed that the balance between protecting privacy and ensuring freedom of speech has been struck inappropriately. It is argued that the law is too quick to protect trivial or anodyne information and that the public interest is construed too restrictively given the need for the media to present information in a way that has impact and appeal. We address these concerns in section two below.

With regard to restraints by the courts which limit open justice, the BBC does not generally feel that these represent an undue interference in its right to impart information. The BBC has been only minimally affected by the granting of super-injunctions, the notable example being the BBC's tangential involvement in the proceedings brought by Trafigura against Guardian Newspapers Limited in September 2009 regarding a leaked expert report that had been commissioned by Trafigura. Whilst the BBC does find itself on occasion the respondent to anonymity injunctions, the majority of these in recent years have related to children and/or Family Court proceedings. In such cases, the principles governing anonymity are well established.

Nonetheless, there have been cases where restrictions have been imposed inappropriately by the courts. In the past two years, the BBC has succeeded in setting aside interim injunctions which ought never to have been sought in two cases. The first concerned a forced marriage protection order where there was no jurisdiction to grant the relief sought. In the second case, an interim injunction was obtained without notice by Doncaster Metropolitan Borough Council but, when the matter came before him, Mr Justice Tugendhat found that there was no evidence of a threat to publish and that there had been "lamentable omissions" by the Council to follow the appropriate procedures. Such situations (fortunately not common) have arisen we believe primarily out of a lack of understanding of the law on the part of certain practitioners and by the fact that non-specialist judges are

called to determine supposedly urgent applications either out of hours and/or made with minimal notice. There is a case we believe for simple guidance being issued by the Judicial Studies Board along the lines of the guidance issued to the judiciary on Reporting Restrictions to ensure that interim injunctions are only granted where certain basic requirements are satisfied.

A super-injunction keeps the very existence of proceedings secret, thereby preventing any public scrutiny. The granting of a super-injunction is, therefore, the complete antithesis of the principle of open justice and should therefore be used only in exceptional cases. Although our experience is that the granting of super-injunctions is very rare (and that anonymity orders are not prevalent), we support the conclusions and recommendations of the Master of the Rolls in the report of the Committee on Super-Injunctions which we believe will safeguard against inappropriate use.

The recommendations made by the Committee on Super-Injunctions build on the principles laid down in the cases of *Attorney General v Levenson* [1979] AC 440 and *In Re S (A Child) (Identification: Restrictions on Publication)* [2005] 1 AC 593. We endorse the statement in particular that derogations from open justice can only properly be made where, and to the extent that, they are “strictly necessary in order to secure the proper administration of justice”. Such derogations should be supported by “clear and cogent evidence“ of necessity which the courts should subject to careful scrutiny. In addition, the Committee noted, a super-injunction should be made only for short periods and in exceptional circumstances, when this level of secrecy is necessary to ensure that the whole point of the order is not destroyed.

We consider it likely that, in the civil litigation sphere, the Committee’s report has put a check on what may have been a tendency by some applicants and their advisers to seek a super-injunction, not because this was essential for the administration of justice, but because the applicant did not welcome being identified as the seeker of an injunction. There was, we consider rightly, wide spread concern that in determining in private *Trafigura’s* application for an injunction, Mr Justice Maddison may have been swayed by concern that publishing the fact that an injunction had been obtained would “unfairly ... damage the interests of” *Trafigura*. The Committee’s report makes clear that such considerations do not justify the granting of a super-injunction and that this exceptional power must only be exercised where it is necessary so as not to undermine the administration of justice (most obviously where there is a real concern that a respondent would frustrate an order if they were made aware of it).

We also welcome the guidance in the Committee’s report that a super-injunction cannot be granted so as to become in practice permanent and that they should be kept under review by the Court. Given the severe interference with freedom of expression and the principle of open justice that any granting of a super-injunction entails, it is vital that restrictions remain in place no longer than is absolutely necessary. We are concerned, therefore, that practical mechanisms may not yet be in place for ensuring that super-injunctions can effectively be challenged and that the continuance of any super-injunction remains under active review. These mechanisms could include timetabled court reviews or return dates at, say, quarterly intervals, with the burden being on the claimant to persuade the court at each hearing that the continuation of the secrecy aspect of the injunction is necessary. Since, by definition, non-parties would not be on notice it would appear appropriate for a heavy

burden to fall on the court to ensure the restrictions on open justice are no more and no longer than necessary.

The Court must also guard against possible abuse of the open justice where parties agree to settle an Article 8 claim where anonymity has been granted on the basis of permanent undertakings. In such cases, a mechanism is required whereby non-parties can apply for anonymity to be lifted.

In many cases where injunctive relief is obtained, a trial does not ultimately take place. Indeed, by virtue of the court's decision in *Jockey Club v Buffham* [2003] Q.B.462, there is an incentive on applicants to delay actually going to trial as any final injunction that is granted may be less advantageous than the interim injunction obtained at the outset (which, unlike the final injunction, binds third parties who have notice of it). The reason that final injunctions do not bind third parties is that it would be far too severe a restriction on freedom of expression were it otherwise. It would in effect mean that the claimant would not have to satisfy section 12(3) of the HRA against each new person who threatened to publish the information in question. In practice in such a situation the claimant may well find it relatively easy to obtain a fresh injunction against that person to stop them publishing the same or very similar information as had already been enjoined at trial against the original defendant. The BBC would also no doubt consider very carefully whether it would wish to publish the information in the knowledge that the claimant had already succeeded at a trial in relation to it. Nevertheless, we consider it to be important that the principle be maintained, namely that it is for the claimant to satisfy section 12(3) in respect of each and every threatened new publication.

The most recent super-injunction case of which we are aware (*DFT v TFD* [2010] EWHC 2335, which was heard shortly after the Committee's report), does appear to have been based on an appropriate assessment of whether such relief was necessary and was followed up with judicial case management. In granting an interim injunction to restrain publication of private information in that case, Mrs Justice Sharp ordered that there be no report of the existence of the proceedings. She considered such a provision necessary - at least for a short period - because of the risk that the respondent, who was a suspected blackmailer, might avoid service or try to frustrate an order if she became, or was made aware, of the proceedings. Mrs Justice Sharp cited Mr Justice Tugendhat's judgment in *Terry v persons unknown*, in which he stated that:

*"[i]f a prohibition of the disclosure of the making of the injunction is included in an order for the purpose of preventing tipping-off, and if the order provides for a return date (as the practice direction envisages), then the prohibition on disclosure may normally be expected to expire once the alleged wrongdoer has been served with an injunction, or at the return date (whichever is earlier)."*

The super-injunction in *DFT v TFD* lasted only one week. When the case came back before the Judge once the respondent had been served (as she had directed), the respondent consented to the continuation of the injunction until trial or further order for what were described by her counsel as "pragmatic reasons".

Despite the respondent's consent, the Judge went on to address whether the injunction remained in effect by considering, in accordance with section 12(3) of the Human Rights Act 1998, whether the applicant was likely to establish at trial that publication should be

allowed. In this regard, we welcome the draft Practice Guidance put forward by the Committee on Super-Injunctions that interim non-disclosure orders which contain derogations from the principles of open justice cannot be granted by consent.

### **Timing and Costs**

Our experience is that interim injunctions and appeals regarding injunctions are dealt with by the courts promptly and that truly urgent matters can be dealt with within an appropriate time frame. This is reassuring in light of the uncertainty and inconvenience that delay can cause and because, inevitably in an age of fast moving news, there is a real risk that information will cease to have topical value. It is an inherent part of the right to freedom of expression that the media is able to impart information at the time it feels most appropriate as it is in the public interest that news services remain topical and relevant and that news is imparted with appropriate impact.

No steps should be taken to penalise any media organisation which refuses to give an undertaking not to publish private information, irrespective of whether there is a subsequent attempt to defend an application for an injunction. To threaten such a penalty could only result in media organisations waiving their right to freedom of expression, potentially in unmeritorious circumstances. It would give applicants, who may demand undertakings without a serious intention of putting their claim before a court (and thereby having their evidence scrutinised) undue leverage. It could also put any media organisation which does give such an undertaking, for fear of a potential cost penalty, at a disadvantage if the relevant information does become public and is widely reported by other media outlets.

There may also be good practical reasons why a media organisation, although it declines at the very outset to give an undertaking, takes a pragmatic decision not to oppose a court application having regard to the costs and having considered more fully the evidence. Further, section 12(3) of the Human Rights Act 1998 requires that the court itself must be satisfied that a privacy claim appears well founded before granting an injunction. In other words, even if a respondent does not oppose an application, the Court must nonetheless be satisfied on the evidence (as Mrs Justice Sharp observed in *DFT v TFD*) that an injunction is appropriate. Therefore, as noted by the Committee on Super-Injunctions (paragraph 1.31 of its report), “..the court cannot simply give effect to an agreement between the parties to derogate from the principles of open justice”.

It is well documented that legal costs in High Court action concerning reputational rights are very high in England and Wales. We support the recommendations of Lord Justice Jackson which are aimed reducing costs in civil litigation generally. However, even if these reforms are implemented, there is limited scope to reduce costs substantially in injunction proceedings because of the adversarial system which places emphasis on oral submissions. As a result, parties are likely to continue to invest heavily in case preparation and on their advocates. Whether, and if so how, more fundamental changes are made to civil litigation, for example to reduce the emphasis on oral hearings, is beyond the scope of this submission.



**Section 2. How best to strike the balance between privacy and freedom of expression, in particular how best to determine whether there is a public interest in material concerning people’s private and family life.**

The principles on which the right to privacy is founded in English law are now in theory at least well established. English courts apply a two stage test in which the first issue is whether the applicant has a reasonable expectation of privacy in respect of the subject matter in issue. Only if the answer is yes must the court go on to consider the second limb of the test: this entails balancing the Article 8 rights of the applicant (and potentially family members) against the Article 10 rights of the media. The statutory foundation upon which this test is derived (the Human Rights Act of 1998) is also well understood.

Given that the foundations and principles of the law are well recognised, there is no necessity in our view for Parliament to enact a statutory privacy law. We also see no need for Parliament to prescribe a definition of “public interest” through statute, this being a concept which is best left for the courts to define and evolve over time to reflect the changing values and needs of society. In any event, by virtue of the European Convention on Human Rights, the English courts must have regard to the decisions of the European Court of Human Rights and it is better for the courts to interpret these decisions as they arise than for Parliament to try to encapsulate them in immovable legislation. We note that the Joint Committee on the Draft Defamation Bill in its report of 19 October 2011 declined to define the public interest for the purposes of the proposed statutory defence of ‘responsible publication’. It would therefore be unhelpful and potentially confusing to have a statutory definition of public interest for privacy law, particularly given that private life interests and reputation are both aspects of Article 8.

Over the last five years the BBC has been the subject of around 10 injunction applications based on privacy or confidence. Of those cases, all but one, have been successfully defended. This would suggest that in the area in which we operate, the balance between freedom of expression and the right to privacy is being struck by the courts in an appropriate manner, in so far as injunctive relief is concerned. In general terms we consider that the operation of section 12(3) HRA as a threshold test for the grant of injunctions for privacy is fair and works in practice in most cases.

However, it is potentially of some concern that the courts have been approaching the assessment of what it is in the public interest to publish (usually in celebrity sex-related cases) by applying the test in *Von Hannover v Germany* (2005) 40 EHRR 1 (the Princess Caroline case)), namely as to whether publication of the information in question would contribute to a debate of general public interest. In that case the test was designed to counter disclosure of mere private life tittle-tattle and in such cases the test may be appropriate (subject to the threshold of seriousness being satisfied).

We are concerned therefore that that test remains poorly defined in practice and could lead to inconsistencies of approach where injunctions against freedom of expression are being considered. It would appear for example to be less flexible than in section 32 of the Data Protection Act 1998 (among other things that 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). That last element of the DPA exemption threshold is similar to the provision in section 12 (4)(a)(ii) of the Human Rights

Act where the court is required to have particular regard to the importance of freedom of expression and to the extent to which it would be in the public interest for the material to be published. We believe there is an argument for more consistency of approach across privacy and data protection.

### **Threshold of seriousness**

Some decided cases indicate a willingness by the court to protect matters which, although private in the strict sense, are in our view not of a highly confidential or intrusive nature. The cases of *McKennitt v Ash* [2008] QB73 and *Murray v Express Newspapers* [2009] CH481 are the two best known examples where the Court has found privacy to be violated by the publication of what many may regard as anodyne information. Whilst, fortunately, few applicants have sought the relief of the courts in respect of trivial matters, the low threshold set in some cases for when the right to privacy is engaged presents the media with uncertainty and, we would suggest, exposes them to undesirable legal risks (bearing in mind the costs incurred in litigation). We believe the Supreme Court decision in *M v Secretary of State for Work and Pensions* [2006] 2 AC 91 at [83] (which is recognised as having general application to Article 8) is important in this respect as it was made clear that for the right to be engaged, interference with private life has to be of some seriousness.

In general, when considering how to protect private or confidential information, we believe it is preferable for the Court to provide as much information as possible in their judgments regarding the application even if, necessarily as a result, the Court directs that one or more parties be anonymised. This is because there is a greater public interest in scrutinising the circumstances in which a privacy injunction is granted than in knowing, in the absence of meaningful contextual information, who sought relief.

### **People in the Public Eye**

We do not consider that celebrities, politicians, sports people or other people in the public eye should waive all their rights to privacy as a result of that position. The nature of the information being disclosed and the reason for its disclosure should remain the most important factors, however the manner in which an individual uses their image or information about their private life is clearly a relevant factor potentially both at the threshold stage (is there a reasonable expectation of privacy?) and in the balancing act between public interest and privacy. Those who regularly place stories (or on whose behalf stories are placed) about their private lives in newspapers are likely to be less entitled to privacy than those who do not. Information which shows a person has acted in a hypocritical manner must be a significant factor at the threshold stage and in the balancing act.

### **Damages**

There is no reason why the usual principles for compensating victims of tort should not apply to breaches of privacy. As such, aggravated damages and exemplary damages can in principle be awarded by the court should the particular circumstances of a privacy case warrant this. It would be wrong in principle for a media publisher to be liable to pay aggravated damages for having failed to give prior notification to the subject of a publication in light of the decision of the European Court of Human Rights in *Moseley v United Kingdom*. It should also be borne in mind that the costs of defending a privacy action far

outweigh any award of damages and that these costs should operate as a significant brake on the reckless publication of private information.

### **Prior Notification**

The issue of prior notification is dealt with in various codes which govern the media (for example, BBC's Editorial Guidelines, OFCOM's broadcasting code and the PCC's Editors' Code of Practice). In light of the European Court of Human Rights having rejected Mr Max Moseley's argument that there should be an obligation in law on the media to notify subjects prior to publishing private information, further regulation is wholly unnecessary.

### **Prior Restraint in Defamation claims**

There is an argument in some quarters for broadening the circumstances in which an interim injunction can be sought in defamation proceedings. It is vital, however, to bear in mind the different purposes which the laws of privacy and defamation serve. Defamation primarily serves to protect reputation from untrue allegations. Where a damaging allegation is later shown to be untrue, the victim achieves vindication and fair minded individuals will take note of the true facts...

The same cannot be said where private or confidential information is published. When forming an assessment of someone, the public cannot be expected to disregard information which they know to be true but which should have remained private. A finding that private information has been misused may serve as some vindication, but it is not complete vindication. It is the irreparable nature of the harm that can be caused by the misuse of private or confidential information that justifies the granting of interim injunctive relief.

### **3. Issues relating to the enforcement of anonymity injunctions and super-injunctions, including the internet, cross-border jurisdiction within the United Kingdom, parliamentary privilege and the rule of law.**

Whilst there have been recent instances of the Scottish press publishing information that is subject to a English High Court injunction, we do not consider that this perceived problem justifies the blurring of what are separate UK jurisdictions by allowing an English injunction to have effect across the UK. The current system of registering a judgment with another UK court is appropriate and effective, provided it is acted upon.

A more difficult issue, however, concerns enforcement where there is foreign media or online publication which undermines the effectiveness of an English court injunction. Enforcement of privacy injunctions in relation to bloggers and tweeters poses a significant challenge. It is undesirable to have a two-stream media with the mainstream, law abiding organisations on the one hand, and the unregulated, uncontrolled blogosphere on the other hand. Many users of the mainstream media also obtain information from blogs and tweets. It may be unrealistic to expect the mainstream media to completely ignore matters which have gained considerable weight/force in the blogosphere. It would be undesirable to prosecute editors or proprietors of mainstream media organisations for publishing matters which many others have published and which are freely available to their readers or viewers via the internet, and maintaining silence on matters which the internet is abuzz with will encourage conspiracy theories. In this regard it may be desirable to apply the 'Spycatcher' principle, in order to reflect the reality of the situation where the information has ended up

significantly in the public domain (although an affected person who wished to rely on that argument would have to apply to discharge or vary the injunction otherwise risk being in contempt).

The prospect of online publication thwarting an injunction presents a real, and for the moment, insoluble risk in some applications. In the longer term, there is some prospect of international co-operation to protect against online privacy violations as discussed at the eG8 summit in Paris in May 2011. However, such co-operation is some way off because consensus is yet to emerge as to whether or how this can be achieved.

### **Parliamentary privilege**

Reporting parliament is one of the most important aspects of the media's role in a democracy and that it is of the greatest importance that the media should be able to do so without fear of civil or criminal liability. While the Bill of Rights confers on MP's complete protection for what they say in Parliament and the Parliamentary Papers Act 1840 confers protection for Hansard, or a summary of material published by Hansard, there appears to be a lacuna for some media reports which may not attract qualified privilege. This issue has arisen in connection with the deliberate breach by MPs of court orders preventing the reporting of particular information. Where media organisations are aware that what an MP has said in the House is a breach of an order, it is not clear that qualified privilege will attach to their reports of what the MP has said. This leaves media organisations potentially vulnerable to the possibility of prosecution for contempt, when reporting an MP's speech which is in breach of a court order. The position, which was recognised by the Master of the Rolls' Report of the Committee on Super-Injunctions, is not acceptable and needs to be addressed by Parliament, so as to give media organisations complete certainty that they will be protected provided they report fair and accurately on what has been said in parliament.

## **4. Ofcom**

- Do the guidelines in Section 8 of the Ofcom Broadcasting Code correctly address the balance between the individual's right to privacy and freedom of expression?
- How effective has Ofcom been in dealing with breaches of the Ofcom Broadcasting Code in relation to breaches of privacy?

While the principles and practices outlined in Section 8 of the Ofcom Broadcasting Code do, in our view, correctly address the necessary balance, we do not think this Section alone is sufficient to understand Ofcom's approach to deciding privacy matters. The Legislative Background pre-amble to the Code sets out the Article 10 obligations, and it is clear from the phrasing used in numerous Ofcom adjudications that Ofcom starts from the proposition that a broadcaster's freedom of expression is a matter of high public interest (as does the BBC's Editorial Guidelines).

Section 8 actually consists of a single rule and 21 "practices to be followed". Following them will help avoid breaking the rule, but not following them does not mean the rule has been broken. Few would dissent from any of the practices, and the way Ofcom interprets the requirements of Section 8 when deciding individual cases demonstrates its concern to achieve an appropriate balance. The disadvantage of this approach, however, is that a high level of judgement has to be applied. We drew attention above to our view that in certain

cases a lack of understanding of the law on super-injunctions on the part of practitioners and even the judiciary has led to some questionable decisions. Something similar may be said about a small handful of Ofcom privacy decisions, but as its judgement and expertise have developed over the years, it has taken what we would regard as suitably robust approach when balancing an individual's right to privacy with a broadcaster's freedom of expression.

Where we would differ with Ofcom is in its view that it has a general duty to protect privacy. On one occasion Ofcom made a finding that the BBC had breached an individual's privacy despite the fact that, when Ofcom asked him explicitly if he wished to complain, he replied in the negative. Privacy attaches to an individual, and if he chooses to give it away (by, for example, giving informed consent to be filmed in circumstances where others might not, or even by simply shrugging his shoulders following what some might regard as a breach), we do not think it appropriate that Ofcom substitutes its judgement for that of the individual concerned.

- Is there a case that the rules on infringement of privacy should be applied equally across all media content?

The BBC is not a proponent of extending broadcasting regulation to the newspapers. The BBC's Director General has made clear that he does not believe statutory regulation of the newspapers or the extension of Ofcom's remit to cover print as well as broadcast is desirable. At the moment UK newspaper web sites fall under the aegis of the Press Complaints Commission and the BBC's online output is regulated by the BBC Trust. But Ofcom has no jurisdiction over the internet.

There are understandable reasons for this: in practice it would not be possible for any UK regulator to have jurisdiction over much internet content even if it were considered desirable in principle. It would not be possible to regulate ex UK sites emanating from jurisdictions with very different approaches to privacy from our own. As we have noted earlier even the law has difficulty with enforcement in these circumstances. There is little point in creating a regulatory regime whose powers may appear strong on paper but are unenforceable offshore. Attempts to control onshore would be likely to increase offshore activity designed to evade content regulation. This can already be seen to happen in relation to the law.

25 October 2011

David Jordan, Director of Editorial Policy and Standards, BBC, Valerie Nazareth, Head of Programme Legal Advice, BBC, and Prash Naik, Controller of Legal & Compliance, Channel 4—Oral evidence (QQ 273–325)

**David Jordan, Director of Editorial Policy and Standards, BBC, Valerie Nazareth, Head of Programme Legal Advice, BBC, and Prash Naik, Controller of Legal & Compliance, Channel 4—Oral evidence (QQ 273–325)**

[Transcript to be found under Prash Naik, Controller of Legal & Compliance, Channel 4](#)

## **Professor Steven Barnett—Written evidence**

Biographical Note: Steven Barnett is Professor of Communications at the University of Westminster, specialising in media policy, regulation, press ethics, and the theory and practice of journalism. Over the last 25 years, he has advised government ministers in the UK, has given evidence or served as an adviser on several parliamentary committees, has been called to give evidence to the European Parliament, and has been invited to speak at numerous national and international conferences. He has directed over thirty research projects on the structure, funding, regulation and business of communications in the UK and around the world, and his work is frequently quoted in parliamentary debates and government reports. He has been a member of the NUJ for nearly 30 years, and has been involved in the training of journalists from former iron curtain countries. He was a columnist on the Observer newspaper from 2000-2004, and writes frequently for the national, online and specialist press as well as being widely quoted by the international media. He is an editorial board member of the British Journalism Review, and his new book “The Rise and Fall of Television Journalism” is being published by Bloomsbury in November.

### **One page overview of evidence**

*(this is followed by one page of relevant quotes, then answers to the committee’s specific questions)*

- Press standards and intrusion have been a problem for at least 30 years, partly because of the uniquely competitive nature of Britain’s national newspaper market.
- During the Calcutt committee’s hearings in 1990, newspaper proprietors and editors pleaded to be allowed a final chance to reform themselves. They have manifestly failed to prevent widespread newsroom excesses. There should be no more “last chances”.
- Proposals for reform should not be confused with any desire to “rein in” Britain’s popular press. This is categorically not an issue of tabloid versus broadsheet values, but about promoting acceptable standards of journalism – on every publication in the country.
- Public figures, and ordinary members of the public suddenly finding themselves in the public eye, have been routinely subjected to gross invasions of privacy which can cause enormous personal and family distress. Such behaviour has no place in a civilised society.
- In any democracy, the balance between free expression and the right to privacy is a delicate one, but each is properly protected by the Human Right Act. There is no justification for preferring free speech rights (s.10) over privacy rights (s.8).
- A public interest framework needs to be established by Parliament which would ensure that any invasion of privacy genuinely designed to expose wrongdoing, injustice, incompetence, or hypocrisy would have a legitimate defence.
- With the legitimacy of Parliament behind it, such a public interest defence would safeguard and promote genuine watchdog journalism while protecting individuals from gratuitous journalistic behaviour designed simply to satisfy a public appetite for gossip.
- Public figures who are not abusing or exploiting positions of power have the same right to privacy as ordinary citizens. We are not entitled to know about the intimate (and often distressing) details of their lives simply because they are high achievers or high earners.
- Neither commercial viability nor public “shaming” are justifiable arguments for breaches of individual privacy. We are not entitled to know about the lawful intimate activities of public figures, simply because some editors or columnists may disapprove.
- Current approaches to redress and self-regulation under the PCC are wholly inadequate. Punitive fines for breaches of an agreed journalistic code, powers of

investigation, and an obligation to respond to third party complaints should be part of a new system.

- Ideally, such a system should still rely on frontline self-regulation. It will, however, require some kind of backstop statutory powers to guarantee compliance. One model might be the Solicitors Regulation Authority, backed in law by the Legal Services Board.
- Key to a new system should be three fundamental principles: promoting high quality journalism in the public interest; protecting the public from unethical and unlawful newsroom practices; and regaining public trust through transparent mechanisms of accountability. I have called this “accountable self-regulation”.
- Arguments that such reforms would “chill” free speech are refuted by Britain’s long tradition of high quality television journalism. Despite well-established statutory codes of conduct, Britain’s television journalism remains robust, independent, ethical and trusted.

### Some relevant quotes

"I do believe the press – the popular press – is drinking in the Last Chance Saloon". Home Office Minister David Mellor, December 1989.<sup>1</sup>

"The Press Complaints Commission is not, in my view, an effective regulator of the press. The Commission has not been set up in a way, and is not operating a code of practice, which enables it to command not only press but also public confidence. It does not, in my view, hold the balance fairly between the press and the individual. " Sir David Calcutt reviewing the new mechanisms of self-regulation, January 1993.<sup>2</sup>

“ ‘I’m sorry about all that press complaining thingamajig’, [Murdoch] said, to my astonishment. He definitely used the word ‘sorry’. And it was clear by his failure to even remember the name of the Press Complaints Commission that he doesn’t really give a toss about it. ‘We had to deal with it the way we did or they’d have all been banging on about a privacy law again and we don’t need that right now. Anyway, it’s done now. How are you going to sell me more papers?’” Piers Morgan, quoting Rupert Murdoch’s reaction to a PCC ruling in May 1995 about publication of intrusive photos of Earl Spencer’s wife.<sup>3</sup>

"There is a line between what is and what isn't acceptable, and..... I think we often crossed it. Whether it was because of deadlines looming, desperation to keep the job, desperation to pay the rent. Or perhaps because when thousands of stories are churned out each week, it's easy to lose sight of the impact those stories have on the people involved". Reporter Sharon Marshall, reflecting in 2010 on ten years of working on British tabloid titles.<sup>4</sup>

"Sienna Miller.... was door-stepped, spat at, verbally abused, harassed and stalked every night by groups of men who made it their business to be as hostile, frightening and

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<sup>1</sup> Home Office Minister David Mellor speaking on the Channel 4 programme *Hard News*, 21 December 1989. The Committee on Privacy and Related Matters headed by David Calcutt Q.C. had been set up in April.

<sup>2</sup> Sir David Calcutt QC, *Review of Press Self-Regulation*, Dept of National Heritage, January 1993. London: HMSO, Cm 2135, p41 par 5.26. Sir David was asked to review whether the new arrangements for self-regulation under the PCC had been effective.

<sup>3</sup> Piers Morgan, 2005, *The Insider*, Ebury Press, p82. Morgan was then editor of the News of the World. The PCC's "ultimate sanction" was a referral to the offending newspaper's proprietor, and Murdoch issued a strong public rebuke. His private position appears to have been rather different.

<sup>4</sup> Sharon Marshall, 2010, "Tabloid Girl". Sphere Books, p237. To assure readers of the veracity of her account, she writes in a preface that "...these stories all happened. These Very Bad Things were done. They still are being done. By tabloid journalists, right now".



provocative as possible. 'The tabloid media culture in this country had got to a point where it was completely immoral. There was no consideration for you as a human being.... I realised I couldn't continue living in this country and do my job, which I loved. You want to feel that you can do something creative that you love without being picked apart and mutilated for other people's pleasure.'" Actress Sienna Miller, interviewed for the Independent by Jemima Khan, September 2011.<sup>5</sup>

(Given the number of questions posed in the Call for Evidence, I have confined myself to those which I am best equipped to address.)

### **Section 1. How privacy law and injunctions have operated in practice**

*Have anonymous injunctions and super-injunctions been used too frequently, not enough or in the wrong circumstances?*

There was, before the phone hacking scandal intervened, a deliberate campaign being waged in some sections of the press to suggest that judges were “trigger-happy” in issuing both injunctions and super-injunctions. Injunctions are a legitimate means for potential victims to ensure that their case against publication is heard. Moreover, newspapers have demonstrated over the years ever more inventive ways of circumscribing orders not to reveal the identity of applicants or the nature of their complaint (e.g. finding a spurious reason for publishing a photo of the complainant next to an “unrelated” story about an injunction being granted). Super-injunctions only become necessary if court decisions are not properly respected. They are currently used sparingly, though further abuse of injunctions may provoke an increased number of applications.

*What can be done about the cost of obtaining a privacy injunction? Whilst individuals the subject of widespread and persistent media coverage often have the financial means to pursue injunctions, could a cheaper mechanism be created allowing those without similar financial resources access to the same legal protection?*

I believe it is essential to allow ordinary people, who become the victim of extraordinary events or otherwise find themselves in the public eye, to have easy and affordable access to protection against excessive intrusion. One – albeit cumbersome – idea might be some kind of tribunal akin to the small claims court which is equipped to weigh up the legitimate reporting requirements of journalists with the citizen's right to a private family life. The current PCC “hotline”, which appears to be effective for those who know about it, might provide another preventative option; however, it would need to be accompanied by a large-scale national publicity campaign to alert people to its existence. Most are now fully aware of the Advertising Standards Authority's watchwords “legal, decent, honest, truthful”. How many are aware of a hotline for those feeling harassed by insensitive or persistent reporters?

### **Section 2. How best to strike the balance between privacy and freedom of expression?**

*Have there been and are there currently any problems with the balance struck in law between freedom of expression and the right to privacy?*

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<sup>5</sup> "Sienna Miller: Hacking's Heroine" in *The Independent*, 23 September 2011, accessed at <http://www.independent.co.uk/news/people/profiles/sienna-miller-hackings-heroine-2359415.html>

In law, the Human Rights Act quite properly enacts both Article 8 (on privacy) and Article 10 (on free expression) of the European Convention. It is currently up to the courts to balance the two according to the merits of each case. In theory this should provide a proper legal balance, but the sheer force of press lobbying for greater latitude on interpreting Article 8 – and indeed for repeal of the HRA in its entirety – is very disturbing. In practice, as long as the courts can withstand the sometimes hysterical outcry of self-interested editors and as long as the HRA survives in its present form, the status quo is acceptable. However, an unequivocal statement of support from this committee would be a powerful expression of cross-party parliamentary support for the importance of sustaining this equilibrium.

*Who should decide where the balance between freedom of expression and the right to privacy lies?*

It must be right that the overarching strategic framework for deciding this balance should lie with the nation's democratically elected representatives. Parliament cannot, however, be expected to legislate for each individual case, which should still be decided in the courts with reference to Parliament's wishes.

*Should Parliament enact a statutory privacy law?*

Reluctantly, I have come to the conclusion that this may now be desirable. It would not be necessary if we could be certain that two conditions would be fulfilled: that the relevant clauses of the HRA survive intact; and that the system of press regulation includes a back-stop statutory power to ensure that the "public interest" as a defence to invasions of privacy is properly defined (see below). I am not confident of either, and would rather that approaches to privacy are dictated by Parliament than a press which consistently puts its own interests above those of the public.

*Should Parliament prescribe the definition of 'public interest' in statute, or should it be left to the courts? Is the current definition of 'public interest' inadequate or unclear?*

We need a statutory definition, which can easily be cloned from existing codes that tend to differ in length and scale rather than substance. By far the most thorough (and impressive) are the *BBC Editorial Guidelines* which could serve as a template for a new statute. Both Ofcom's code and the PCC's are less detailed and leave more to the interpretation of editors and journalists. It is this varied interpretation which leads inevitably to lack of clarity and therefore to (mostly wealthy) litigants taking matters to court. This is unhelpful – and arguably undemocratic – for two reasons. First, the vast majority who cannot afford legal action are denied access to justice, especially with conditional fee arrangements now under scrutiny. Second, there is no overarching guidance laid down in statute, properly debated in Parliament and therefore invested with democratic legitimacy. The argument of some newspaper editors – that law is being made by "unaccountable, unelected and invisible judges" – is self-serving but would certainly have less purchase if a public interest framework were enshrined in law.

It would not need to be prescriptive and, like all laws, would inevitably require interpretation and refinement through the courts. Importantly, however, it would enshrine the fundamental importance of journalism's watchdog function, and could thereby vitiate arguments that legislative initiatives will inevitably "chill" free speech. On the contrary, I

believe that a carefully phrased public interest definition which explicitly protected and encouraged investigative journalism in the public interest could actually serve to *liberate* the kinds of journalism which apologists for self-regulation disingenuously suggest would be endangered. A statutory definition would therefore safeguard the absolute right to publication in the case of:

- Exposing wrongdoing, injustice or incompetence amongst private or public officials in positions of responsibility, including abuses of public office
- Protecting the public from potential danger
- Preventing the public from being misled either by erroneous statements or by the hypocrisy of those attempting to create a false image of themselves
- Revealing information which fulfils a democratic role in advancing a better understanding of important issues or assists the public to come to electoral or other decisions of clear democratic importance.

Such a definition would also help to safeguard the right to privacy when none of these conditions are met. There will of course be grey areas (see below) and in such cases there could be an obligation to balance the public interest justification against the distress and harm that exposure of an individual's private life would inflict on the individual, their family and their friends. These would be decided in the courts on the merits of the case, but within a clear statutory framework democratically agreed after proper debate within Parliament.

*Should the commercial viability of the press be a public interest consideration to be balanced against an individual's right to privacy?*

Categorically not. Commercial self-interest is rarely advanced explicitly by the press, although Daily Mail Editor in Chief Paul Dacre has argued that, if mass-circulation newspapers are not free to write about scandal, there would be “worrying implications for the democratic process.”<sup>6</sup> It is difficult to understand how exploiting the private lives of members of the public – whether or not they enjoy celebrity status – can be justified by reference to commercial viability. It is a little like a jewellery retailer arguing that, were he not allowed to burgle private properties to steal people's valuables, he could not make a living from his shop.

In fact, apart from being an absurd justification for gross invasions of privacy and a deliberate distortion of “public interest” arguments, there are two reasons for doubting the empirical basis for such arguments. First, there is no evidence that those who buy newspapers for scandal also read those news or comment sections on which the “public value” arguments are based. Particularly in the red-top newspapers, the news content is often a very minor element of the total package. This is not an argument for belittling their value – there is nothing wrong with an appetite for gossip or for news with little democracy-enhancing value – but it does somewhat diminish the relevance of “democratic good” justifications.

Second, it is well established within the entertainment business that many celebrities deliberately court the media for fear of disappearing from the public gaze, and will provide plentiful stories and photo-opportunities to fill newspapers. Whatever the motivation for such stories, they provide a source of popular journalism without resorting to illegal or

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<sup>6</sup> Speech to the Society of Editors, 9 November 2008.

amoral acts of intrusion into private lives. There may be fewer scandal stories preferred by editors, but it is not immediately obvious that this will necessarily result in lower sales.

*Should it be the case that individuals waive some or all of their right to privacy when they become a celebrity? A politician? A sportsperson? Should it depend on the degree to which that individual uses their image or private life for popularity? For money? To get elected? Does the image the individual relies on have to relate to the information published in order for there to be a public interest in publishing it (a 'hypocrisy' argument)? If so, how directly?*

There should be one firmly established principle: that Article 8 applies to all citizens, whether or not they are public figures. Everyone at some time in their lives encounters personal difficulties, whether it be marital problems, children in trouble, bereavements, serious illness or the misdemeanours of friends or relatives. There is no justification whatsoever for parading these personal issues in front of millions through the mass media where such disclosures will inevitably cause distress to the individuals involved as well as their friends and relatives.

To suggest that anyone who achieves fame automatically forfeits the right to keep their personal lives private is a manifest breach of a basic human right. It is, moreover, a recipe for crushing creative ambition and punishing success. There may well be an appetite for reading about the intimate private lives of successful and gifted actors, singers, dancers, artists, or sporting heroes who contribute to British cultural life; and of the lives of politicians, philanthropists, entrepreneurs and senior executives who contribute to our public and economic life. But, as I have written in the *British Journalism Review*, "we are not entitled to gatecrash their private lives simply because they have an exceptional talent or have achieved something extraordinary."

Implicit in the public interest arguments outline above is the major exception to this fundamental principle: that anyone exploiting their status or their office or their wealth to mislead or commit any kind of fraud on the public should of course be subject to full journalistic scrutiny, complete with public interest exceptions for any intrusion. In other words, the hypocrisy argument should certainly apply. In most cases, this will be a straightforward equation: it is not usually difficult to ascertain whether a public image is being deliberately courted or created, contrary to the private reality, for private gain. In difficult cases, as above, the courts are the place to interpret the will of Parliament on the basis of the facts. But the inviolable principle should remain: celebrity status or public prominence should not, in itself, entail an automatic loss of the right to privacy.

*Should any or all individuals in the public eye be considered to be 'role models' such that their private lives may be subject to enhanced public scrutiny regardless of whether or not they make public their views on morality or personal conduct (i.e. in the absence of a 'hypocrisy' argument)?*

No, for the reasons given above. I appreciate the arguments about, for example, England football captains and others in the public eye, and these arguments would certainly apply to public breaches of acceptable behaviour. It would also apply (as in the case of Rio Ferdinand) where private behaviour was not consistent with public statements. But to excuse intrusion into private lives on any "role model" grounds would open the floodgates to public interest justifications for pursuing the kinds of destructive and intrusive journalism which triggered this and Lord Justice Leveson's inquiry.

*Are the courts giving appropriate weight to the value of freedom of expression in ‘celebrity gossip’ and ‘tittle-tattle’?*

As stated above, it is important that we recognise the legitimate role of gossip in our news diets. Andrew Marr has called journalism the “industrialisation of gossip”, a slightly uncharitable description which at least acknowledges a popular fascination in other people’s lives. In this sense, the presence of a vibrant and healthy tabloid press is to be welcomed. But a fascination for gossip cannot justify unwarranted and distressing invasions of people’s private lives simply to feed a public appetite for gossip. For that reason, the oft-quoted notion that freedom of expression is itself a public interest defence for otherwise unacceptable breaches of journalistic codes is unsustainable.

*In the context of sexual conduct, should it be the case that a person’s conduct in private must constitute a significant breach of the criminal law before it may be disclosed and criticised in the press?*

Yes, although other public interest considerations would certainly apply to public figures: for example, if any kind of coercion, intimidation or breach of trust was involved. Other than these clear public interest exceptions involving abuse of public office, there should be no justification based simply on moral disapproval.

Britain is a tolerant society, and successive British Social Attitude surveys demonstrate a broad acceptance of moral codes that may not necessarily accord with majority practice. In an attempt to rationalise their lurid exposés, some newspaper editors like to elevate themselves to guardians of the nation’s moral compass by “shaming” those individuals whose private – and perfectly legal – practices they may intensely dislike. This is not only a disingenuous excuse for pursuing commercial self-interest at the expense of distressed victims and their families, but is also reminiscent in its methods of a police state. In the very powerful words of former Court of Appeal judge Sir Stephen Sedley: “Observers with a sense of history have noted that the tabloids’ self-justification, advanced in the name of press freedom, mirrors that of the authoritarian state..... It can be credibly said that the fourth estate is close to being a state within the state, unregulated except to the modest extent that it chooses to regulate itself and alternately feared and pandered to by public figures”.<sup>7</sup> The private bedroom activities of public figures are no business of ours, whatever the personal views of some self-opinionated newspaper editors or columnists.

*Could different remedies (other than damages) play a role in encouraging an appropriate balance? Are damages a sufficient remedy for a breach of privacy? Would punitive financial penalties be an effective remedy? Would they adequately deter disproportionate breaches of privacy?*

It is patently clear that sanctions at the moment are inadequate in two respects. First, they are mostly derisory and bear very little relationship to the financial benefits that might accrue to a publication which can therefore profit from a gross intrusion into privacy. And second, they are insufficient to deter further breaches by the same or other publications. A clear principle should therefore be established that any additional profits accumulated through boosted circulation or advertising revenue as a result of unjustifiable intrusion should be assessed independently and returned to the plaintiff. In addition, a new regulatory

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<sup>7</sup> Stephen Sedley, 2011, “The Goodwin and Giggs Show” in *London Review of Books*, Vol 33 No 12, p3.

system is required – preferably frontline self-regulation with a statutory backstop – which has the power to levy fines of sufficient magnitude to deter further breaches.

*Should we introduce a prior notification requirement, requiring newspapers and other print media to notify an individual before information is published, thereby giving the individual time to seek an injunction if a court agrees the publication is more likely than not to be found a breach of privacy? If so, how would such a requirement function in terms of written content online eg blogs and other media?*

Unwarranted publication of personal details cannot be undone, and for some of those on the receiving end no amount of damages will recompense for the distress caused. It is therefore axiomatic that prior notification should be allowed, as long as the threshold for granting injunctions continues – as it is now – to be high.

The anarchic nature of online, social and mobile media is often quoted in privacy debates as a reason for doing nothing. In fact, the power and reach of new media tends to be overstated, and the potential damage of these media in breach of privacy cases is tiny compared to the main conduits of mass communication. Very few blogs can count their readerships in more than four figures, and even the better known (such as Guido Fawkes) tend to consist of those “in the know” talking to themselves. While Twitter revelations were blamed for the “outing” of Ryan Giggs (reinforced by his naming in Parliament), the disclosure of an identity is very different from the widespread coverage generated across television bulletins and tabloid newspapers. In particular, the sensationalist and lurid nature of much popular press coverage cannot possibly be emulated in 140 characters on Twitter, and the latter should not be used as a convenient excuse for violating legitimate privacy rights.

*Is section 12 of the Human Rights Act 1998 appropriately balanced? Should the media’s freedom of expression be protected in stronger terms? Or is there a disproportionate emphasis on the media’s freedom of expression over the right to privacy?*

Section 12 is an anomaly, the result of undue pressure by newspaper proprietors on the government when the Human Rights Act was going through Parliament. It is particularly unwelcome because it exploits concerns about freedom of expression for individuals with freedom to promote commercial self-interest through publication of celebrity-based revelations – themselves often derived through illegitimate or unlawful means. This is an important distinction: my right to criticise the government or the judiciary is a cornerstone of democracy and should be sacrosanct; but my right to intrude on other people’s lives purely to indulge my appetite for gossip is not an equivalent free speech. I would commend to the committee Onora O’Neill’s words in her 2002 Reith lectures:

Like Mill we may be passionate about individual freedom of expression, and so about the freedom of the press to represent individuals’ opinions and views. But freedom of expression is for individuals, not for institutions. We have good reasons for allowing individuals to express opinions even if they are invented, false, silly, irrelevant or plain crazy, but not for allowing powerful institutions to do so. Yet we

are perilously close to a world in which media conglomerates act as if they too had unrestricted rights of free expression.<sup>8</sup>

#### **Section 4. Issues relating to media regulation in this context, including the role of the Press Complaints Commission and the Office of Communications (OFCOM)**

##### **PCC**

*Do the guidelines in section 3 of the Editors' Code of Practice correctly address the balance between the individual's right to privacy and press freedom of expression?*

Section 3 is essentially an endorsement of section 8 of the HRA, subject to public interest exceptions. These are so broadly interpreted that they are essentially useless. Hence the need for i. a statutory definition of the public interest and ii. reform of the PCC into a body which does not simply represent the interests of powerful newspaper groups.

*How effective has the PCC been in dealing with bad behaviour from the press in relation to injunctions and breaches of privacy?*

Its only saving grace has been the "hotline" which – for those aware of it – has sometimes been effective in dispersing paparazzi and reporter scrums. It has been utterly ineffectual in dealing with some of the amoral and unlawful behaviour which is endemic within some parts of the national press. In other words, it has proved useful in some individual cases of fire-fighting, but useless in terms of changing an unaccountable newsroom culture.

*Does the PCC have sufficient powers to provide remedies for breaches of the Editors' Code of Practice in relation to privacy complaints?*

It has neither the powers nor the institutional will. As the creature of newspaper interests, it cannot (and would not) impose fines, and is concerned only to ensure that complaints are assessed with minimal fuss, minimal publicity, minimal transparency and minimal redress. It is also worth reiterating that for many victims, remedy is not the issue: transgressions of privacy cannot be undone, and success depends on unlawful and unjustifiable intrusions being prevented in the first place.

*Should the PCC be able to initiate its own investigations on behalf of someone whose privacy may have been infringed by something published in a newspaper or magazine in the UK?*

Subject to the qualification above – that the emphasis must be on prevention rather than redress – there must be powers both to initiate investigations and to respond to third party complaints on behalf of those who may be unable or reluctant to pursue complaints in person.

*Should the PCC have the power to consider the balance between an individual's privacy and freedom of expression prior to the publication of material – or should this power remain with the Courts?*

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<sup>8</sup> Onora O'Neill, *A Question of Trust: the BBC Reith Lectures 2002*, Cambridge University Press, 2002, pp93-4.

It should remain with the courts, supported by a public interest framework established democratically by Parliament. Should a new, independent regulatory framework emerge (my own preference is for frontline self-regulation backed by backstop statutory powers, as with solicitors), the interests of justice may well be served by allowing the regulator to consider this balance at the first instance.

*Is there sufficient awareness in the general public of the powers and responsibilities of the PCC in the context of privacy and injunctions?*

No (see above), but greater awareness would probably lead to a greater public outcry at the lack of transparency, lack of accountability and lack of effectiveness..

## **OFCOM**

*Do the guidelines in Section 8 of the Ofcom Broadcasting Code correctly address the balance between the individual's right to privacy and freedom of expression?*

They are significantly more thorough and more considered. The public interest exceptions are very similar, but significantly do not include the weasel words that "There is a public interest in freedom of expression itself". Their effectiveness, however, lies in Ofcom's powers of investigation and sanctions.

*Is there a case that the rules on infringement of privacy should be applied equally across all media content?*

Yes, with the proviso that any application of rules should be proportionate in terms of online, social and mobile media. In other words, they should take account of the reach, popularity and power of the media concerned. It is worth emphasising that our television journalists, who have operated within statutory codes operated by the BBC and commercial regulators for decades, have no history of unwarranted invasions into personal privacy. Television journalism is no less robust or independent, and has an equally honourable tradition of holding power to account and pursuing watchdog journalism in the public interest. The argument that free speech would be "chilled" by regulation supported in statute is demonstrably false.

October 2011



Professor Steven Barnett, Joshua Rozenberg, and Professor Brian Cathcart—Oral evidence (QQ 119–161)

**Professor Steven Barnett, Joshua Rozenberg, and Professor Brian Cathcart—Oral evidence (QQ 119–161)**

[Transcript to be found under Joshua Rozeberg](#)

## **Monica Bhogal and Rachel Donoghue, Berrymans Lace Mawer LLP— Written evidence**

The views expressed in the attached response are those of the authors, Monica Bhogal and Rachel Donoghue, both of whom are solicitors in the firm's Media and Technology team handling a variety of privacy and related claims.

### ***(2) How best to strike the balance between privacy and freedom of expression, in particular how best to determine whether there is a public interest in material concerning people's private and family life***

- a. *Have there been and are there currently any problems with the balance struck in law between freedom of expression and the right to privacy?*

**No, not currently.**

The development of jurisprudence in this area is largely inspired by the Convention. Until relatively recently, there was very little precedent in English law which allowed litigants and practitioners to anticipate how future cases might be decided. However, the law of privacy has evolved rapidly over the last 5 years and, although not crystal clear, there is a substantial body of decisions in which the tests to be applied in claims for misuse of private information have been considered at length. Although some have expressed a considerable degree of hostility to the way in which the balance between Article 8 and Article 10 has been determined by the English courts in recent months, this should not, in our view, precipitate a raft of new legislation, simply to appease those who disagree with the way in which the balance has been struck. In particular, the recent phone-hacking scandal has called into question the media's demands in relation to the law of privacy. Lastly, it should be remembered that Parliament had an opportunity to prescribe the way in which the right to privacy and the right to freedom of expression should be interpreted when it enacted the Human Rights Act. It chose not to, and the courts have been required to develop the law as they see fit. In our view, there are no convincing arguments as to why this practice should not continue.

- b. *Who should decide where the balance between freedom of expression and the right to privacy lies?*

**The judiciary.**

The English law of privacy is required to operate under the umbrella of the European Convention on Human Rights. In determining an individual's right to respect for privacy, pursuant to Article 8, our courts are required to carry out a balancing exercise in relation to whichever Articles under the Convention are said to be engaged. In almost all claims for misuse of private information, the defendant will seek to argue that his right to freedom of expression, as enshrined in Article 10, is engaged. The methodology for determining cases has to be based on a balancing exercise between Article 8 and Article 10. It is trite to say that when conducting the

balancing exercise between the rights afforded by Article 8 and the rights afforded by Article 10, neither has priority, and that the balance can only be determined in the context of a particular case.

In one of the leading privacy cases, *Campbell v MGN [2004] UKHL 22*, Lord Hope expressed the view that the rights as such are of equal value in a democratic society. In another leading privacy case, *Re S (A Child) [2005] 1 AC 593*, the House of Lords outlined a five-stage approach to the decision-making methodology. This approach includes whether in all the circumstances the interest of the owner of the personal information should yield to the right to freedom of expression.

In our view, the balancing exercise is difficult but necessary and must be determined on a case-by-case basis.

- c. *Should Parliament enact a statutory privacy law?*

**No. Please see response to (a) above.**

- d. *Should Parliament prescribe the definition of ‘public interest’ in statute, or should it be left to the courts?*

**No. It should be left to the courts.**

Public interest is largely defined by the social mores of the time. It would be very difficult for Parliament to legislate on this issue. If they did so, it is likely that any such statute would need to be repealed in due course or amended on a regular basis, so as to reflect the changing nature of the attitudes of society. Alternatively, any legislation would need to be drafted widely enough to allow for this, likely rendering it at the very least of little practical use and more probably open to attack by way of satellite litigation. Given that the balancing exercise that the courts are required to undertake demands an intense focus on the particular facts of the case, in our view, this approach is inextricably linked with the requirement to consider what is in the public interest in the context of any given case.

- e. *Is the current definition of ‘public interest’ inadequate or unclear?*

**Yes, although this is inevitable in light of the rights-based approach to determining breach of privacy cases.**

Disclosure of information on the grounds that disclosure is required in the public interest is an aspect of the right to freedom of expression. Public interest is not defined in Article 10 or elsewhere in the Convention, nor has it been (nor, we submit, can it be) wholly defined in case-law. In our view, what is considered to be in the public interest must be addressed on a case-by-case basis, in the context of balancing whichever Convention rights are engaged, and with an intense focus on the specific facts of the case. In recent decisions, there appears to be a broader approach to what is in the public interest or public concern, and a move away from the previously held view that where wrongdoing was alleged, the proper recipient of the information was the appropriate regulatory body or the police, rather than the

public at large. This suggests to us that the media is more likely to be able to rely on this defence in the future.

- f. *Should the commercial viability of the press be a public interest consideration to be balanced against an individual's right to privacy?*

**No.**

The right enshrined in Article 10 of the Convention concerns freedom of expression. This is considered to be one of the cornerstones of a democratic society. Article 10 is often relied upon by the press when defending actions for breach of privacy or misuse of private information. The Article does not afford the press a right to be commercially successful at the expense of an individual's rights, and nor should it. That said, there are circumstances in which smaller publications, with less profitability than a national newspaper, are required to incur substantial costs in defending a claim for misuse of private information. This is one of the reasons, in our view, that exemplary damages ought not to be awarded in breach of privacy cases, and this is addressed further in our response to (l) below.

- (g) *Should it be the case that individuals waive some or all of their right to privacy when they become a celebrity? A politician? A sportsperson? Should it depend on the degree to which that individual uses their image or private life for popularity? For money? To get elected? Does the image the individual relies on have to relate to the information published in order for there to be a public interest in publishing it (a 'hypocrisy' argument)? If so, how directly?*

It is often asked whether the leader of the country should be entitled to the same or a greater degree of privacy as the leader of the national football team, or a pop star. In our view, every UK citizen, regardless of occupation, is entitled to respect for their private life. The fact that an individual may have previously given an interview to a journalist in which that individual revealed some personal information about themselves, should not mean that they are unable to protect their right to privacy should other private information be disclosed in the future without their consent.

We do have sympathy with the hypocrisy argument, however, since it must be in the public interest to know whether an individual is seeking to portray themselves as something they are not. There is an inevitable moral duty on the part of individuals who elect to be in the public eye. In our view, such individuals should expect to come under scrutiny from time to time, in the context of fair and balanced reporting on matters that are deemed to be in the public interest. The courts also appear to be recognising a 'right to criticise' as a factor in conducting the balancing exercise.

This issue was recently considered by the High Court in the case of *Rio Ferdinand v MGN Ltd* [2011] EWHC 2454 (QB). In that case, the court determined that the publisher's right to freedom of expression prevailed over the England football captain's right to privacy in respect of an article concerning his alleged relationship and communications with a woman. It was held that there was a public interest in showing that the image he had previously tried to convey of himself was false, and a substantial body of the public would expect higher standards from the England captain.

The court was not being asked to determine whether the claimant was suitable to hold the position of England football captain. It was instead being asked to consider whether he would be viewed as a role model, by young children in particular, and whether or not the public had an interest in knowing that his recent assertion of being a reformed character was true. Overall, we agree with the court's decision, and consider it to be further evidence of the judiciary being adept at balancing the various Convention rights with an intense focus on the facts of each particular case.

- h. Should any or all individuals in the public eye be considered to be 'role models' such that their private lives may be subject to enhanced public scrutiny regardless of whether or not they make public their views on morality or personal conduct (i.e. in the absence of a 'hypocrisy' argument)?*

**No.** In the absence of the 'hypocrisy' argument, we do not consider that such individuals should be subject to enhanced scrutiny. See the response to (g) above.

- i. Are the courts giving appropriate weight to the value of freedom of expression in 'celebrity gossip' and 'tittle-tattle'?*

In traditional breach of confidence cases, the courts often applied a triviality threshold. Since the development of the law of privacy has been influenced by these decisions, the courts already have regard to the fact that trivial disclosures ought not to be captured by the Convention. This is particularly so, given that Article 8 is not strictly speaking a right to privacy, but a right to 'respect' for privacy. The scope of protection which Article 8 is designed to afford is listed in the Article itself, namely respect for family life, home and correspondence. This is likely to be of assistance to the courts when considering whether the claimant has a reasonable expectation of privacy in the material concerned, and how this should be balanced against the right to freedom of expression.

- j. In the context of sexual conduct, should it be the case that a person's conduct in private must constitute a significant breach of the criminal law before it may be disclosed and criticised in the press?*

**Yes. We have taken this question to relate to sexual conduct in the sense of disclosure of explicit details rather than the bare fact of a relationship.**

In our view, most individuals would consider that sexual behaviour is an aspect of their private life, and one which ought to be protected from scrutiny by the public, or indeed warrant any interference by the state, unless it involves significant criminal activity. The courts have held that all sexual relationships will engage Article 8 and create a reasonable expectation of privacy, including the "clandestine recording of sexual activity on private property", as held by Mr Justice Eady in *Mosley v Group Newspapers* [2008] EWHC 1777 (QB). In our view, this is the correct approach.

- k. Could different remedies (other than damages) play a role in encouraging an appropriate balance?*

**Yes, potentially.**

A claimant is entitled to seek an account of the profits made by a newspaper or magazine following publication of an article that infringed the claimant's right to privacy. This may often be a more attractive remedy than compensatory damages or the destruction of property, and may serve as a deterrent to some publishers when considering whether the nature of the material is likely to infringe an individual's right to privacy. Currently, this is a discretionary remedy and is not always suitable, as it is often difficult to take an account. In addition, defendants would be entitled to argue, in our view, that being ordered to pay the whole of the profit from the offending publication, would constitute unjust enrichment on the part of the claimant. It may be difficult for a court to apportion the whole of the profit in a pragmatic way, and it may therefore be appropriate for additional guidance to be provided on this issue.

In addition, it is possible that the additional remedies available in a defamation claim, namely an apology and/or a statement in open court, could go some way towards compensating for an unwarranted breach of privacy.

- l. Are damages a sufficient remedy for a breach of privacy? Would punitive financial penalties be an effective remedy? Would they adequately deter disproportionate breaches of privacy?*

**Not always, although punitive financial penalties may not represent a meaningful alternative.**

Exemplary damages have been considered and dismissed in the case of *Douglas v Hello! Ltd* [2007] UKHL 21. We accept, however, that compensatory damages may not represent any real deterrent to a large media organization contemplating the publication of photographs which infringe an individual's privacy. The issue was considered more recently in the *Mosley* case (referred to above), and the court held that exemplary damages were not available, at least not without the sanction of Parliament. Exemplary damages are not recognised by the Convention and a claim for invasion of privacy involves direct application of Convention values. It is also possible to argue that exemplary damages would be too great an impediment to freedom of expression. Whilst it may deter disproportionate breaches of privacy, it may also act as a deterrent to necessary investigative, evidenced-based reporting on matters of public interest. This is particularly so in relation to smaller publications.

- m. Should we introduce a prior notification requirement, requiring newspapers and other print media to notify an individual before information is published, thereby giving the individual time to seek an injunction if a court agrees the publication is more likely than not to be found a breach of privacy? If so, how would such a requirement function in terms of written content online e.g. blogs and other media?*

**No. Notification should continue to be voluntary as opposed to a statutory requirement.**

This issue was recently considered by the European Court on Human Rights in the case of *Mosley v UK* (10 May 2011). Following his successful breach of privacy claim against the News of the World, Max Mosley made an application to the ECHR

seeking a declaration that the UK was in breach of Article 8 by failing to impose a legal duty on publishers to notify individuals in advance of publication. In brief, the ECHR ruled that UK domestic law was not in conflict with the Convention. The court added that UK law already provided adequate means of redress in the form of reporting to the Press Complaints Commission and/or seeking damages in a claim for misuse of private information.

We agree with this decision. A ‘prior notification’ rule would, in our view, be too much of a fetter on freedom of expression. In addition, it is likely to be expensive for smaller publications to continually notify. A deluge of notifications would no doubt precipitate substantially more injunction hearings, which are costly to pursue and therefore not necessarily an option that all individuals can afford.

There are already instances where journalists do notify individuals prior to publishing information that is likely to impact on their right to respect for private life. There is no reason to consider that this practice will not continue. Indeed, in light of the recent phone-hacking scandal, it is possible that the media will seek to notify more often, in an effort to be transparent and to enhance public perception of journalists in general.

- n. *Should aggravated damages be payable if a media publisher does not give prior notification to the subject of a publication which a court finds is in breach of that individual’s privacy?*

**No, for the same reasons as outlined in the response to (m) above.**

- o. *Is section 12 of the Human Rights Act 1998 appropriately balanced? Should the media’s freedom of expression be protected in stronger terms? Or is there a disproportionate emphasis on the media’s freedom of expression over the right to privacy? Has section 12 of the Human Rights Act 1998 ensured a more favourable press environment than would be the case if Strasbourg jurisprudence and UK injunctions jurisprudence were applied in the absence of section 12?*

Section 12 of the Human Rights Act serves as an appropriate reminder of the importance of a free press in a democratic society. The press already have a great deal of influence. However, it must be noted that it is the European Convention on Human Rights and the Strasbourg court that have clearly set out that neither Article 8 nor Article 10 take precedence. They are both of equal weight. In order for this to be changed (which we do not advocate as we accept that the starting point must be the equality of each of the Articles of the Convention), Parliament would need to legislate to alter the status of Strasbourg jurisprudence.

- p. *Is the test in section 12 for an injunction to be granted too high a threshold? Should that test depend on the type of information about to be published? Has the court struck the right balance in applying section 12?*

We consider the test is not too high and this is demonstrated in the number of cases in which privacy injunctions have been granted. Nor do we consider it appropriate for the test to be dependant upon the type of information that is in issue. Once it is established that the information is private and that no sufficient public interest

arguments are relevant, whether the private material is of a sexual, financial, medical or other nature should be irrelevant.

We further consider that the court has been properly taking into account the Strasbourg jurisprudence (as it is required to do so) in striking the balance in applying section 12.

**(3) Issues relating to the enforcement of anonymity injunctions and super-injunctions, including the internet, cross-border jurisdiction within the United Kingdom, parliamentary privilege and the rule of law.**

- b. *Is it possible, practical and/or desirable for print media to be restrained by the law when other forms of 'new media' will cover material subject to an injunction anyway? Does the status quo of seeking to restrict press intrusion into individual's private lives whilst the 'new media' users remain unchallenged represent a good compromise?*

It is our view that 'new media' presents significant challenges for the law in this area. However, the law should be predicated on what our society values and should seek to protect those values.

In circumstances where the public disclosure of private information is so widespread as to render futile any attempt to contain its further disclosure, an injunction cannot be properly granted nor should an injunction that is already in place be continued. To do so would be to make a mockery of the legal system.

However, each case must be considered on its own merits and the mere fact that new media such as Twitter enables the rapid and wide-spread dissemination of private information (sometimes information which is the subject of an injunction) is not sufficient justification for any blanket rule.

- e. **PARLIAMENTARY PRIVILEGE:**

*i. With regard to the enforcement of privacy injunctions and the breaching of them during Parliamentary proceedings, is there a case for reforming the Parliamentary Papers Act 1840 and other aspects of Parliamentary privilege? Should this be addressed by a specific Parliamentary Bill or is it desirable for this Committee to consider privilege to the extent it is relevant to injunctions?*

**Yes.**

In our society, the judiciary is supposed to be free from political influence in their decisions. Where the court has reached a considered view, having heard relevant evidence and granted an injunction, it is not acceptable, in our view, that an MP should be permitted to effectively overturn the court's decision.

24 October 2011



## Professor Anthony Bradley QC<sup>9</sup>—Written evidence

1. This paper is limited to some issues relating to parliamentary privilege that are raised in the Joint Committee's Call for Evidence, section (3) (e). I have had the benefit of reading *inter alia* the evidence to the Committee from the Clerk of the House of Commons and the Clerk of the Parliaments, and also the report of the Committee on Super-injunctions chaired by the Master of the Rolls. In view of the full examination in that report (at paras 6.23-6.33) of the uncertainty surrounding press reporting of parliamentary proceedings and contempt of court, I do not deal with the specific question of whether section 3 of the Parliamentary Papers Act 1840 should be amended or replaced to clarify the position in favour of the press.<sup>10</sup>

### ***The courts and Parliament: the significance of the contempt jurisdiction***

2. The present inquiry raises fundamental questions relating to the relationship between the courts and the two Houses of Parliament. The essentials of that relationship are clear. As the Joint Committee on Parliamentary Privilege said in 1999,  
“The legislature and the judiciary are, in their respective spheres, estates of the realm of equal status. Parliamentary privilege is founded on the principle that the proper conduct of parliamentary business ...requires that Parliament shall be answerable for the conduct of its affairs to the public as a whole.... It must be free from, and protected from, outside intervention. ... The courts have a legal and constitutional duty to protect freedom of speech and Parliament's recognised rights and duties, but they do not have power to regulate and control how Parliament shall conduct its business.”<sup>11</sup>
3. The Joint Committee further stated that Article 9 of the Bill of Rights 1689  
“and the constitutional principle it encapsulates protect members of both Houses from being subject to any penalty ... in any court or tribunal for what they have said in the course of proceedings in Parliament.<sup>12</sup> ... Members should not be exposed to the risk of being brought before the courts to defend what they said in Parliament. Abuse of parliamentary freedom of speech is a matter for internal self-regulation by Parliament, not a matter for investigation and regulation by the courts.”<sup>13</sup>
4. The coordinate status of the courts and the Houses of Parliament in our unwritten constitution means that potentially unresolved conflicts of authority may arise, as was famously seen in 1840 when the House decided to punish for contempt of Parliament officers of the court who were seeking to enforce an order of the court.<sup>14</sup> The *sub judice* rule of the two Houses, as it has been developed in recent years,<sup>15</sup> is an

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<sup>10</sup> As the Joint Committee on Parliamentary Privilege in 1999 considered might be desirable: see their Report (1998-99, HL Paper 43-I, HC 214-I), paras 364-365.

<sup>11</sup> *Ibid*, para 23.

<sup>12</sup> *Ibid*, para 37.

<sup>13</sup> *Ibid*, para 40.

<sup>14</sup> See the case of *The Sheriff of Middlesex*, a sequel to the case of *Stockdale v Hansard* (1839) in which the court held that the House of Commons by its own resolution could not authorise material to be published that at common law was defamatory.

<sup>15</sup> See the report of the Procedure Committee, *The Sub Judice Rule of the House of Commons* (2004-05, HC 125).

important means of minimising the risk that the continuing freedom of speech in Parliament may endanger the administration of justice: indeed, each House must be committed to maintaining rather than weakening due process of law. As the *sub judice* resolutions make clear, while members of each House are immune from restraints enforced in the courts when these restraints would breach Article 9, they are subject to restraints imposed by the House itself. An unusual instance of prejudice to criminal justice occurring outside the *sub judice* rule was seen in 1990, when towards the end of the trial of three Irishmen suspected of conspiring to murder the Secretary of State for Northern Ireland (Tom King MP), at which the accused had all remained silent, the Home Secretary announced in the House that the Government intended to change the law on the right to silence; this was followed at once in the media by prominent statements from the Northern Ireland Secretary and (in his retirement) Lord Denning, declaring that far too many guilty men were acquitted because of the right to silence. The jury convicted the three accused, and McCann was sentenced to 25 years; but the convictions of the three accused were set aside because of these comments on the proposed change in the law.<sup>16</sup>

5. An historic exercise of the power of the courts to protect the administration of justice by means of the contempt jurisdiction was seen in 1994, when the Home Secretary (Kenneth Baker MP) was held to have committed contempt of court in deciding not to bring back to the United Kingdom a Zairean asylum-seeker whom the High Court had ordered to be returned.<sup>17</sup> There was, of course, no suggestion in that case that the contempt had arisen from anything said or done in the course of proceedings in Parliament. But *M v Home Office* makes clear that Ministers of the Crown as such do not enjoy the immunity from the contempt jurisdiction that is a constitutional privilege of those who take part in debate in Parliament.
6. The possibility of an unresolved institutional conflict between courts and Parliament has been highlighted by the recent instances in which Members have during parliamentary proceedings named persons who were protected by court order from being named. The report of the Master of the Rolls' committee on super-injunctions sets out with great clarity the constitutional position that there is "no question that a super-injunction, or for that matter any court order, could extend to Parliament, or restrict, or prohibit Parliamentary debate or proceedings". But the committee at once proceeds to state: "This is not to say however that Parliament may not voluntarily choose, consistently with its *sub judice* rules, to limit its scope of debate".<sup>18</sup> The Clerk of the House has included with his present evidence the text of a draft resolution dealing with reference to matters subject to injunction that was considered by the Select Committee on Procedure in 1996.<sup>19</sup> The Joint Committee will wish to consider the desirability of a resolution on these lines. In my opinion, the adoption of such a resolution would be an acceptable development, by contrast with enactment of legislation that would grant the court power to review proceedings in Parliament. However, the text proposed in 1996 includes a clause dealing with "a class of information the publication of which is expressly prohibited by the criminal law": this clause raises matters that may be controversial and appear to go outside the terms of reference of the Joint Committee.

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<sup>16</sup> *R v McCann* (1990) 92 Cr App Rep 239.

<sup>17</sup> *M v Home Office* [1994] 1 AC 377.

<sup>18</sup> Para 6.8

<sup>19</sup> Written evidence to the Joint Committee, page 73.

7. An advantage of both the *sub judice* resolutions and a similar resolution to deal with the naming of individuals whose identity is protected by a court order is that they are not phrased in absolute terms and allow for discretion in their application. It would, for instance, be wrong to exclude a Member from using his or her freedom of speech in a situation where this seems to him or her necessary to bring to public notice some apparent abuse of power, whether by a public authority or a private undertaking. Whistle-blowing by someone who is at odds with authority is often a hazardous path to take, and one that those in power may seek to suppress, despite the statutory protection for it that now exists. A Member may have a reason for action taken in support of a whistle-blower even though this might on inquiry prove to have been mistaken. Similarly, the failure of a regulatory system (for instance, in not eliminating dishonest trading) may justify an intervention that cuts across the normal channels.

***Is reliance on Article 9 of the Bill of Rights an adequate response by the Houses to current concern for the protection of privacy?***

8. Since the protection of privacy is within the Joint Committee's inquiry, the question arises of whether, if further legal protection for privacy is needed, such a scheme should address the difficulty for a comprehensive scheme of protection that Article 9 presents. (If it does not, a journalist might well say, 'We are going to be barred from printing X or Y, but MPs can still get away with it'.) In *A v United Kingdom*,<sup>20</sup> the European Court of Human Rights upheld the parliamentary immunity of the MP for Bristol North-West (Mr Michael Stern) in respect of a speech in the House (during a debate on housing policy) in which he had named a constituent and her family, giving their home address, describing them in strong language as 'neighbours from hell', and stating that her brother (of the same address) was currently in prison. The MP repeated the substance of his comments in press releases, and they at once received media attention. He had not tried to contact the constituent over the complaints made against her by her neighbours. She failed to get legal aid for proceedings against Mr Stern. She complained to Strasbourg of breaches of her right to a judicial remedy (Article 6 ECHR), of failure to respect her private and family life (Article 8) and the lack of a remedy for breach of her rights (Article 13). Third-party comments supporting the immunity of elected members from liability for speeches in national legislatures were received from eight European governments.
9. The Court by 6-1 held that Mr Stern's remarks in Parliament were protected by absolute privilege; this immunity pursued the legitimate aims of protecting free speech in Parliament and maintaining the separation of powers between the legislature and the judiciary. The majority judgment referred to the control over debates exercised by the Speaker and to the disciplinary powers of the House, and quoted the view of the Select Committee on Procedure (in its report in 1988-89) that "there already exists a wide range of remedies which can be pursued by an aggrieved person who wishes to correct or rebut remarks made about him in the House". These were stated to be an approach to an MP with a view to tabling an Early Day Motion, a question to a Minister if some ministerial responsibility could be established, a petition to the House, or an attempt to persuade the MP concerned "in the hope of persuading him that a retraction would be justified". "In extreme cases, deliberately

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<sup>20</sup> Decided on 17 December 2002; 13 BHRC 623.

misleading statements may be punishable by Parliament as a contempt”.<sup>21</sup> The Court held that the rule of absolute parliamentary immunity did not exceed the margin of appreciation allowed to states for limiting an individual’s right of access to court. However, the Court agreed that the MP’s allegations were extremely serious, ‘clearly unnecessary’ in a debate about municipal housing policy, and it was ‘particularly regrettable’ that repeated references had been made to the constituent’s name and address.

10. The French judge, Jean-Paul Costa (later President of the Court), who agreed with the decision but not the Court’s reasoning, upheld the public interest in absolute immunity for parliamentary speeches, but he was not convinced that the victim of a defamatory misstatement in Parliament had any means of redress. The suggested means of redress (outlined above) seemed to him “to be more theoretical and illusory than practical and effective”. Judge Costa argued that the concern of parliaments should now be to affirm the complete freedom of their members “but also, perhaps, to reconcile that freedom with other rights and freedoms that are worthy of respect”. In his view, despite the very serious allegations made against the constituent and her children, the case did not indicate that efforts were being made to bring about such a reconciliation.<sup>22</sup>
11. Judge Loucaides (Cyprus) gave a dissenting judgment. He believed that “as in the case of the freedom of the press, there should be a proper balance between freedom of speech and protection of the reputation of individuals”. That balance had not been maintained, and the application of absolute immunity had been a disproportionate restriction of the right of access to a court. He commented that the absolute privilege of parliamentarians had been established at a time “when the legal protection of the personality of the individual was in its infancy and therefore extremely limited”. The process of balancing the conflicting interests involved required that neither of the two interests should be allowed to prevail absolutely over the other.<sup>23</sup>
12. I have dealt at length with this case because the report includes the following response by the Speaker to the constituent’s complaint:

“Subject to the rules of order in debate, Members may state whatever they think fit in debate, however offensive it may be to the feelings or injurious to the character of individuals, and they are protected by this privilege from any action for libel, as well as from any other molestation”.<sup>24</sup>

Without knowing any more of the facts than are stated in the report of the Strasbourg judgment, I question whether this is an adequate response on behalf of the House. Today we expect all reputable bodies with power to take action affecting individuals to maintain an effective grievance procedure. Did the manner in which the Bristol constituent was treated so publicly by her MP fall below the standards of what the whole body of Members would regard as good practice in dealing with a constituency problem? If so, a way should be found of bringing this home to the

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<sup>21</sup> 13 BHRC 623, 642 (para 86).

<sup>22</sup> *Ibid*, page 646.

<sup>23</sup> *Ibid*, page 650.

<sup>24</sup> *Ibid*, page 629 (para 19).

Member concerned and thus of enabling the constituent to know whether her grievance was justified.

13. In a later decision, the Grand Chamber of the Strasbourg Court upheld a very strong rule of immunity from the criminal law that applies to members of the Turkish National Assembly, even though this was broader than in many European countries. The facts of *Kart v Turkey*<sup>25</sup> need not concern us, but we may note that the Court said that “the regulation of parliamentary immunity belongs to the realm of parliamentary law, in which a wide margin of appreciation is left to member States”.<sup>26</sup> In the Court’s view, the aim of the immunity of MPs was “to guarantee the smooth functioning and integrity of Parliament”.<sup>27</sup> The decisions by parliamentary bodies were “political decisions by nature and not court decisions, so they cannot be expected to satisfy the same criteria as court decisions when it comes to giving reasons”.<sup>28</sup> This approach suggests that the Strasbourg Court gives weight to the autonomy of Parliament and its ability to perform its constitutional duties, and accepts that there is no single pattern of parliamentary law within European countries. We can thus assume that the Court would not find against legislation that protected the right to privacy but did not extend the protection to what is said and done within the two Houses.

### **Conclusions**

14. My conclusions can be summarised as follows:

- (A) Recent instances in which Members have made statements in the House that would constitute contempt of court if made outside do not justify legislation that would, by amending Article 9 of the Bill of Rights, authorise the courts to deal with those statements as contempt of court.
- (B) Since potentially there is the risk of serious prejudice being done to the administration of justice, there is a case to be made on constitutional grounds for action by each House that would on a continuing basis bring home to their Members the existence of that risk and might provide for a disciplinary sanction where an unjustifiable injury is done to the due process of law.
- (C) Apart from situations in which there is a court order protecting an individual’s identity from disclosure, existing parliamentary procedures may need to be supplemented to provide a form of redress when a person outside the House complains that his or her privacy has been unjustifiably infringed by a Member in the course of debate.

13 December 2011

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<sup>25</sup> Decided on 3 December 2009. Other decisions by the Strasbourg Court dealing with issues relating to parliamentary privilege are summarised by Lord Lester of Herne Hill QC in evidence to the Committee on Standards and Privileges, *Privilege: Hacking of Members’ mobile phones* (2010-11, HC 628), Ev 27-28.

<sup>26</sup> *Kart v Turkey*, para 82; also para 96.

<sup>27</sup> *Ibid*, para 91.

<sup>28</sup> *Ibid*, para 101.

## Alastair Brett—Written evidence

From Alastair Brett, solicitor and media law consultant, former Legal Manager to The Times and Sunday Times and now the Managing Director of Early Resolution CIC, a not-for-profit company set up to help litigants resolve expensive libel or privacy actions quickly, fairly and cost-effectively through arbitration or mediation.

I became an in-house solicitor at Times Newspapers Ltd (TNL) back in 1977 and only left the company on 31<sup>st</sup> December 2010. I therefore have over 33 year's experience working in the media as a broadsheet legal adviser. While I was Legal Manager I handled numerous libel complaints and over the last ten years handled a number of interesting privacy complaints. While my experience of privacy issues is nothing like as extensive as my former counterparts at the Sun and News of the World, I did have some thought provoking cases. These ranged from one brought against The Sunday Times by Lord Levy seeking an injunction to stop the newspaper publishing details about his tax return in 2000 to advising one of my editors not to publish long lens photographs of Sienna Miller while she was filming Hippy Hippy Shake a film in which she appeared naked. I do not propose going into those cases in any detail but if the Committee wished to take evidence from me I would obviously be able to give rather more evidence in response to specific questions. I also do not wish to say anything much about super-injunctions as the Master of the Rolls's Report is I believe infinitely more valuable than anything I can contribute to the debate. Instead I wish to set out a summary of the reforms which I believe would make the law in this area, fairer, more certain and more accessible to people with limited financial means.

### Summary of Recommendations

- Because of definitional problems there should be no broad based statutory law of privacy. The common law of “misuse of private information” should remain judge led, flexible and adaptable so that an appropriate balancing exercise can be conducted in Court between Articles 8 & 10 of the ECHR in each individual case. (see the Younger Report in 1972 re definitional problems)
- While privacy should remain a civil wrong, “narrowly defined criminal offences” such as those recommended by the Calcutt Committee in 1990 could and should be brought into effect to curb the excesses of the paparazzi, private investigators and over-intrusive tabloid journalists. They must be narrowly and clearly defined so that they comply with the concept of “legal certainty” (see *Goodwin v UK* 27 March 1996 below)
- The 3 criminal offences might be:
  - 1) unauthorised entry onto private property with a view to publication of private photographs and/or private information and/or making a financial gain;
  - 2) placing a surveillance or recording device on private property without the consent of the lawful occupant with a view to publication of private photographs and/or private information and/or making a financial gain,
  - 3) taking a photograph or recording the voice of an individual who is on private property, without that person's or the lawful occupant's consent, with a view to publication of private photographs and/or private information and/or making a

financial gain.

The penalties would be unlimited fines (like s.55 of the DPA as it currently stands) and prosecutions should be brought by the Attorney General or the Information Commissioner.

- There should be a clear “public interest” defence to the above 3 criminal offences and this should include a “reasonable belief that what was being done was in the public interest”— see s. Sections 77 and 78 of the Criminal Justice and Immigration Act 2008 (as yet unimplemented).
- Prior restraint in privacy cases should remain the exclusive preserve of the High Court and only it can and should be able to order interlocutory injunctive relief and then permanent injunctions. (see below for advisory “desist notices” by a new Press Regulatory authority)
- Under the CPR both parties to an interlocutory application for a privacy injunction would be obliged to file a s.12 Human Rights Act affidavit. Under this a claimant would be obliged to disclose if there was any likelihood of the private information “becoming available to the public” within a reasonable period of time and/ or any facts which might make disclosure of the alleged private information something which would be in the public interest. Likewise a defendant would have to swear an affidavit saying if he/she/it had complied with the paragraph below and all or any other relevant privacy code particularly if what was proposed to be published was alleged to be in the public interest.
- Any new Press Regulatory Authority (e.g. a Media Standards Authority suggested by the Reuters Institute for the Study of Journalism – “MSA”) would make it clear in its Code of Practice under paragraphs dealing with privacy (currently paragraphs 3,4,5,8,9 and 11 of the PCC’s Code) that the publisher would have to justify why it had NOT approached someone *prior* to publication for their response to a story about them being involved in sexual indiscretion, serious hypocrisy or breach of a clear moral or ethical obligation.
- Another matter which could be dealt with in a new Press Regulatory Code of Practice would be what might be called the delinquent’s equivalent of a “rehabilitation of offenders” paragraph. This would make it clear that if someone had done something foolish or reprehensible while at university or in a previous phase of their life e.g. taking drugs or selling nude photographs of themselves, publishing information or photographs of them in that earlier phase could amount to a serious breach of privacy unless justified as in the public interest at the time of publication.
- Any new Press Regulatory Authority (MSA) should be able to issue “desist notices” to all its members PLUS television companies (like the PCC now) and all or any other publishing/broadcasting bodies registered with it. (Desist notices would be similar to if not identical to the desist notices currently sent out by the PCC which work well and give access to justice to those who cannot afford the expense of applying for interlocutory relief in the High Court.)

- If a publisher, which was a member of a new Press Regulatory Authority, failed to comply with a “desist notice” and published photographs or private information without the consent of the owner, then that publisher would be vulnerable to a claim for exemplary damages from the person whose privacy had been damaged. There would be an automatic presumption that they had breached the desist notice for financial reasons and they would have to adduce evidence to counter that presumption in order to avoid a serious financial penalty.
- It is hoped that a new Press Regulatory Authority would be an independent voluntary organisation offering substantial benefits to those commercial publishers who joined it. Those who did not join it (“Independents”) might not be able to claim the full benefit of VAT exemption, could not join the Audit Bureau of Circulation and would not be able to benefit from a quick, cheap and independent mediation and adjudication system which would be a precursor to all High Court actions except applications for interlocutory injunctive relief. “Independents” would be subject to the High Court jurisdiction *ab initio*, while members of the new Press Regulatory Authority would be able to have libel, privacy or confidence cases stayed and referred to a new statutory adjudication system like that in the Construction Industry, which would deliver justice, quickly, professionally and cost effectively before either party could go to the High Court or rack up huge legal costs. Publishers who were not members of the new Regulatory Authority would be subject to the full weight and costs of High Court litigation from the start and would be subject to similar penalties and even higher legal costs.
- Finally, damages in privacy cases should be on a par with damages in libel cases. Thus in a case where there had been serious damage to someone’s right to a private life e.g. Gordon Kaye type cases, the damages could or should be anything up to £200,000 or possibly more.

## General

Privacy is all about pre-publication restraint; libel is all about post publication relief. The two are quite different and led to the Early Resolution Procedure Group finding in its report of December 2010, “They [privacy cases] are most commonly determined by pre-publication applications, where the outcome substantially rests on whether the threatened publication is restrained by interim injunction or not. Insofar as shortcuts are reasonably available, the Group believes the current CPR provides the Court in such cases with extensive management powers already”. I still believe this to be true and injunctive relief should be left to High Court judges.

When I first came across the law of privacy it was in connection with a privacy claim being brought against The Times in France. This was because The Times had mentioned that a French millionaire had a child who could inherit a fortune and that that child’s mother was unstable and that the child had not been cared for properly by her mother. I remember being absolutely amazed that facts which were undoubtedly true could form the basis for a privacy claim for damages, particularly when almost everyone in France seemed to know what The Times had published long before it went into print. While the damages were nothing like on the scale of libel damages in those days I remember thinking that an



overdeveloped law of privacy could have a serious chilling effect on free speech (e.g. Mitterrand and his illegitimate child). If “a modern participatory democracy requires that the media be *free, active, professional and inquiring* (emphasis added)” – Lord Bingham in *McCartan, Turkington Breen (a firm) v. Times Newspapers Ltd.* [2001] 2 AC 277 – there will inevitably be a tension between Article 8 and 10 rights. All that can be said is that it would be a tragedy if Britain ever went down the French privacy route.

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hat said what happened to Gordon Kaye back in 1989 was simply appalling and the gradual development of the law of privacy over the last ten years has been entirely right. Indeed, I was working in-house at Times Newspapers when the Press was told that it was “drinking in the Last Chance saloon”. I and other in-house lawyers gave evidence to the Calcutt Committee prior to its report in 1990 when it recommended “that, in general, ..... where such [privacy] protection is necessary it is best provided through specific, targeted remedies”. I still believe the above to be basically true and would prey in aid the earlier findings of the Younger Committee which I had to read when I first joined TNL in 1977.

The fundamental problem with privacy is defining what is actually private. As was stated in the **Goodwin** case,

“The relevant national law must be formulated with sufficient precision to enable the persons concerned – if need be with appropriate legal advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.....” *Goodwin v UK* 27 March 1996

Defining what is private is incredibly complicated and for the purposes of a law which would meet the “legal certainty” test trying to define a broad based statutory tort of privacy would, I believe, be nigh on impossible. It should not therefore be introduced and individual decisions should be left to the judiciary on a case by case basis or be hived off to an independent adjudicator or arbitrator such as a silk or retired judge for a key issue like “is it private or isn’t it?” or “is it in the public interest or isn’t it?” to be decided by an expert in the relevant field.

In this context, I believe it is vitally important for the parties to crystalize what might be genuinely “private” and/or in the “public interest” as early as possible in a dispute and long before publication. While I did not, and still do not believe that it should be a criminal offence not to approach someone prior to publication, as Mr. Mosley tried to persuade the ECtHR should be the case, I do believe it is *good practice* for newspapers to approach someone prior to publication and let them know what it is proposed will be published. I had one case where we were threatened with a privacy injunction; but with my editor’s consent and against leading counsel’s advice we showed the other side a draft of the proposed article to crystalize what was and was not private and/or in the public interest in a complex situation. (The draft article would probably have had to be shown to the judge at any interlocutory hearing in any case, so it was pointless not letting the other side see it in draft form!) This led to serious and sensible without prejudice negotiations by the lawyers; various facts were removed from the article but the rest of it went to print and was published in the public interest without serious legal costs being incurred by either side.

If a newspaper decided not to approach a target prior to publication of information which was obviously of a private nature, this would be a prima facie breach of any new Press Regulatory Authority’s Code of Practice. In short the newspaper would have to

demonstrate very good reasons for not approaching someone prior to publication if that was the case.

As this cannot be part of any criminal procedure it would have to be part of a new Code of Practice for a new Press Regulatory Authority. In the same vein, deciding if something is genuinely private and/or in the public interest, can and should be something either a judge can do at an interlocutory hearing or a silk or retired judge could do under a voluntary or statutory adjudication system specifically designed for the press like the construction industry has a statutory adjudication system for construction industry disputes. We at Early Resolution CIC are interested in researching how a statutory adjudication system like that in the Construction Industry might be set up and work in media or press disputes. Lord Justice Jackson, as former head of the TCC, has given us encouragement in this direction and with support from the judiciary or Lord Hunt, as current chair of the PCC, we believe that a “group of well-respected libel lawyers and media representatives [could be set up] to put together a fully worked out scheme for consideration by the MoJ” and/or Lord Justice Leveson.

If there can be real problems over deciding what is and is not “private” in an age of Twitter and social networking *and* it is good practice to crystalize key issues as early as possible, trying to decide what is and is not in the public interest – the obvious defence to a privacy claim – is perhaps even more difficult. From the cases I have been involved in, I know that nothing can be guaranteed when it comes to what a judge is going to hold is in the public interest or is not in the public interest in a particular case. Why the exposure of Max Mosley as head of FI behaving in a quite extraordinary manner with prostitutes in a basement in Chelsea is not in the public interest and yet reporting the contents of Lord Levy’s tax return and how in the year 2000 he, as a multi-millionaire, had only paid £5,000 tax in the previous year, *was* in the public interest, may not be immediately apparent to the average man in the street. Again, an early decision on whether something is “in the public interest” could easily be part of a new statutory adjudication system carefully designed for the media.

There are as can be seen from the Appendix to this submission a huge number of statutes already in existence, which protect peoples’ privacy. Some of these create criminal sanctions while others simply create a civil remedy. Where private and deeply personal matters such as medical reports are leaked to the press they should be subject to criminal sanctions. The question is one about proportionality in every case and whether fines are a sufficient deterrent to serious wrong doing. The clamour by Information Commissioners, past and present, for the imposition of prison sentences for breaches of s.55 of the DPA are I believe uncalled for and unnecessary and could lead to serious injustice and a real chilling effect on legitimate investigative journalism. Rather, IF the Attorney General and Information Commissioners brought prosecutions on a more regular basis and fines in relation to criminal offences were of an unlimited nature, like in contempt proceedings where fines can be anything from £50,000 to over £100,000, a) newspapers would be that much more circumspect in publishing material which was going to lead to a prosecution and b) individuals would not want to risk serious financial penalties even bankruptcy in breaching the criminal law. (In any case which involved a criminal sanction there must be a clear public interest defence as stated above.)

It is for these reasons that the Grand Chamber at the European Court of Human Rights unanimously stated in *Cumpana and Mazare v Romania* [17 December 2004]:

“Although sentencing is in principle a matter for the national courts, the Court considers that the imposition of a prison sentence for a press offence will be compatible with journalists’ freedom of expression as guaranteed by Article 10 of the Convention *only* [emphasis added] in exceptional circumstances, notably where other fundamental rights have been seriously impaired, as for example, in the case of hate speech or incitement to violence... ..Such a sanction, by its very nature, will inevitably have a chilling effect” (at §§115-116)

There has in fact been an incredibly small number of prosecutions under s.55 of the DPA and back in 2008 only in two cases had the fines exceeded £5,000. Fines for serious breaches of privacy should be on a par with fines in contempt proceedings while damages in privacy claims should be on a par with damages in libel actions i.e. up to £220,000 in serious cases and even more where the publisher had breached a desist notice. Prison sentences should not be necessary where the fines are substantial and any civil compensation all but penal. Prison should as the MoJ said some years ago be reserved for “*serious, violent and dangerous offenders*.”

While the Press needs to be reigned back when it comes to privacy, the right of free speech should never be forgotten. Lord Bingham referred to the press as “the eyes and ears of the public to whom they report” and as Lord Nicholls said in *Reynolds v TNL*: “*Above all, the court should have particular regard to the importance of freedom of expression. The press discharges vital functions as a bloodhound as well as a watchdog. The court should be slow to conclude that a publication was not in the public interest and, therefore, the public had no right to know, especially when the information is in the field of political discussion. Any lingering doubts should be resolved in favour of publication.*”

I hope the above is of some help and would be happy to answer any questions the Committee might have on the ideas set out above.

25 January 2012

## **Statutory Prohibitions on Disclosure**

For a comprehensive list, please see: “**Review of Statutory Prohibitions on Disclosure**” published by the DCA in 2005. It was published specifically with reference to the Freedom of Information Act 2000, although it provides an extremely useful overview of the myriad prohibitions on disclosure under certain circumstances.

It is almost impossible to provide a complete list of those statutes which protect personal information. The list given below is intended to be an overview of those most applicable to the type of information which would fall under the DPA or the law of confidence.

Access to Justice Act 1999, section 20 (legal aid information)  
Communications Act 2003, section 393  
Broadcasting Act 1990, section 196 (to be amended under FOI section 75)  
Human Fertilisation and Embryology Act 1990, section 33  
Criminal Appeals Act 1995, sections 23; 25  
National Minimum Wage Act 1998, sections 15; 16  
Postal Services Act 2000, schedule 7 paragraph 1  
Bank of England Act 1998, Schedule 7 paragraph 1(3)  
Census Act 1920, section 8  
Civil Aviation Act 1982, section 23  
Child Support Act 1991, section 50  
European Communities Act 1972, section 11  
Finance Act 1989, section 182  
Financial Services and Markets Act 2000, section 348  
Local Government Act 1974, section 32  
National Savings Bank Act 1971, section 12  
Official Secrets Act 1989, sections 1-6  
Police Act 1997, section 124  
Regulation of Investigatory Powers Act 2000, sections 19, 54  
Rehabilitation of Offenders Act 1974, section 9  
Sexual Offences (Amendment) Act 1992, section 1  
Social Security Administration Act 1992, section 123  
Telecommunications Act 1984, section 94; 101  
Wireless Telegraphy Act 1949, section 5  
Abortion Regulations 1991, regulation 5  
Adoption Agencies Regulations 1983, regulation 14  
National Health Service (Venereal Disease) Regulations 1974, regulation 2  
National Health Service Trusts and Primary Care Trusts (Sexually Transmitted Diseases) Directions 2000, paragraph 2  
Adoption Rules 1984, rule 53(3)  
Enterprise Act 2002

In the wider context, and depending on the circumstances both the Theft Act 1968 and the Protection from Harassment Act 1998 are prohibitions on obtaining information (in addition to some of the above provisions) and therefore relevant to the journalistic process.

The majority of the above Acts only apply to certain information and certain persons (mostly officials and employees).

## **British Sky Broadcasting Limited ('Sky')—Written evidence**

### **Introduction**

- Sky is happy to respond to the Committee's questions. In answering these questions Sky has limited its response to its role as the broadcaster of the Sky News channel and associated news services
- Sky News is proud of its reputation for delivering high-quality, award-winning news coverage to millions of people on television, online, mobile, tablet and radio. Sky News takes its responsibilities as a news provider very seriously and is fully cognisant of the standards of behaviour to which broadcasters must adhere including those encompassing privacy. Furthermore, as a licensed broadcaster, it has regulatory obligations to maintain such standards.
- In the six and a half years since January 2005 Sky News has been the subject of viewer complaints to Ofcom in relation to around 500 items. Of those complaints, Ofcom has twice found Sky News in breach of the Code's standards (with a further four complaints in such cases resolved to Ofcom's satisfaction), and on a further two occasions fairness and privacy complaints against Sky News were upheld in part. The two upheld cases concerned flashing images and inappropriate scheduling of a war report.

### **About Sky News**

- Sky News is a pioneering multi-platform news provider, online via skynews.com, on the radio via more than 300 commercial stations, on mobile phones, on iPads and iPhones, with SMS news alerts, on your desktops and on out-of-home screens, in addition to its broadcast television channel available on all major platforms.
- As the UK's first dedicated 24-hour news channel, Sky News has built a deserved reputation for being the first to break major news, and winning numerous awards since its launch. Sky News has brought a fresh approach to news broadcasting, and is renowned for the speed of its coverage and flexibility of reporting news live. With bulletins on the hour, and regular sport and business updates, Sky News is available to 145 million people in 36 countries in Europe alone as well as Asia, the Middle East and Africa.
- Over the last 12 months Sky News has been at the forefront of some of the most momentous news stories of our time including the Arab Spring, the Japanese Tsunami and, in the UK, the Summer Riots. Sky News delivered extensive coverage for all of them and was once again named the Royal Television Society (RTS) News Channel of the Year – for a record eighth time. Judges commented that it was a “vintage year for Sky News which exhibited outstanding range and depth”.

**Questions:**

**1. Do you think that broadly the right balance is struck between privacy and freedom of expression in the context of broadcasting?**

- The current legal and regulatory structure provides a sensible and flexible framework in which to operate and Sky News bases its judgements on those accepted principles on an on-going basis.
- Ofcom's Broadcasting Code [the Code] provides direction and outlines the key elements that must be considered when making real time judgements on privacy issues in broadcasting. Crucially Section 8 of the Code is grounded in a principles based approach under which each case is assessed in its specific context. We believe that the Code and underlying legal principles together provide an effective balance.

**2. Has privacy regulation ever restricted your ability to report on particular issues which you would otherwise have reported?**

- There are of course situations where we have elected not to run stories because of the view that to do so would involve an invasion of an individual's privacy. However, our approach in those cases, and generally, is not dictated solely by reference to Ofcom's Code and guidance and Article 8 ECHR considerations, but also having regard to general principles of integrity, and with our responsibilities as a respected broadcaster in mind.

**3. What is Sky's policy with regards to covering Parliamentary proceedings? Why did you take the decision to instantly cover what had been said in the floor of the House of Commons? Did you seek legal advice before broadcasting and if so, what was that advice? In retrospect, do you think that this was the right decision?**

**a. Why do you think that the BBC took a different approach?**

- Sky News reports on Parliamentary proceedings where it considers the proceedings to be newsworthy and the report to be justified. Its reports are fair and accurate summaries of the proceedings, and are published in good faith. The decision to report the Ryan Giggs story was taken with legal advice, and, as with other decisions on whether and what to broadcast, having regard to the facts of that matter and the circumstances leading up to Mr Hemming's question.
- As the Master of the Rolls' May 2011 Report of the Committee on Super-Injunctions notes, there is no authority on whether qualified privilege applies where a court order is in place, and therefore the approach to whether to report in any given case necessarily has to be fact specific. In this case, the view was taken that reporting of the question at an early stage was justified, and we continue to hold that view. In other similar situations, including that involving Sir Fred Goodwin four days earlier, Sky News did not report the question as soon as it was raised, nor was it the first media organisation to report it. In the Giggs case, it should be noted that Sky News

did not refer to any details of the injunction other than his identity, which was of course in the public domain by that point.

- Sky News cannot comment on why the BBC took longer to broadcast the information in this case, but notes that other media organisations published the information much more quickly than the BBC.

**4. Are you happy with the Ofcom rules and practices in this area? Should any of them be revised or redrafted? How does Ofcom interpret and apply its privacy code? At Sky, do you supplement the Ofcom Code with your own editorial guidelines on privacy?**

- We are broadly happy with Section 8 of Ofcom's Code on privacy, including the 'practices to be followed' and their interpretation of them.
- The Committee will be aware that privacy law is not fixed and evolves through case law. This has occurred over many years, indeed well before the Human Rights Act was enacted, and has shaped the legal and regulatory framework we see today.
- Sky News also supplements Ofcom's Code with its own editorial guidance and these are based on a context and a case by case, programme by programme basis to ensure that the appropriate level of scrutiny is given to each instance. The Ofcom guidelines are applied as necessary in each case. This works well in practice and Sky News has a good track record with Ofcom in this area.

**5. There are examples of what constitutes the "public interest" in the Ofcom Broadcasting Code, the BBC guidelines, the Independent Producers handbook etc., but there is no statutory definition. Should there be?**

- On the basis that each case relating to privacy and the public interest is different and the specific facts of each case must be considered individually, flexibility is an essential ingredient for any legal or regulatory framework to be truly responsive and effective.
- The current Code provides that necessary degree of flexibility and appears to work well. A statutory definition would run the risk of constraining the application of the Code and guidance too tightly and would not be able to reflect or respond to changes in public values or take into account the intricacies of every possible circumstance.

**6. Should individuals have a reasonable expectation of privacy that they are not filmed when in public places, for example, whilst out shopping or relaxing in a park?**

- We do not believe this question can be answered in a vacuum. Whether individuals should have a reasonable expectation of privacy depends not just on the location they happen to be at, but also the status of the individual and the activity they are engaged in, and the individual's past and general approach to the media. This is reflected in the Ofcom Code which points out that "*legitimate expectations of privacy*

*will vary according to the place and nature of the information, activity or condition in question, the extent to which it is in the public domain (if at all) and whether the individual concerned is already in the public eye.”<sup>29</sup>*, as well as being reflected in a number of ‘practices to be followed’, including paragraphs 8.14 – 8.16. Sky News believes that the Code and the rights in ECHR Articles 8 and 10 set out a reasonable balance between the right to privacy and the right to freedom of expression of the media.

**7. Are commissioning editors able to act against the advice of internal compliance teams? Are there repercussions if there is then a complaint?**

- Sky News prides itself on its editorial independence and ultimately our editors can act against compliance advice. It is infrequent that this situation arises. If there is a disagreement over advice the issue will be raised with senior editorial staff, ultimately extending up to the Head of News [John Ryley] although such senior level intervention is rarely required.

**8. Would it be beneficial for commissioning editors to have an external body from which they could seek pre-transmission advice on privacy issues?**

- As a 24 hour rolling news broadcaster there would be considerable practical difficulties involved in seeking pre-transmission clearance on privacy issues. That is why the current system comprising the necessary legal and regulatory direction and post transmission recourse works well.
- Also, as it is the broadcaster’s Ofcom licence that would ultimately be at risk should there be a serious breach of the Code, it would be difficult to see how a further body could add to regulation in this area and may actually lead to regulatory double jeopardy.

**9. Should there be a higher threshold for holding that Article 8 privacy is engaged? Is it a problem for broadcasters that the courts have sometimes protected anodyne information?**

- An individual’s Article 8 rights need to be carefully considered in conjunction with the broadcaster’s Article 10 rights on the facts of every case. That balance is a delicate one and Sky does not believe that it would be helpful to attempt to redraw it at this time whether by statute or otherwise.

**10. Should Ofcom consider harassment as a specific issue within the Broadcasting Code?**

- While Ofcom’s Code does not contain a specific section on harassment, it does contain provisions on door-stepping and unwarranted invasions of privacy. Sky News believes these provisions are adequate to protect individuals against media harassment. The Code also contains provisions on fairness which are relevant to any dealings with and portrayal of an individual, for example rule 7.1 states that

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<sup>29</sup> The Ofcom Broadcasting Code, Section Eight, Privacy



Broadcasters must “avoid unjust or unfair treatment of individuals or organisations in programmes”. In addition, there is criminal law which protects against harassment.

**11. Should the same privacy rules apply in principle equally to all media—print, broadcasting and online?**

**a. If so, which body should have authority to apply these rules? (Ofcom, ATVOD, a new media tribunal?)**

- Ultimately all platforms are subject to the same privacy laws. Nevertheless the regulatory framework that has evolved around the various media reflects the different ways in which they are regarded and consumed and the public broadly understands and embraces these differences.
- Essentially, different media provide different offerings to the public. For example, broadcasters are regarded as playing a significant part in people’s lives, particularly as their programmes are beamed directly into people’s homes. There is also now an accepted level of trust in the quality and impartiality of broadcast news which the public are able to differentiate from press or online reporting. As such it is apposite that the regulatory framework encompasses these differences. Saying that, Sky News chooses to use the Ofcom Broadcasting Code as a compliance guide across all the media platforms on which its content is made available.

**12. What impact would a statutory tort of privacy—essentially along the lines of the existing privacy law which is being implemented by judges in individual cases—have upon broadcasters?**

- It is difficult to see how a general body of statute could cater any better for the manifold permutations of privacy disputes that could arise, and indeed such a statute may give rise to a new type of litigation around interpretation of the statute. It might also risk upsetting what is presently a finely poised balance between the various provisions of human rights legislation as supported in the case of media reporting in this country by the Ofcom Code.

**13. Do you fear that the process of negotiating and drafting a statutory tort might upset the balance which currently seems to exist in the broadcasting media between respect for privacy and freedom of expression?**

- See above answer.

November 2011

## Mark Burby—Written evidence

### Summary

- (1) **Operation in practice:** There are real vices in the present law and practice. Those affected are likely to be afraid to provide any details about any super-injunction about which they might wish to complain, even if told that a submission to this Committee would have the benefit of Parliamentary privilege. Super-injunctions can be obtained by relying on other super-injunctions and a web of such injunctions can drastically restrict the ability of all the affected parties to prepare their case; obtain evidence; seek funding; and thereby, defend themselves. Many judges were in practice at the Bar at a time when public funding was more widely available and have scant (if any) experience of dealing with commercial funders, as is now required for those of modest means. Few have experience of the impact of webs of super-injunctions on trial preparation. The present law and practice is presently potentially unfair, unbalanced and oppressive; it may particularly favour the rich and powerful, particularly through channels not apparently visible or significant to the courts and through the momentum which unlimited funds can create in litigation.
- (2) **Striking the balance:** Mixed allegations (private and public interest), litigated together, are extremely problematic and the present approach of the courts is unsatisfactory and not intellectually rigorous. Where an application for super-injunction gains a momentum of its own, the affected party can often find it unduly difficult to oppose, especially where there is a stark inequality of arms and resources. This is compounded where one super-injunction relies on one or more others (the web point, above) and by the dangers of apparent falsity of allegations determining questions of public interest in their disclosure.
- (3) **Enforcement:** There is a real risk of abuse, where a party with (effectively) unlimited funds can litigate even the most meritless application with no material risk; in that case, enforcement proceedings are themselves oppressive, even if ultimately unsuccessful. As they are typically very expensive to defend, few can afford to run the risk of paying the richer party's costs. This may lead to unjustified concessions being forced from weaker parties; particularly unsatisfactory when this can then be leveraged in other proceedings.
- (4) **Call for Evidence:** Those with real stories to tell may not be identifiable or willing to make submissions to this Committee.

## Introduction

1. This written submission is made to the Joint Committee on Privacy & Injunctions. I therefore make this submission under parliamentary privilege, so far as it may be necessary and available.
2. This would be of particular importance if I (or someone I knew) were the subject of a super-injunction. However, if I (or they) were, I would be prohibited from disclosing that fact<sup>30</sup> or providing any relevant details of the proceedings. Even if not legally prohibited, the prospect of having to defend expensive enforcement proceedings, raising the issue of the scope of any privilege is disincentive enough for most people.
3. I would be willing to give evidence to the Committee and to answer any questions that the Committee may require me to answer and am happy to attend before the Committee at short notice.
4. I would also be willing to identify two lawyers, one or other of whom might be willing to give brief evidence to the Committee, if invited by the Committee to do so.
5. For the avoidance of doubt, lest these submissions are put before any court that deals with any case with which I might one day or now be involved in, I should say that these submissions are, in any event, made without prejudice to any rights or any arguments in any such proceedings
6. I am a resident of the Bailiwick of Jersey.

## Purpose of Submission

7. I wish to make it clear that I do not invite the Committee to take any view about any particular case, less still any that is, or that could be considered to be, *sub judice*.
8. The nature of my submission is of general importance and refers to general principles and practice and how those may relate to particular situations.
9. I note from the Committee's website<sup>31</sup> that the Committee expects to cover:
  - (1) how the statutory and common law on privacy and the use of anonymity injunctions and super-injunctions has operated in practice;
  - (2) how best to strike the balance between privacy and freedom of expression, in particular how best to determine whether there is a public interest in material concerning people's private and family life;
  - (3) issues relating to the enforcement of anonymity injunctions and super-injunctions, including the internet, cross-border jurisdiction within the United Kingdom, parliamentary privilege and the rule of law; and

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<sup>30</sup> If Parliamentary privilege would allow a person affected by a super-injunction to disclose any concerns that they might have about super-injunctions by reference to the procedural history of a particular case (not referring to the underlying allegedly 'private' or confidential matters, it would be helpful if this could be clarified.

<sup>31</sup> <http://www.parliament.uk/business/committees/committees-a-z/joint-select/privacy-and-superinjunctions/news/committee-formation-and-call-for-evidence/>

- (4) issues relating to media regulations in this context, including the role of the Press Complaints Commission and the Office of Communications (Ofcom).
10. I deal briefly with those issues and many of the subsidiary questions raised by the Committee in its Call for Evidence<sup>32</sup> before turning, briefly, to additional matters of which the Committee ought to be made aware. I preface all of this with brief observations on some of the problematic aspects of the present law, in terms of the reach of the concepts of privacy and confidence.

### **Freedom of Speech and Public Interest**

11. It is wrong to equate the right to freedom of speech merely to the disclosure of matters in the public interest.
12. The courts appear to have elided the concepts of freedom of speech and public interest, so as to circumscribe the right to freedom of speech by defining it narrowly, in the context of privacy and super-injunctions.
13. This is wrong because Article 10 protects freedom of speech itself, including the freedom to be wrong, silly, satirical or even irresponsible. There is plenty of room for reasonable disagreement about how to characterise what other people say. What is important is that there is a public interest in freedom of speech itself, which is not confined to what the courts typically consider to be in the public interest.
14. I recognise that the courts have quite correctly sought to distinguish between what the public may be interested in<sup>33</sup> from what is in the public interest; that is a real and useful distinction. However, that does not address the anterior question of the breadth of the right to freedom of speech, itself.
15. Perhaps in a mature democracy, we assume the right to freedom of speech and pay it little heed. But where this committee is looking at the very essence of that right, it would be wrong to confine to matters in the public interest. To do so would be dangerous.

### **Tentacles of Privacy and Confidence**

16. Whilst many of the governing principles of the (relatively) new law of privacy and confidence are plainly well-considered and defensible, it is the combination of the principles which are typically in play which tends to generate real difficulties. The reach of the combined concepts of privacy and confidence is a real concern.
17. Take a relationship which is quintessentially private in its nature, by way of example. The following would appear to be capable of being treated as private as a result:
  - (a) Details of the clearly private aspects of the relationship: not problematic unless combined with some very real and legitimate public interest in their disclosure which is unlikely.
  - (b) Information (not about the relationship itself) communicated during the course of that relationship: only problematic where that information (i) cannot properly be regarded in any sense as confidential, but is still claimed to be private; and (ii) contains matters of real and legitimate public interest. The

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<sup>32</sup> [http://www.parliament.uk/documents/joint-committees/Privacy\\_and\\_Injunctions/Call\\_for\\_Evidence\\_P4%20final\\_for\\_issue\\_and\\_publication.pdf](http://www.parliament.uk/documents/joint-committees/Privacy_and_Injunctions/Call_for_Evidence_P4%20final_for_issue_and_publication.pdf)

<sup>33</sup> most obviously, salacious private matters of no real public interest

latter category is particularly problematic where the truth or falsity of the information or allegations would or could be decisive as to the reality or legitimacy of the public interest in their disclosure, but that distinction (between truth and falsity) is irrelevant to their inherent privacy.

18. What is the position where, for example, one person conveys to information falling within category (ii) above? This information might relate to the commission of a civil wrong or even a criminal offence; indeed, it might relate to an allegation concerning terrorism or wide scale environmental pollution.
19. The courts take the view that the old rule that there is no confidence in an iniquity may be overridden by the quality of privacy in the information concerned.
20. Equally, if the suggestion of the civil wrong or criminal offence is in some sense surprising (as any real revelation will typically be), any barriers to proving the possible truth of those allegations (as may be encountered with super-injunctions) provide real scope for abuse, particularly where the courts do not require candour, as to truth and falsity, from the person seeking the injunction.
21. It seems absolutely fundamental that an applicant for a super-injunction should have to discharge the highest duty of candour *to the court* in making the application, particularly (but not only) when the application is made *ex parte* (in the absence of the person who is to be made subject to the injunction).
22. Rigorous rules as to candour from parties applying for these injunctions would do much to prevent abuse of super-injunctions by those who can readily afford to obtain them. On the issue of candour, in this context, it may be helpful to have in mind the issues of principle which arise.

### Issues of Principle

23. Against the background of a requirement for full and frank disclosure (a 'high duty' of candour) for all injunctions obtained *ex parte*, common sense coincides with careful analysis in suggesting that the principles which should apply to super-injunctions should be stringent in this regard.
24. There is little difficulty in straightforward cases where there is no question of public interest justification of disclosure or where the allegations are candidly accepted as true, but privacy and confidence are claimed.
25. The proper focus of any revision to, or reform of, the law or practice should therefore be on those cases for which the present law does not cater satisfactorily.
26. Those are most obviously cases where:
  - (a) a freedom of speech justification is put forward;
  - (b) there is some legitimate privacy or confidence in at least some of the allegations;
  - (c) the necessary balancing act between the Article 8 (privacy) and Article 10 (freedom of speech) rights is highly fact-sensitive (as it will almost always be);
  - (d) the party applying for the injunction does not state to the court what allegations of fact are true or false.
27. A coherent set of principles is required to deal with such situations fairly. (As noted below, this however is not sufficient fully to prevent abuse by the rich and powerful, because of the costs and risks of any participation in litigation.) However, the following questions need answers if the skewing of the court's approach to such injunctions, as a result of a lack of candour by the

applicant for a super-injunction, is to be avoided. I have suggested my own answers to these questions, below.

### Full and frank disclosure

28. What is the extent of the obligation of full and frank disclosure, on an *ex parte* application for a super-injunction, in a case based (or partly based) on privacy?

The duty should be stringent; lack of candour (and certainly, lying) should normally result in discharge of the injunction, so as to respect the Defendant's Article 6 (fair trial) rights as well as balancing Articles 8 and 10. (This is normally the case for other injunctions.)

29. Put another way, is the duty of candour particularly high and/or ought it to be discharged with particular care on such an application?

The duty should be stringent; it should be discharged with particular care in such cases.

30. What does the "high duty" (i) to make full, fair and accurate disclosure of material information to the court and (ii) to draw the court's attention to significant factual, legal and procedural aspects of the case<sup>34</sup> actually require in this context?

This will depend on the case, but candour as to the background context of the application for the super-injunction may be just as important as candour on key facts put forward to justify.

31. In particular, is there ever an obligation to tell the court candidly which of the allegations to be enjoined is true or false (as provided to the court in *LNS v Persons Unknown* [2010] EWHC 119 QB)?

There should always be such an obligation, save in the most exceptional circumstances. A super-injunction departs from many of the norms of due process, particularly when granted *ex parte* and there is ample justification for such a requirement.

32. In answering the above, are there procedural means of protecting any legitimate privacy interests of X, where X seeks a super-injunction against Y, other than by simply not requiring candour to the court as to the truth and falsity of such allegations?

Yes; such proceedings already take place in private and often involve sealing of the court file. There is no reason, in the interests of privacy, not to require complete candour, save in the most exceptional cases.

33. Does the absence of a requirement for such candour of X materially interfere with Y's fair trial rights under Article 6, or those of Z, where Z is a newspaper wishing to report Y's allegations?

Plainly it may; where an allegation appears to the court to be apparently false or baseless (say an allegation of a serious crime), at least in part because of its inherent implausibility, the failure to acknowledge that other implausible related allegations, whilst private, are nonetheless true, leaves the court with a false premise. In real life, this can and does prejudice the interests of those against whom a super-injunction is thereby obtained, because one judge's assessment (*ex*

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<sup>34</sup> *Memory Corporation Plc v Sidhu* [2000] 1 WLR 1443, CA, per Mummery LJ; and see *Fitzgerald v Williams* [1996] QB 657, CA, at p. 667 per Sir Thomas Bingham MR

*parte*) that the allegations appear baseless tends to feed into the subsequent re-consideration of the same allegations at a full hearing with all parties represented. This is part of the momentum which a very well funded application for a super-injunction can create within the proceedings. (While academically, one can say that this need not necessarily be the case, practically, the position of someone who cannot afford to risk challenging the first judge's assessment of the balancing exercise is but one example of the real world showing the shortcomings of a purely theoretical appraisal.)

34. Prior to the HRA 1998, did the requirement at common law or as a matter of practice to give the court full and frank disclosure essentially operate as a protection of Y's fair trial rights equivalent to the protection now afforded by Article 6?

Yes; arguably much more effectively, as regards injunctions, than now appears to be the case in more swingeing super-injunctions.

35. If there is an effect on fair trial rights, how is the interference with the Article 6 rights of Y and Z to be regarded in terms of proportionality? And how are those Article 6 rights to be balanced with the Article 8 rights of X, in the context of the Article 10 rights of Y and Z?

It must be seriously doubtful that it is either just or proportionate to forgive (or indeed, reward) a lack of candour in applying *ex parte* for a super-injunction; less still to regard lying to court, in the course of obtaining it as acceptable<sup>35</sup>.

36. In considering the questions above (and where X seeks an injunction against Y), what material distinctions are to be made between the following types of case<sup>36</sup>:

- (a) All the allegations made by Y, which X seeks to enjoin, clearly engage Article 8 protection. None of them, even if true, could demonstrate any public interest sufficient to tip the balance in favour of freedom of speech under Article 10.

Clearly, an injunction should be granted, and nuances as to the requirement of candour are less likely to arise.

- (b) All the allegations clearly engage Article 8 protection, but some of them are admitted to be true and those (true) allegations raise issues of sufficient public interest that Article 10 considerations are highly likely to outweigh Article 8.

Clearly, because there has been candour as to truth of those allegations which are true, the court is well placed to conduct the (fact-sensitive) balancing exercise on a properly informed basis, and is likely to refuse the injunction.

- (c) The court is told that some of the allegations are true and some are false; but the court is not told which are which. The truth or falsity of some allegations is likely to (or at least, may) inform the foundation, or lack of it, for other allegations. Some of the allegations attract Article 8 protection but, if true, may

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<sup>35</sup> Lord Browne of Madingley v Associated Newspapers [2007] EWHC 202; Lord Browne of Madingley v Associated Newspapers [2007] EWCA Civ 295

<sup>36</sup> or any materially distinct hybrids of these examples

raise issues of sufficient public interest that Article 10 considerations may outweigh Article 8, but the court is invited to treat these as baseless.

I respectfully suggest that this is precisely the sort of case where the court is not properly placed to conduct a properly informed balancing exercise. A skilful application, without a proper requirement of candour, may result in real unfairness and the granting of a super-injunction which should otherwise not have been granted.

- (d) As above, but where the allegations against X raises a direct challenge to X's honesty and reliability.

This makes the duty of candour all the more important, especially where the dishonesty alleged relates to statements made to a court or otherwise

37. Some of the allegations clearly engage Article 8 protection, with no countervailing Article 10 considerations. However, those (private) allegations are material ingredients of other allegations, which are not private at all in themselves and clearly give rise to potentially strong Article 10 considerations, e.g. disclosing serious wrongdoing.
38. Is it incumbent upon X to identify which allegations are said to engage Article 8 and which are accepted (if any) as engaging Article 10?
39. In terms of the court's contextual appraisal of allegations which X contends are baseless, in the absence of Y, should X be required to disabuse the court of any favourable assumptions as to character that the court may make, where:
- (a) the likelihood of the court making such assumptions (whether or not implicitly encouraged the terms of X's application) is clearly more than merely probable, that is to say, highly likely; and
- (b) it is obvious that such assumptions would:
- (a) colour the court's general approach to the application,
- (b) directly inform the court's appraisal of whether the disputed allegations are likely to be baseless, and
- (c) thereby set out a misleading background or context for such appraisal?

### **Bonnard v Perryman**

40. It can be seen from the above that there are three classes of allegations/information:
- (a) Information that is clearly private and/or confidential and properly to be protected by injunctive relief and/or a privacy law (if true) or (if false) is defamatory;
- (b) Information that would ordinarily be seen as such but for the underlying allegation of perjury;
- (c) Information that is a matter of public interest (if true) or defamatory (if false).



41. Does the fact that the application is substantively an application for prior restraint of (allegedly) defamatory statements<sup>37</sup> make any difference at all to the court's approach on an *ex parte* application in all or any cases?

It plainly should do, since the effect of the application (however it is dressed up) is to subvert a long-standing common law rule, developed to strike an appropriate balance given the constitutional and cultural norms of this jurisdiction.

There appears to be real conflict here, between the modern approach and the well established and liberal approach of the common law. Is it really the case that the common law afforded more protection to freedom of speech than is available under Article 10 of the Human Rights Act? Article 8 means that the answer will sometimes be yes, even where the real issue is defamation.

## Harassment

42. The overlay provided by the Protection from Harassment Act is frequently relied upon by applicants for super-injunctions. Again, an assessment of alleged harassment is very fact-sensitive and where there is a stark inequality of arms (and, particularly, funding) between the parties, the poorer party will typically be unable to take the costs risk of litigating a fact-sensitive issue, at vast expense, with an uncertain outcome. This too may lead to unjustified concessions by way of settlement, which, ironically lead to the courts feeling that they are making the correct appraisal of these cases. This iterative loop is likely to be highly misleading over time and lead to judicial over-confidence.

## The Call for Evidence

43. I now turn to the questions raised in the Call for Evidence.

## Operation in Practice

44. In the context of how the statutory and common law on privacy and the use of anonymity injunctions and super-injunctions has operated in practice:
- (a) The Call for Evidence first asks whether anonymous injunctions and super-injunctions have been used too frequently, not enough or in the wrong circumstances. They have been used too frequently, as those which have been discharged have begun to show. I believe that they have sometimes been used in the wrong circumstances too and without analysis within a sufficiently rigorous set of principles of law and requirements of practice. The overriding objective of the Civil Procedure Rules requires that litigants enjoy, insofar as is possible, equality of arms. An super-injunction of this nature ought only to be granted once a claimant has outlined to a judge whether any particular allegation is true or false so that the judge can then determine whether it is properly to be protected by an injunction, is a matter of public interest and/or is instead properly to be considered in the context of defamation proceedings instead.

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<sup>37</sup> the rule in *Bonnard v Perryman*: if a defendant to a libel action makes a statement verified as true in which he maintains that he can and will justify the alleged libel, the rule has always been that claimants will be unable to obtain an interim injunction to restrain the publication of an allegedly defamatory statement unless it is plain that the plea of justification is bound to fail; re-affirmed in *Greene v Associated Newspapers* [2004] EWCA Civ 1462, [2005] QB 972, [2005] 1 All ER 30 and in *LNS v Persons Unknown* [2010] EWHC 119 (QB)

- (b) The Call for Evidence further asks whether the courts are making appropriate use of time limitations to injunctions and of injunctions *contra mundum* and how such injunctions are working in practice. Present practice allows for one super-injunction to support another, and world-wide webs of injunctions to support each other. This can operate very unfairly.
- (c) The Call for Evidence then asks what can be done about the cost of obtaining a privacy injunction, noting that whilst individuals the subject of widespread and persistent media coverage often have the financial means to pursue injunctions there is no cheaper mechanism that allows those without similar financial resources access to the same legal protection. The same could perhaps be asked in the context of any litigation, not merely injunctive relief sought in the context of a privacy claim. As a layman it strikes me that access to justice for those other than the rich and powerful should be at the forefront of the Committee's minds. In the absence of the availability of legal aid (albeit that legal aid ought to be available for both parties in claims that are based on competing human rights arguments of this nature), the only options are for claimants to be able to rely on legal expenses insurance (but no policies cover such claims) or third party funding; but funders will be reluctant to become involved unless damages awards are more substantive and the super-injunction impedes access to funders, as well as to witnesses and sources of documents in the proper preparation of the case.
- (d) The Call for Evidence goes on to ask whether injunctions and appeals regarding injunctions are being dealt with by the courts sufficiently quickly to minimise either (where the injunction is granted or upheld) prolonged unjustifiable distress for the individual or (where an injunction is overturned or not granted) the risk of news losing its current topical value. The Committee ought also to consider the distress suffered by a defendant who has the sword of Damocles of a penal notice hanging over him or her – particularly when faced with aggressive solicitors who see contempt proceedings based on any alleged breach of the injunction as a useful way to generate additional fees or pressure on the other side by way of ruinously expensive satellite litigation.
- (e) The Call for Evidence goes on to ask whether steps should be taken to penalise newspapers which refuse to give an undertaking not to publish private information but also make no attempt to defend an application for an injunction in respect of that information, thereby wasting the court's time. While the majority of defendants may well be newspapers, that is not always the case. It seems to me that the courts ought to expect newspapers to act properly, either giving undertakings or defending proceedings as envisaged. Due allowance should, in turn, be given for litigants-in-person who find themselves, on the receiving end of solicitors' letters and injunction proceedings. The same expectations cannot justly be anticipated.

### **Striking the Balance**

- 45. In the context of how best to strike the balance between privacy and freedom of expression, in particular how best to determine whether there is a public interest in material concerning people's private and family life:
  - (a) The Call for Evidence asks whether there have been and/or are there currently any problems with the balance struck in law between freedom of expression

and the right to privacy. Judging from the law as it has been applied, the answer must be yes. The right to privacy ought only to extend to those allegations that are true and are not considered properly to be in the public interest.

Allegations that are false ought to be addressed by the law of defamation, not the misuse of the law of privacy.

- (b) The Call for Evidence also asks who should decide where the balance between freedom of expression and the right to privacy lies. In the context of these injunctions that should remain a matter for the courts. However claimants should be required to give full and frank disclosure when obtaining such relief on an *ex parte* basis, any *inter partes* hearing should occur within seven days and the substantive trial of the claimant's underlying claim ought to be determined within twelve months or sooner.
- (c) The Call for Evidence asks whether Parliament should enact a statutory privacy law. I believe that that would be preferable in this context, so as to assist the courts in establishing a coherent and principled framework – rather than waiting for sometimes indigent defendants to spend money they do not have developing case law, at wholly unreasonable risk to themselves.
- (d) The Call for Evidence asks whether Parliament should prescribe a definition of “public interest” in statute, or whether it should be left to the courts. Again, I believe that laws made by Parliament are invariably preferable to judge-made law.
- (e) The Call for Evidence asks whether the current definition of “public interest” is inadequate or unclear. I believe that is both inadequate and unclear. It should be set out clearly by Parliament and the definition and test should be at the forefront of the court's mind at all times. As a society we surely want our public discourse to be closer to that of the United States (with freedom of expression enshrined as the First Amendment to its Constitution) than to the French (whose privacy laws have been abused by its elites for decades).
- (f) The Call for Evidence asks whether the commercial viability of the press should be a public interest consideration to be balanced against an individual's right to privacy. My view is that this should depend on the identity and profile of the claimant, the nature of the allegations that are averred to be private and/or confidential, how widespread those allegations already are and the motivation of the defendant (including whether that defendant is actuated by malice or, for example, by a reasonable sense of injustice).
- (g) The Call for Evidence then raises whether it should be the case that some individuals waive some or all of their right to privacy when they become a celebrity, a politician or a sportsperson, whether it should depend on the degree to which that individual uses their image or private life for popularity, money or to get elected, and whether the image the individual relies on has to relate to the information published in order for there to be a public interest in publishing it (referred to as “a hypocrisy argument”). My view is that those who enter public life, by which I mean those who have sought election or appointment to public office, should have less of a right to privacy than others, but it is clear that they should retain some privacy. The balance of public interest in disclosure of otherwise private matters will be likely to be tipped more often in the case of a public figure.
- (h) The Call for Evidence goes on to ask whether any or all individuals in the public eye should be considered to be “role models” such that their private lives may be subject to enhanced public scrutiny regardless of whether or not

they make public their views on morality or personal (i.e.: in the absence of a “hypocrisy” argument). My view is that the “hypocrisy” argument is what tips a particular matter from being private into being a matter of public interest. If a famous sportsman cheats on his wife then that is ordinarily a private matter unless he has traded on his family image for the purposes of generating income (such as in an autobiography, interview or for endorsement income purposes). This, after all, is what seems to have excited so much interest in the Ryan Giggs case. Giggs had portrayed himself and generated considerable income from having done so as an upstanding citizen when, in fact, he had had an affair not only with a model but with his sister-in-law.

- (i) The Call for Evidence further asks whether the courts are giving appropriate weight to the value of freedom of expression in “celebrity gossip” and “tittle tattle”. Perhaps the maxim to be adopted in this regard that he who lives by the sword cannot be expected not to be wounded by that sword from time to time. That said, mud sticks and people tend (albeit foolishly) to believe whatever is written about someone in a newspaper or online. Thus the mere fact that someone is a celebrity ought not to determine whether their reputation deserve protection from gossip or tittle tattle.
- (j) The Call for Evidence then asks whether in the context of sexual conduct it should be the case that a person’s conduct in private must constitute a significant breach of the criminal law before it may be disclosed and criticised in the press. That would, in my view, be far too restrictive. The material (rather than immaterial) hypocrisy argument in the context of a public figure is a more reasonable way forward, subject to control.
- (k) The Call for Evidence asks whether different remedies (other than damages) could play a role in encouraging an appropriate balance. In the context of newspapers and broadcasters, the publication of an equally prominent apology could assist although that has not worked particularly effectively in the context of defamation claims thus far. Damages (and indeed adverse costs awards) are not a worry if a defendant is a wealthy publisher unless if malice can be shown then aggravated and/or exemplary damages can be awarded. Costs are not an effective deterrent to an unjustified application for a super-injunction by a wealthy applicant either.
- (l) The Call for Evidence asks whether damages are a sufficient remedy for a breach of privacy, whether punitive financial penalties would be an effective remedy and whether they would adequately deter disproportionate breaches of privacy. As outlined above, damages and costs are inadequate against many publishers. The threat of punitive damages would deter breaches of privacy but might also act as a chilling effect on investigative journalism and free speech. To that end malice ought to be a determinative factor on the part of the defendant, coupled with a claimant being required to prove actual loss. After all, much of the focus has been on wealthy claimants versus wealthy defendants. A case involving the most wealthy of claimants against indigent defendants, makes ensuring a fair opportunity for both parties to participate in the litigation equally important. Some breaches of privacy may not be capable of remedy by damages; I accept that injunctive relief may be appropriate in those cases.
- (m) The Call for Evidence moves onto ask whether we should introduce a prior notification requirement requiring newspapers and other print media to notify an individual before information is published, thereby giving the individual time to seek an injunction if a court agrees the publication is more likely than not to

be found a breach of privacy and, if so, how such a requirement would function in terms of written content online (e.g. blogs and other media). This is the nub of the problem. Journalists would be required to operate within higher ethical and legal constraints than the blogosphere. That is not necessarily unfair, given that most newspapers have a readership that is far wider and an authority far greater than that of most websites. However Twitter and Facebook allow for information to be spread globally within seconds. I cannot see how this suggestion could therefore be policed other than perhaps in the context of the level of damages and/or costs awarded in due course. Thus a newspaper or website that gave prior notification ought perhaps to benefit from some form of protection in damages and/or costs whereas a newspaper or website that does not choose to give prior notification ought prima facie not to have the benefit of such protection.

- (n) The Call for Evidence asks whether aggravated damages should be payable if a media publisher does not give prior notification to the subject of a publication which a court finds is in breach of that individual's privacy. As outlined above, I do not consider that to be an inherently unreasonable assumption, so long as it is rebuttable.
- (o) The Call for Evidence asks whether section 12 of the Human Rights Act 1998 is appropriately balanced, whether the media's freedom of expression should be protected in stronger terms, whether there is a disproportionate emphasis on the media's freedom of expression over the right to privacy and whether section 12 of the Human Rights Act 1998 has ensured a more favourable press environment than would be the case if Strasbourg jurisprudence and UK injunctions jurisprudence were applied in the absence of section 12. As a layman all that I can add here is that I believe that the American system is superior to the French or European system in this regard. What we need is an equivalent right to that enshrined in the First Amendment to the US Constitution.
- (p) The Call for Evidence asks whether the test in section 12 for an injunction to be granted is too high a threshold, whether that test should depend on the type of information about to be published and whether the court has struck the right balance in applying section 12. In my view, as outlined above, the key is whether the claimant avers that any particular is true or false. If it is false then the law of defamation provides a sufficient remedy, unless there is no potential public interest in disclosure or the truth or falsity of the allegations would not affect their assessment or the balancing exercise. If an allegation is true then the balance should favour freedom of expression and the public interest unless the matter in question is particularly private.
- (q) The Call for Evidence asks whether there is an anomaly requiring legislative attention between the tests for an injunction for breach of privacy and in defamation. Respondents and the court may be left unable to determine which of the allegations in question is true or false. The proper course, in my submission, is that false allegations should be met with defamation proceedings (and, if appropriate, an interim injunction) and true allegations should be met with privacy proceedings (and, if appropriate, an interim injunction on the public interest/privacy test is considered), unless there is no potential public interest in disclosure or the truth or falsity of the allegations would not affect their assessment or the balancing exercise.

## Enforcement, Jurisdiction, Privilege and the Rule of Law

46. In the context of issues relating to the enforcement of anonymity injunctions and super-injunctions, including the internet, cross-border jurisdiction within the United Kingdom, parliamentary privilege and the rule of law:
- (a) The Call for Evidence asks how privacy injunctions can be enforced in the new media age, whether it is practical and/or desirable to prosecute tweeters or bloggers and, if so, for what kind of kind of behaviour and how many people – i.e.: where should or could those lines be drawn. This question arises in the context of the Ryan Giggs super-injunction where his identity was well known online and the law fell into disrepute as a result. It cannot be right to expect or require internet service providers or the likes of Google or Twitter to police websites, Facebook or Twitter. Equally it is unrealistic for a claimant to be expected or to want to pursue hundreds or thousands of individuals who publish material that is the subject of an injunction online. Again, that would be impractical. Indeed this perhaps highlights why such injunctions ought to be the most rare of creatures.
  - (b) The Call for Evidence goes on to ask whether it is possible, practical and/or desirable for print media to be restrained by the law when other forms of new media will cover material subject to an injunction anyway and whether the status quo of seeking to restrict press intrusion into individuals' private lives while the new media users remain unchallenged represents a good compromise. The problem here is that the internet is global. Laws could be passed in the United Kingdom or in the European Union but how will that deal with website registered in other jurisdictions. We surely do not want to be like the Chinese, blocking websites that are not properly registered with a regulatory body of some kind? The proportionate way to deal with this is surely to recognise that higher standards and controls are properly expected of the mainstream media because it has a far higher readership than most websites do.
  - (c) The Call for Evidence asks whether enough is being done to tackle “jigsaw” identification by the press and new media users. In essence this asks whether the revelation of some information might amount to a breach of an injunction in some way. That is always a risk. Sometimes this may be inadvertent. Sometimes it may be deliberate. The courts are surely capable of determining the state of mind of the publisher in each instance.
  - (d) The Call for Evidence asks whether there are any concerns regarding enforcement of privacy injunctions across jurisdictional borders within the UK and, if so, how these concerns should be dealt with. Ultimately this is a consequence of devolution and indeed the fact that the Scots have kept their own legal system ever since the Act of Union. Injunctions granted in England & Wales can be “breached” in Scotland, France or Uganda. That is the problem inherent in a multi-jurisdictional world.
  - (e) In context of parliamentary privilege:
    - (a) The Call for Evidence asks with regard to the enforcement of privacy injunctions and the breaching of them during Parliamentary proceedings whether there is a case for reforming the Parliamentary Papers Act and other aspects of Parliamentary privilege, whether this should be addressed by a specific Bill or whether it is desirable for the Committee to consider

privilege to the extent it is relevant to injunctions. My firm view is that the Bill of Rights 1689 should be left alone and Parliament should continue to be supreme and superior to the courts.

- (b) The Call for Evidence asks whether Parliament should consider enforcing “proper” use of Parliamentary Privilege through penalties for “abuse”. That is a matter for the Speaker of the House of Commons.
- (c) The Call for Evidence asks what it is “proper” use and what is “abuse” of Parliamentary Privilege. Again, that is a matter for the Speaker of the House of Commons, not the courts.
- (d) The Call for Evidence asks whether it is desirable to address the situation whereby a Member of either house breaches an injunction using Parliamentary Privilege using privacy law or is that a situation best left entirely to Parliament to deal with, whether it is possible to address the situation through privacy law (or if that is constitutionally impermissible) and whether the current position in this respect could be changed in any significant way (and, if so, how). I am firmly of the view that Parliament is supreme and should remain so. This is not a matter for the courts.

## Media Regulation

47. In the context of issues relating to media regulation, including the role of the Press Complaints Commission and Ofcom:

- (a) The Call for Evidence asks whether the guidelines in section 3 of the Editors’ Code of Practice correctly address the balance between the individual’s right to privacy and press freedom of expression. I take the view that this is a matter for the press. A free press is integral to a free society and we must eschew calls for statutory regulation of the media.
- (b) The Call for Evidence asks how effective the PCC has been in dealing with bad behaviour from the press in relation to injunctions and breaches of privacy. It has been very ineffective but that is a reflection on its leadership, not its remit. Again, there are remedies through the courts that are available to any complainant. Provided that damages and costs awards are sufficiently punitive then any editor will be wise enough not to cross the line too often.
- (c) The Call for Evidence asks whether the PCC has sufficient powers to provide remedies for breaches of the Editors’ Code of Practice in relation to privacy complaints. It does not and clearly it would be preferable if the PCC provided for a cost-effective, proportionate and speedy way of resolving disputes, rather than for the courts to be accessed unnecessarily.
- (d) The Call for Evidence asks whether the PCC should be able to initiate its own investigations on behalf of someone whose privacy may have been infringed by something published in a newspaper or magazine in the UK. I believe that that would be preferable in the first instance to the use of the courts, which remain slow, expensive and cumbersome means of resolving such disputes.
- (e) The Call for Evidence asks whether the PCC should have the power to consider the balance an individual’s privacy and freedom of expression prior to

- the publication of material – or should this power remain with the courts. I believe that this crosses the line and should be a matter solely for the courts.
- (f) The Call for Evidence asks whether there is sufficient awareness in the general public of the powers and responsibilities of the PCC in the context of privacy and injunctions. I suspect that there is not. Publishers perhaps ought to be required to set out how the PCC can be accessed on their websites and in their publications.
  - (g) The Call for Evidence asks whether the guidelines in section 8 of the Ofcom Broadcasting Code correctly address the balance between the individual's right to privacy and freedom of expression. As outlined above in the context of the print media, that balance ought to be closer to that in the United States than that in France or on the European continent.
  - (h) The Call for Evidence asks how effective Ofcom has been in dealing with breaches of the Ofcom Broadcasting Code in relation to breaches of privacy. I am unable to comment in this regard other than to note that most complaints seem to relate to newspapers, not broadcasters.
  - (i) The Call for Evidence concludes by asking whether there is a case that the rules on infringement should be applied equally across all media content. In principle the answer might perhaps be yes but I cannot see how that can happen in the context of 24/7 broadcasting and a (rightly) unregulated blogosphere and internet.

### **Other Practical Implications**

48. There are certain practical implications of super-injunctions which ought properly to be a cause for concern. These include the following:-
- (a) Access to third party funding and after-the-event insurance: these are necessary unless you are rich and powerful; they are difficult to obtain. If access to justice and equality of arms in the context of litigation is to mean anything then surely it must provide for the party that is the subject of an injunction to be allowed to seek funding and/or insurance from whomever he wishes while, of course, safeguarding the privacy/confidence of any claimant while an interim injunction is in force. This is unlikely to be the present practice.
  - (b) This highlights not only how it is nigh on impossible for indigent respondents to gain access to justice (or to funding/insurance) but how these injunctions may be abused by claimants and their lawyers who wield the sword of Damocles over respondents', funders' and insurers' heads with a threat of becoming engaged in expensive satellite litigation.
  - (c) Breaches of professional rules on the part of an applicant's solicitors cannot be reported without permission of the court. These are matters that ought properly to be brought to the attention of the Solicitors Regulation Authority. They cannot be. To do so would amount to a breach of the super-injunction. This therefore means that the regulator tasked with protecting the public in the context of the provision of legal services is unable to do so in respect of an applicant's solicitors. This cannot be right. The SRA must surely be able to retain regulatory oversight over solicitors in all circumstances and the existence of a super-injunction, whether properly obtained or improperly procured,



should not prevent this. It is scant consolation to ask the Claimant to take a costs risk on going to court to ask permission, in these cases.

- (d) Likewise, the inability to report certain matters to the police. It cannot be right that someone who is the subject of a super-injunction cannot bring matters of such a relevant nature to the attention of the police. The police are there to protect us all. They must be able to know matters that ought to be made known to them.
- (e) The consequential effects of super-injunctions do not appear to have been fully thought through; these effects include interference with the ability of the respondent to gather evidence, obtain documents and prepare his or her case. Nor has obtaining commercial litigation funding been thought through; most judges have scant if any experience of what such funding organisation practically require and the difficulties and hurdles faced by those seeking such funding, even without the serious impediments imposed by a super-injunction.

### **Conclusion**

- 49. There are real issues as to both the law and practice in super-injunctions, which give rise to potential unfairness in the process and injustice in the result.
- 50. These relate as much to the practical difficulties of challenging an *ex parte* injunction, once obtained, and funding such a challenge, as they do to the principles of law and practice which should apply. The principles should therefore take into account these factors; they presently fail to do so.
- 51. Candour should be a stringent requirement in obtaining super-injunctions, both in the interests of fairness and to avoid abuse, in particular by the rich and powerful.
- 52. In the event that the Committee would welcome any clarification of points raised in this submission, or would welcome oral evidence from me, I remain ready, able and willing to provide such assistance to the Committee on short notice, should the Committee invite me to do so.

9 December 2011

## **Mark Burby—Supplementary written evidence**

1. This supplementary written submission is made to the Joint Committee on Privacy & Injunctions. It is supplementary to a written submission I made on 9 December 2011. As such it is governed by parliamentary privilege and all or any elements of this submission should be read in that context.
2. This is of particular importance as I am the subject of a super-injunction and, as adverted to in my preliminary submission made on 9 December 2011, the Claimant in those proceedings and/or the Claimant's solicitors are likely to seek to criticise me (at the very least) or to bring contempt proceedings (at the very worst) in respect of this submission to the Committee. Those proceedings, if brought, will also be in secret.
3. To that end this submission has been worded in such a way so as not to undermine the integrity of the super-injunction by which I am, in England & Wales, bound. The wording of that super-injunction is such, however, that I am not bound by its terms other than while in England & Wales.
4. I am a resident of the Bailiwick of Jersey.

### **My super-injunction**

5. Firstly I deal with the case in which I am the subject of a super-injunction.
6. On 9 September 2009 a super-injunction was obtained in the Queen's Bench Division of the English High Court on an ex parte basis by a Claimant against three Defendants – myself, my public relations consultant and the business through which he trades.
7. I am a resident of the Bailiwick of Jersey. Publication of the matters complained of was made in Jersey, both by way of newspaper and television interviews and online, although the claimants identity was not broadcasted. The only reason that my public relations consultant and the business through which he trades were joined as Defendants to these proceedings (and are thus subject to the super-injunction in question) is because they are based in England & Wales and this, in turn, gave the English courts jurisdiction over a matter that otherwise ought properly, if at all, to have been brought in the Bailiwick of Jersey.
8. The Claimant is the ex-spouse of an Asian Head of State. A Head of State that is considered a strategic ali to the UK. As these proceedings are anonymised it would clearly be inappropriate in the context of this submission to reveal her identity. I will also take careful steps to avoid calculation of her identity although it's quite clear that there is already a significant amount of unsavoury publicity about this person already in the pubic domain. A fact that makes the super-injunction referred to in this submission somewhat questionable.
9. There are six areas that are the subject matter of this super-injunction (as it was ordered ex parte by Mr Justice Maddison on 9 September 2009 and as affirmed by Mrs Justice Sharp after an inter partes hearing on 3 November 2009):
  - (a) Information/allegations concerning any personal relationship of any kind between the Claimant and a man who is not her ex-husband;

- (b) Information/allegations known or believed by the Defendants or either of them to have been communicated by the Claimant to that same man;
  - (c) Information/allegations relating to steps taken by the Claimant to secure payment of a £61m judgment debt from members of her family, of which I am the beneficiary (including the fact that such steps have been taken at all);
  - (d) The fact of any details of the discussions or dealings (including alleged discussions or dealings) between the Claimant and myself about that judgment debt and any information/allegations known or believed by the Defendants to have been communicated by the Claimant to me in the course of such discussions or dealings;
  - (e) Any information calculated to identify the Claimant as the claimant in English proceedings against another individual or as the plaintiff in Australian proceedings against another individual, whom has since been assassinated, and a company that he controlled;
  - (f) Any allegation that the Claimant was involved in or responsible for that individual's murder.
10. The super-injunction requires that I must not, within England & Wales:
- (a) Publish or disclose to any person or institution any of the information or allegations set out above;
  - (b) Communicate to the Claimant (directly or indirectly) any threat to make such publication or disclosure or any request for payment or other benefit in return for not doing so;
  - (c) Otherwise harass the Claimant. (This is a key legal term that is abused in such proceedings to imply unsavoury conduct on my part and is a very misleading reference indeed)
11. While the first of these is clear, the latter two are not. How can it practically be determined how an indirect communication is made and I am culpable for it? What does harassment mean in this context, particularly when litigation is ongoing? This highlights the excessively broad scope that these injunctions, bolstered by a penal notice, cover.
12. It is important to reiterate that the super-injunction expressly does not bind me other than in England & Wales.
13. That said, while I reside in the Bailiwick of Jersey I have not at any time breached the super-injunction even though, for example, I could have communicated the subject matter of the super-injunction to any newspaper or broadcaster in any jurisdiction

other than in England & Wales and/or published these matters online other than through an internet service provider based in England & Wales.

14. Other matters that are pleaded by the Claimant as being private and/or confidential but that are not expressly covered by the terms of the super-injunction (but are impliedly covered by it) include:
- (a) Descriptions of the Claimant's body allegedly discovered in the course of the alleged sexual relationship with the man who is not the ex-husband of the Claimant. Such would demonstrate that she has perjured herself when denying that any such sexual relationship existed;
  - (b) That the Claimant offered that individual's wife money to divorce him;
  - (c) That the Claimant had become pregnant with an illegitimate child but terminated the pregnancy;
  - (d) That the Claimant had been the victim of sexual harassment by a high profile UK Arab businessman and former proprietor of a substantial UK retailer;
  - (e) Descriptions of the Claimant's feeling towards her ex-husband during and after her marriage;
  - (f) Details of the Claimant's sexual relations with her ex-husband;
  - (g) Details of the Claimant's divorce and divorce settlement;
  - (h) That the Claimant had a sexual relationship with another individual and details of that alleged relationship while she was married;
  - (i) That the Claimant had a sexual relationship with one of her two solicitors and details of that alleged relationship;
  - (j) That the Claimant's ex-husband, as a Head of State, sympathised with and supported Islamic fundamentalists;
  - (k) That the Claimant knew or suspected, from conversations with her ex-husband, that there would be major terrorist attacks on the UK (7/7) and Israel;
  - (l) That the Claimant's ex-husband flew a senior member of Al-Qaeda to the country of which he is Head of State and gave him substantial funding for Al-Qaeda.
15. Whether or not the Claimant did or did not have a relationship with the man who is not her ex-husband is, in and of itself, not a matter of public interest. It is clearly a private matter. However, it is only a matter of public interest in the context of other injunctions obtained by the Claimant in other proceedings whereby she has stated on oath that that relationship never took place and/or was not sexual in nature when both she and her solicitors are aware that that relationship did take place and/or was sexual nature. In other words, my position is that the Claimant – the ex-wife of a

foreign Head of State – has perjured herself in these and other proceedings and she has relied on that perjury to obtain injunctive relief against me (and others). Also, the said man was committed to 3 months in Brixton prison for an alleged breach of a super-injunction because he was restrained from repeating the allegation that he did have sex with the claimant. However, the claimant failing to disclose to the High Court photographic evidence in their possession of the alleged sexual encounter when applying for super-injunctions is brushed to one side. Therefore the alleged abuse of the English courts in this manner is clearly a matter of public interest.

16. If these allegations are untrue then the proper course is for the Claimant to sue in defamation. It is striking that the Claimant has refused to confirm whether she accepts that these allegations (or any of the allegations complained of) are true or untrue. However, they state that some are true and some are false but are not required to state which under the protection of the super-injunction.
17. As for the second aspect of the allegations concerning the allegation that the Claimant had agreed to secure payment of the £61m judgment of which I am the beneficial owner, that again is surely not a matter that is properly to be classified as private such as to merit the protection of a super-injunction. If the Claimant has entered into an agreement to agree to secure payment of a judgment and has then breached that agreement then that is a question of fact properly determinable by the courts. It is not private and/or confidential information per se. The existence of the super-injunction completely interferes with the equality of arms and/or commercial negotiations that would otherwise exist between parties
18. As for the third aspect of the allegations referred to expressly in the super-injunction concerning proceedings brought by the Claimant against an individual in England and Australia, who was subsequently assassinated, I again submit that that is not properly a matter that ought to be the subject of a super-injunction. If the allegation is true, it is plainly a matter of public interest that the ex-wife of a Head of State was involved in, responsible for or co-conspirator in the murder of this individual. If the allegation is false then it is defamatory and the applicable remedy for the Claimant ought to be in damages. However, the existence of the super injunction is suffocating the truth being either investigated or other witnesses evidence being obtained. It is further compounded by the fact the man assassinated was the subject of a similar/identical super-injection taken out by the same claimant to avoid publication of the same facts. He was assassinated at the juncture of making an application to have the injunction set-aside on grounds that would have, in all likelihood, been successful. This is clearly a matter of public interest.
19. As for the matters contained in the Claimant's Particulars of Claim but which are not expressly referred to in the super-injunction (but which may, by implication, be considered also to be private and/or confidential such as to be covered by its scope):
  - (a) Descriptions of the Claimant's body allegedly discovered in the course of the alleged sexual relationship that gave rise to the super-injunction would rightly ordinarily be considered to be private and/or confidential and properly to be protected by injunctive relief and/or a privacy law, other than in the context of the perjury allegation outlined above which brings the matter into the realm of public interest;

- (b) That the Claimant offered money to that individual's wife to divorce him is, again, (if true) ordinarily a matter that ought properly to be seen as private and/or confidential and properly to be protected by injunctive relief and/or a privacy law or (if false) defamatory, other than in the context of the perjury allegation outlined above which brings the matter into the realm of public interest;
- (c) That the Claimant had become pregnant with that individual's child but had a termination is (if true) a matter that ought properly to be seen as private and/or confidential and properly to be protected by injunctive relief and/or a privacy law or (if false) defamatory, other than in the context of the perjury allegation outlined above which brings the matter into the realm of public interest;
- (d) That the Claimant had been the victim of sexual harassment by a prominent Arab businessman is (if true) a matter that ought properly to be seen as private and/or confidential and properly to be protected by injunctive relief and/or a privacy law or (if false) defamatory;
- (e) Descriptions of the Claimant's feelings towards her ex-husband during and after her marriage, details of her sexual relations with him and details of her divorce and divorce settlement are (if true) matters that ought properly to be seen as private and/or confidential and properly to be protected by injunctive relief and/or a privacy law or (if false) defamatory;
- (f) Details of the Claimant's sexual relationships with another individual and/or one of her solicitors are (if true) matters that ought properly to be seen as private and/or confidential and properly to be protected by injunctive relief and/or a privacy law or (if false) defamatory, other than in the context of the perjury allegation outlined above which brings these matters into the realm of public interest;
- (g) The Claimant's feelings towards her ex-husband's brother are (if true) a matter that ought properly to be seen as private and/or confidential and properly to be protected by injunctive relief and/or a privacy law or (if false) defamatory;
- (h) That the Claimant's ex-husband, as a Head of State, sympathised with and supported Islamic fundamentalism is a matter of public interest (if true) or (if false) defamatory;
- (i) That the Claimant knew or suspected, from conversations with her ex-husband, that there would be major terrorist attacks on the UK and Israel is a matter of public interest (if true) or defamatory (if false);
- (j) That the Claimant's ex-husband, as a Head of State, flew a senior member of Al-Qaeda to his country and gave him money for Al-Qaeda is a matter of public interest (if true) or defamatory (if false).

20. It can thus be seen that there are three classes of allegations/information:

- (a) Information that is clearly private and/or confidential and properly to be protected by injunctive relief and/or a privacy law (if true) or (if false) is defamatory;
  - (b) Information that would ordinarily be seen as such but for the underlying allegation of perjury;
  - (c) Information that is a matter of public interest (if true), defamatory (if false) and or is not something that should be the subject of a super-injunction.
21. The starting point must therefore surely be, in any such action brought by a claimant, for that claimant to state which of the allegations are true and which of the allegations are false. Allegations that are accepted as being true but which are averred to be private should then either be determined by a judge as being private or, if not private, be held to be in the public interest. Allegations that are false ought to be pursued by way of a claim in defamation.
22. In this instance, however, the Claimant and her solicitors have refused to state which of the allegations are true and which are false, whether in pleadings or pursuant to a formal request for further and better particulars. From the perspective of a defendant this puts that defendant at an unfair advantage.
23. Moreover the following are matters that ordinarily would be capable of being reported by the media in the context of the proceedings brought by the Claimant but for the fact that these proceedings are being held in secret and behind closed doors – in a manner that is wholly contrary to any notions of natural justice, fairness, equality of arms or the positive engagement of my Article 6 rights. The following are some of the points that can be taken from witness statements and evidence provided by some of the claimants staff and/or parties working within the palace residence for her:
- (a) the Claimant's solicitors manufactured evidence for a member of the Claimant's staff to swear in court;
  - (b) the Claimant and her solicitors paid large sums of cash to me to ensure that I, among others, would give evidence to her liking in proceedings where I was a witness;
  - (c) the Claimant hired an assassin to deal with her opponents;
  - (d) the Claimant has an obscene gambling addiction, has lied about whether or not she gambles and pressurised Muslim staff to take part in gambling with her despite it being against their religious beliefs;
  - (e) the Claimant's solicitors gambled her money in casinos with her, contrary to professional ethics and, if such gifts were not declared to HM Revenue & Customs, contrary to law;
  - (f) the Claimant hides her excessive gambling addiction by selling personal jewellery given to her by her ex-husband – in one case she then used another UK super injunction to accuse a member of her staff of stealing the jewellery that she has

laundered to hide the loss of a particular gem from her ex-husband after a family member had noticed that the item was a cheaper copy;

- (g) the Claimant had an improper, possibly sexual, relationship with one of her solicitors;
- (h) the Claimant has been using her immense wealth to harass and bully people with over powering UK legal process under the protection of a web of interlocking super injunctions (which means that the truth or otherwise of the issues behind them can never be re-examined subsequently by another court);
- (i) the Claimant has been using super injunctions to block and isolate material evidence from being heard by the court and isolated between cases;
- (j) the Claimant boasted to a member of staff (who has provided a witness statement) about the assassination of an opponent engaged in litigation against her in another jurisdiction and saying that “Burby” was next;
- (k) the Claimant’s son is homosexual – whilst his sexuality is not an issue worthy of this report and I expressly state that I feel very uncomfortable mentioning it, it is an issue that it is a criminal offence in the state of which her ex-husband (and the boy’s father) is Head of State because it means that while that Head of State’s own son engages in homosexual activity, that Head of State incarcerates his subjects for doing so;
- (l) the Claimant and her solicitors have boasted to me and others that she “owns” the courts in England & Wales and the government of the United Kingdom;
- (m) the Claimant’s solicitors have in the past boasted to me that they can obtain orders in the UK that others cannot;
- (n) one of the Claimant’s solicitors has also divulged that the Claimant’s ex-husband has made arrangements for another litigation opponent of hers to be “dealt with” by the now former leader of Egypt;
- (o) the Claimant gets her staff to cover up a wine cooler when the holy Muslim preachers (known as Mudims) come to visit her house in London. She is in possession of the Karba (a holy artifact from the shrine of the Profit Mohammed) and keeps it within close proximity of the alcohol;
- (p) the Claimants conducts disloyal collusions with her ex-husband’s official representative in London resulting in that representative being disloyal to the Head of State;
- (q) that the Head of State’s most senior representative in London, a Muslim himself, has been engaged in drinking alcohol and gambling with the Claimant, contrary to Islamic law;
- (r) the Head of State’s current wife has also been on a gambling trip to a London casino with the Claimant;



- (s) I hold photographic evidence showing the Claimant having sex with the man she denies ever having had sex with – the Claimant’s solicitors also have this photographic evidence and concealed it when applying for super injunctions so as to characterize the notion of the sexual relationship as fanciful.

### **Issues of general principle**

- 24. I return to matters relevant to my circumstances that I believe ought to interest the Committee such that I should be invited to give oral evidence to the Committee on them.
- 25. The first concerns access to third party funding and after-the-event insurance. The wording of the super-injunction in my case allowed for me to seek legal advice alone. I wanted to explore whether third party funding and/or after-the-event insurance might be available to allow for my defence and/or a counterclaim. Given the incredible power, influence and wealth of the Claimant in my case (the ex-wife of a foreign Head of State) I was and remain anxious not to reveal the identity of any such funders/insurers. I attempted to seek the permission of the courts to contact a wide number of such funders/insurers but this was rebuffed by both the Claimant and a Judge. In due course I was permitted to contact three funders/insurers but only after identifying them and giving prior notification to the Claimant (who could thus interfere with my attempts to procure funding/insurance). If access to justice and equality of arms in the context of litigation is to mean anything then surely it must provide for the party that is the subject of an injunction to be allowed to seek funding and/or insurance from whomever he wishes while, of course, safeguarding the privacy/confidence of any claimant while an interim injunction is in force. In my case, however, the Claimant and her solicitors have continually threatened both my funders and myself with contempt proceedings for some imaginary breaches of the terms of the varied injunction even though no such breaches have ever taken place. They also lied to a high court Judge stating that an order for disclosure of my funder had already been made thus requesting an endorsement of an order that did not exist and thus creating a false order by default.
- 26. This highlights not only how it is nigh on impossible for indigent respondents to gain access to justice (or to funding/insurance) but how these injunctions are being abused by claimants and their lawyers who wield the sword of Damocles over respondents’, funders’ and insurers’ heads in an effort to become engaged in expensive satellite litigation.
- 27. In addition, my case has seen what I am advised by my former and current solicitors and counsel amount to a large number of breaches of professional rules on the part of the Claimant’s solicitors. These are matters that ought properly to be brought to the attention of the Solicitors Regulation Authority. They cannot be. To do so would amount to a breach of the super-injunction. This therefore means that the regulator tasked with protecting the public in the context of the provision of legal services is unable to do so in respect of the Claimant’s solicitors. This cannot be right. The SRA must surely be able to retain regulatory oversight over solicitors in all circumstances and the existence of a super-injunction, whether properly obtained or (as I allege in my case) improperly procured, should not prevent this. That lack of regulatory

control is clearly creating an opportunity for abuse of the UK legal system. An abuse that the solicitors in these proceedings are systematically abusing with the protection of the court.

28. Among the matters complained of that the Committee should realise I am unable to report to the Claimant's solicitors' own regulator (that protects the public from unscrupulous conduct by solicitors) are:
- (a) Client Conflict of Interest – between 2006 and 2009, I provided a considerable amount of acknowledged assistance to the Claimant in respect of claims she brought against other individuals in this jurisdiction and elsewhere. While I was represented by a Jersey lawyer at the initial stage, I was not represented by an English solicitor. The Claimant's solicitors were fully aware of this. They took advantage of me. I made statements in proceedings that I was told that I had to make if the Claimant was to ensure payment of a £61m judgment of which I was the sole beneficiary. "Stay in the game" is what I was repeatedly told. I relied throughout on the bona fides, judgment and advice of the Claimant's solicitors. A clear fiduciary relationship arose as between myself and those in whom I reposed trust. Now that the Claimant is engaged in litigation against me, a conflict of interest arises that ought to preclude the Claimant's solicitors from acting against me.
  - (b) Direct Conflict of Interest – I have alleged in these proceedings that the Claimant's solicitors breached duties owed to me and committed other tortious acts that mean that they ought properly to be Part 20 Defendants in Part 20 claims to be brought by me. As such, the Claimant's solicitors ought not to be continuing to act for the Claimant in these proceedings.
  - (c) Breach of Confidence – throughout the time that I was providing the Claimant's solicitors with assistance, I communicated information of a private and confidential nature about myself and my family to them. This was done so at their request in a manner that can best be described as calculating and predatory. That information is now being used against me by the Claimant in breach of confidence.
  - (d) Witness Payments – throughout the time that I provided assistance to the Claimant, I received a number of payments by her solicitors. They concocted a disguise to make those payments and to mask that these amounted to payments to provide witness evidence, which is contrary to law in England & Wales and, I suspect, in Australia (where I likewise was paid by the Claimant to give evidence).
  - (e) Cash Payments – throughout the time that I was providing assistance to the Claimant, I received a number of payments in cash by her solicitors. It is a breach of the Solicitors' Accounts Rules for cash payments to be made by solicitors and/or for false accounts to be prepared.
  - (f) Data Protection Act Breach – I made a data subject access request in February 2010 to the Claimant's solicitors. I wanted to exercise my rights under the Data Protection Act 1998 to obtain my personal data as held by them and arising

from my dealings with that firm over the previous 4 years. The Claimant's solicitors failed to comply with that data subject access request in any way, shape or form. This gives rise to causes of action under sections 7(9) and 13 of the Data Protection Act 1998. I am not permitted to do so under the restraint of the super-injunction

- (g) Incomplete Disclosure – the Claimant's solicitors knowingly and deliberately provided incomplete disclosure. I believe that they were/are attempting to hide and evade an accusation of perjury and pervert the course of justice. In a further attempt the Claimant's solicitors also claimed that one of his laptops has been stolen and critical files have been lost. However, the Claimant's solicitors refused to specify which files have been lost and why a substantial firm like theirs does not back up hard drive data. Also, the Claimant's solicitors only provided **any** disclosure at all when threatened with a court application.
- (h) Failure to Provide Inspection – the Claimant's solicitors twice failed to provide inspection of documents, notwithstanding my entitlement to inspection of documents mentioned in pleadings and that have subsequently been disclosed.
- (i) Misleading Opponents – the Claimant's solicitors claimed that they had only recently begun to act for the Claimant (after its two partners suddenly left the firm that had previously been acting for the Claimant). Unbeknown to the Claimant's solicitors, I have evidence that they had in fact been acting for the Claimant in other proceedings for over 6 months previously. The Claimant's solicitors lied in claiming that a fee dispute had led to their former firm taking a lien over the Claimant's files. I am simply not able to make any complaint about their conduct because of the restraint of the super injunction.
- (j) Misleading Courts – the Claimant's solicitors misled the court when obtaining the ex parte injunction and willfully concealed information that ought to have been provided. Pivotal to the granting of the ex-party injunction was the alleged sexual relationship of which the Claimant's solicitors gave evidence to the court as being fanciful and untrue. While giving such evidence to obtain the ex parte injunction they willfully did not disclose that they were in possession of photographic evidence alleging the contrary. They did not inform the court that allegations had also been made accusing one of the Claimant's solicitors of having a sexual relationship with the Claimant. Throughout proceedings they have given evidence to paint a picture of the Claimant being a devout Muslim and regal lady of repute who falls victim to extortionists by virtue of being the wealthiest woman in the world. However, they have failed to disclose her gambling addiction, enjoyment of alcohol as well as other behavior that would cause her to be reviled by fellow Muslims around the world and paint a picture of her character that would have an affect on the injunctive relief she obtained.
- (k) Misleading Australian Courts – in a rather desperate attempt to quash the truth, the Claimant's solicitors lied to the Australian media by claiming that I had been lawfully served with the ex parte injunction such as to give rise to an entire edition of the *Australian Daily Telegraph* being recalled. In fact, I had not been lawfully served at all and such proof is available from the States of Jersey Viscount's Department.

- (l) Misleading Jersey Government – the Claimant and her solicitors lied to the States of Jersey Government department in an attempt to obtain a license to purchase property in Jersey by a non qualified resident, namely the Claimant. This is because they wanted to be able to own my family home and thus apply pressure on me to give evidence to their liking against the man in Australia, who has now been assassinated. I was told I could not “do any thing against the claimants interests”.
- (m) Failure to Provide Ex Parte Hearing Notes – on obtaining the ex parte injunction, it was incumbent upon the Claimant’s solicitors to provide a full note of that hearing forthwith. That note was not provided for a further 7 months despite numerous requests and denying me from being aware of the allegations they made in court against me. When they did provide that note, 7 months late, it was and still is incomplete resulting in the hearing being in private to the extent that I have been precluded from defending my lawful right in these proceedings.
- (n) Failure to Provide Bundles – the Claimant’s solicitors have repeatedly failed to provide bundles to me, for example failing to do so on 24 February 2011 (and only providing those bundles on the afternoon before the hearing before Tugendhat J on 27 May 2011). As a result, I have had no idea what has been said or shown to the court.
- (o) At the start of a hearing before Justice Slade, my wife received a direct threat in Jersey presumably to persuade her from giving evidence. This matter was reported to the States of Jersey Special Branch and I provided the evidence of the threat to the Judge requesting that the hearing be adjourned for fear of my family. Not only was my request for an adjournment declined, I was told I could not provide any information to the Police unless they made a formal application to the Judge and the claimants solicitors have refused to hand over a transcript of the hearing in my absence, despite requesting to so. I therefore have had no idea what has been said or shown to the court or why the Judge placed such draconian requirements on the Police investigation into the threat on my families safety.
- (p) Failure to Provide Documents – the Claimant’s solicitors refused to provide copies of documents referred to in pleadings (whether pursuant to CPR 31.14/31.15 or pursuant to standard disclosure) and they refused to provide copies of correspondence, applications, pleadings or orders that came into existence during the lacuna between my former solicitors acting for me (namely April 2010 to March 2011). This uncooperative approach runs wholly contrary to the spirit and requirements of the Civil Procedure Rules. However, the super-injunctions prevents any such complaint of conduct being made and is enabling abuse of the UK justice process.
- (q) Discourteous Correspondence – the Claimant’s principal solicitor in particular delights in sending inappropriate, aggressive and discourteous correspondence to his opponents and their solicitors. That correspondence rarely, if ever, advances the litigation. His goal seems to be to cause costs to rise inexorably,

unsurprisingly given that the Claimant is the wealthiest woman in the world a significant advantage over her opponents.

- (r) Gambling with the Claimant – the Claimant’s solicitors regularly go gambling with her (notwithstanding that she has presented herself in these proceedings and elsewhere as a devout Muslim). As well as being wholly inappropriate and unprofessional, this also gives rise to a conflict of interest. This also results in them applying improper pressure to employees of the Claimant who are forced to gamble contrary to their religious beliefs.
- (s) Denial of Access to Witnesses – the Claimant’s solicitors have procured the granting of a myriad of injunctions in the UK and elsewhere that mean that I could not speak to any witnesses about this case until 27 May 2011 and, even then, cannot speak to any other enjoined witnesses in other proceedings (such as the man with whom I have evidence she had an affair) until injunctions in those proceedings have likewise been lifted making it impossible for witness evidence to be obtained without being in contempt of court. The network of super-injunctions starts with one order and that is spring boarded to legitimize and justify the need for others thus creating precedent based on credibility that simply did not exist in the first place.
- (t) Taking an Unfair Advantage – the Claimant’s solicitors sought to have a trial take place on 7 March 2011 without any notice being given to me at all. When I asked for proof that I had been told that the trial was due to take place on that date, the Claimant’s solicitors at first ignored correspondence and then lied that I had received such notification when I had not (and the Claimant’s solicitors well knew that I had not). In addition the Claimant’s solicitors have lied about whether or not hearings were in private – claiming they were when even their own note of the hearing says that they were not (as was the case before Tugendhat J on 24 February 2011).
- (u) Blocking Regulatory Complaints – I wished to complain about the Claimant’s solicitors to the Solicitors Regulation Authority in respect of a variety of aspects of their conduct (including those outlined above). Due notice of such an intended complaint was given. The Claimant’s solicitors refused to consent to the super-injunction being varied so as to allow for enjoined information to be provided to their regulator. Such a refusal is wholly unacceptable in the context of the regulation of the provision of professional services.
- (v) Abuse of Process – the Claimant’s solicitors have obtained a web of injunctions and super-injunctions in England & Wales, Singapore and Australia in an effort to prevent the Claimant’s opponents from talking to each other. They well know that if any such conversations took place then those individuals risk being found to be in contempt of court and/or perjury.
- (w) Collateral Purpose – as can be seen by these proceedings, the Claimant’s solicitors’ primary interest seems to be to obtain injunctions and super-injunctions with a view simply to intimidating the Claimant’s opponents (and their lawyers) and then entrapping them so that contempt proceedings can be

brought. The consequences of such contempt proceedings then fall on the public purse.

- (x) Conspiracy – the Claimant’s solicitors have engaged in a conspiracy of a criminal nature that has resulted in the Claimant’s former lover being jailed, the lives of others being ruined and the reputation of the Claimant to be protected when that reputation deserves to be traduced. In particular, the Claimant’s solicitors know as a matter of fact that the Claimant had a sexual relationship with that man and yet they have prepared documents for the court that they know are untrue (including documents signed by the Claimant’s staff). Similarly tape recordings prove that other allegations denied are, in fact, true. As a result, the Claimant should stand accused of perjury and her solicitors for perverting the course of justice should stand in contempt of court. However, they will not because of the protection they receive from the super-injunction.
29. I repeat that I am mentioning these matters to highlight the serious matters that I am prevented from reporting to the Claimant’s solicitors’ regulator (and that cannot be reported in the print and broadcast media) by virtue of a super-injunction granted nearly 2½ years ago where not a single judgment in respect of any of the interim hearings has ever been published.
30. A further problem revolves around my inability likewise to report certain matters to the police. Not only was it the Claimant’s and the court’s view that I was unable to report matters of national security and/or impending or past criminal acts to the police in England & Wales but supposedly I am unable to do so in the Bailiwick of Jersey (which, given that the injunction does not bite, other than in England & Wales, is nonsense). Again, a form of protected privilege ought to apply in this regard too. It cannot be right that someone who is the subject of an injunction cannot bring matters of such a nature to the attention of the police. The police are there to protect us all. They must be able to know matters that ought to be made known to them without barriers of hurdles being deployed by the very people, the claimant and her lawyers, who are the subject of the complaint

## **Conclusion**

31. I have, as the Committee will observe, been very careful indeed in the way that I have described the super-injunction that relates to me. I have been careful not to reveal the identity of the Claimant, nor to go into any undue detail that breaches the spirit of the injunction. In any event, of course, this written submission is protected by parliamentary privilege and I am not bound by the terms of the injunction in Jersey (where I am resident and from where I have prepared and sent this supplementary submission).
32. I am aware that the Lord High Chancellor, Kenneth Clarke, gave evidence to the Committee last week. When the thrust of my situation was put to him, he responded by saying that super-injunctions "are now being granted only for very short periods where secrecy is necessary to enable service of the order". He went on to say that "you cannot have just long-running secret litigation". That, of course, is incorrect as the super-injunction against me has been in place since 9 September 2009 and it remains in place to this day. The litigation brought against me is indeed secret litigation

and has been secret litigation for well over 2 years. None of the interim rulings made by the judges in these proceedings have been published, even in an anonymised or redacted form. The litigation has been going on wholly in secret and with my Article 6 rights being infringed and ignored. But of course, without my ability to give evidence to this enquiry under Parliamentary Privilege, the Select Committee would be none the wiser and indeed the Lord Chancellor could say what ever he liked.

33. In the event that the Committee would welcome any clarification of points raised in this submission, or would welcome oral evidence from me, I remain ready, able and willing to provide such assistance to the Committee on short notice.

23 January 2012

## **Carter-Ruck Solicitors—Written evidence**

### ***How the statutory and common law on privacy and the use of anonymity injunctions and super-injunctions has operated in practice***

#### **I. Have anonymous injunctions and super-injunctions been used too frequently, not enough or in the wrong circumstances?**

There appears to be a perception that privacy injunctions are being granted too frequently and in circumstances that are not justified. This is not our experience. The distinction between an anonymous injunction and a “super-injunction” is important; the latter restrains publication about the existence of the order and the proceedings, the former restrains publication of information identifying at least one of the parties. As Mr Justice Tugendhat observed in *TSE, ELP v News Group Newspapers (36,37)*<sup>38</sup> there is no stereotype which can be used to categorise claimants in privacy actions and many are children.

The report in Spring 2011 of Lord Neuberger’s committee<sup>39</sup> which this year examined privacy injunctions found that since the *John Terry* case, only two super-injunctions have been granted; one was over-turned on appeal and the other was granted for 7 days for tipping-off reasons. The committee stated that “applicants now rarely apply for such orders and it is even rarer for them to be granted on anything other than an anti-tipping-off, short term basis.”

The important question seems to us to be not how many injunctions are granted, but whether injunctions are granted in circumstances which can be justified. The question of whether it is right in a particular case to grant an injunction will be determined with reference to now well-established principles, the particular facts of the case and the evidence provided to the court. Where values are in conflict an “intense focus on the comparative importance of the specific rights being claimed in the individual case is necessary”.<sup>40</sup>

The principles that are applied have been developed since the introduction of the Human Rights Act 1998 [HRA] in October 2000, which enshrined in domestic legislation Articles 8 and 10 of the European Convention on Human Rights, and which, in s.12 HRA, required the courts to have particular regard to the Convention right to freedom of expression. As the Lord Chief Justice Lord Judge observed in commenting on Lord Neuberger’s Report, contrary to some commentary, unelected judges in this country did not create privacy rights; they were created by Parliament. The committee may find helpful the Report of the Equality and Human Rights Commission<sup>41</sup> which contains a chapter on “why privacy matters”.

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<sup>38</sup> [2011] EWHC 1308 (QB)

<sup>39</sup> Report of the Committee on Super-injunctions: Super-injunctions, Anonymised injunctions and Open Justice

<sup>40</sup> Lord Steyn in *Re S (a child)* [HL] [2004] UKHL 47 (17)

<sup>41</sup> “Protecting Information Privacy” by Charles Raab and Benjamin Goold [Summer 2011]



The committee will be aware of the legal principles which have developed in the common law which stem from the House of Lords' decision in *Campbell v MGN Ltd*<sup>42</sup>. We consider that these principles are sound and that they are being correctly applied having regard to the facts of each particular case. However, as we explain below, there are problems with the current regime as even in cases where a court has determined there is a need for an injunction, the details protected by an injunction are frequently leaked and published, if not in mainstream media, then on the internet.

**2. Are the courts making appropriate use of time limitations to injunctions and of injunctions contra mundum (i.e. injunctions which are binding on the whole world) and how are such injunctions working in practice?**

Interim injunctions will be granted to maintain the status quo pending trial or shorter return date. Applicants who obtain injunctions must undertake to issue proceedings and pursue those proceedings vigorously to trial or until settlement. Under the *Spycatcher* principle<sup>43</sup> an interim injunction against one defendant is binding on everyone. This means it is important that privacy cases are dealt with swiftly. As the law currently stands the *Spycatcher* principle does not apply to final injunctions and if a final injunction is granted at trial it is only binding upon the defendant<sup>44</sup>. Non-parties will nevertheless be served with the injunction but difficulties will arise if non-parties then publish the information as the only remedy for the claimant is to issue separate proceedings, giving rise to further cost. Injunctions *contra mundum* are extremely rare. The court has the flexibility and in practice will often limit the time period for which a final injunction may remain in place.

**3. What can be done about the cost of obtaining a privacy injunction? Whilst individuals the subject of widespread and persistent media coverage often have the financial means to pursue injunctions, could a cheaper mechanism be created allowing those without similar financial resources access to the same legal protection?**

The cost of obtaining a privacy injunction is too high and is an effective bar to access to justice for the vast majority of people, particularly bearing in mind the requirement that the successful applicant must give a cross-undertaking in damages to the defendant to compensate the defendant for loss arising from the restraint of publication if the injunction is found at trial to have been wrongly granted. An applicant who applies successfully for an interim injunction will not be awarded costs to be paid immediately; costs are generally reserved.

The cost of resolving a privacy dispute is determined in large part by the stance taken by the defendant. The overwhelming majority of cases involving the mainstream media in which we are consulted could be resolved by one telephone call and an email; many cases are resolved in that way, with minimum expense to either party. However, there are still too many instances in which applicants are forced to incur the costs of making an application, only for a media defendant to offer an undertaking not to publish or agree to an injunction at the eleventh hour.

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<sup>42</sup> *Campbell v MGN Ltd* [2004] UKHL 22

<sup>43</sup> *AG-v-Newspaper Publishing plc* (1988) 1 Ch 333

<sup>44</sup> *Jockey Club-v-Buffham* [2003] EMLR 111

The number of instances in which there is a genuine argument about either the private nature of the material it is proposed be published or about whether there is a genuine public interest in publication is relatively rare. However, media defendants are well aware that it is very costly to obtain an injunction and some will, quite simply, see if a threat of an injunction is serious before offering an undertaking or consenting to an injunction, by which time an applicant has incurred significant costs.

In the case of those applications which do come before the court, we consider that robust case management from Judges could cut down the costs, by limiting the number of hearings and, where possible, by dealing with arguments on paper.

- 4. Are injunctions and appeals regarding injunctions being dealt with by the courts sufficiently quickly to minimise either (where the injunction is granted or upheld) prolonged unjustifiable distress for the individual or (where an injunction is overturned or not granted) the risk of news losing its current topical value?**

Not always; the answer (see above) seems to us to be robust case management. We also consider that the trial of actions in which publication has been restrained on an interim basis ought to be dealt with expeditiously.

- 5. Should steps be taken to penalise newspapers which refuse to give an undertaking not to publish private information but also make no attempt to defend an application for an injunction in respect of that information, thereby wasting the court's time?**

Yes; see above.

***How best to strike the balance between privacy and freedom of expression, in particular how best to determine whether there is a public interest in material concerning people's private and family life***

- 6. Have there been and are there currently any problems with the balance struck in law between freedom of expression and the right to privacy?**

We consider that the legal principles strike the correct balance and we do not consider that there is a problem with the way in which those principles are applied by the courts which have the opportunity to scrutinise the facts and the evidence. It is important to bear in mind in this context that the courts do not adopt an “all or nothing” approach, that is to say, some information may well be deemed to be in the public interest, for example the fact of an extra-marital affair, whilst the publication of other aspects of the same story; the detail of sexual encounters or photographs, are considered to be an unjustified intrusion. See, for example *Theakston v MGN Limited* [2002] EMLR 398 and *Goodwin v Newsgroup Newspapers Ltd (no 3)*<sup>45</sup>.

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<sup>45</sup> [2011] EWHC 1437 QB

**7. Who should decide where the balance between freedom of expression and the right to privacy lies?**

It is now well-established law that Article 10 rights and Article 8 rights are equal and vitally important rights.<sup>46</sup> Where the correct balance lies in each case will depend on the facts of the case, so the person who should assess where the balance should lie must have access to, and an opportunity to scrutinise the facts and the evidence. Judges are, in our view, best placed to do this.

**8. Should Parliament enact a statutory privacy law?**

We consider that because the determination of the correct balance between Article 8 and Article 10 rights is necessarily fact-sensitive, it is important that the law is flexible. We believe the best way to achieve flexibility is to continue to allow development of the common law. We do not consider that enactment of a statute would bring certainty because any statute would inevitably be open to interpretation and the outcome of each case would still be fact-sensitive.

**9. Should Parliament prescribe the definition of ‘public interest’ in statute, or should it be left to the courts?**

No. The Draft Defamation Bill does not attempt to define “public interest” and the notes to that Bill state that this is because an attempt to define it would not be straightforward. We agree with that analysis.

**10. Is the current definition of ‘public interest’ inadequate or unclear?**

The instances in which publication is in the public interest are necessarily non-exhaustive and so there can be no definitive definition of “public interest”. We consider, however, that the law as it stands is sufficiently clear and is likely to become clearer over time. In addition, the common law has the benefit of being able to evolve in tandem with society. See, for instance, Mr Justice Nicol in the very recent ruling in *Ferdinand v MGN Ltd* ([2011] EWHC, paragraph 62).

**11. Should the commercial viability of the press be a public interest consideration to be balanced against an individual’s right to privacy?**

No. The requirement that a successful applicant for an injunction should provide a cross-undertaking to the defendant to compensate it for losses incurred in the event that at trial an interim injunction is found to have been wrongly granted gives adequate protection to the press. The requirement to provide a cross-undertaking acts as a real deterrent to claimants against bringing frivolous or speculative claims.

**12. Should it be the case that individuals waive some or all of their right to privacy when they become a celebrity? A politician? A sportsperson? Should it depend on the degree to which that individual uses their image or private life for popularity? For money? To get elected? Does the image the individual relies on have to relate to the information published in**

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<sup>46</sup> see for example *re S (a Child)* [2005] 1 AC 593 per Lord Steyn

**order for there to be a public interest in publishing it (a ‘hypocrisy’ argument)? If so, how directly?**

It is well-established law that public figures, whether celebrities, politicians or others are entitled to a private life.<sup>47</sup> In our view it is very important that this is maintained as it is mostly such individuals that suffer at the hands of the prying press. They must be able to protect themselves and their families. The degree of privacy, however, which may be afforded in each case will vary depending on the status and role of the public figure and the nature of the information at issue.

**13. Should any or all individuals in the public eye be considered to be ‘role models’ such that their private lives may be subject to enhanced public scrutiny regardless of whether or not they make public their views on morality or personal conduct (i.e. in the absence of a ‘hypocrisy’ argument)?**

All “role models” should be entitled to respect for their and their family’s privacy. Whether information about them is private and/or invasion of their privacy is justified should depend on the individual circumstances of a case. In our view, the current approach of the law is the correct one, treating Article 8 and 10 rights as equal.

**14. Are the courts giving appropriate weight to the value of freedom of expression in ‘celebrity gossip’ and ‘tittle-tattle’?**

In our view, yes. The courts will not prevent publication of trivial information. However, if the “celebrity gossip” amounts to private information the courts give due weight to the value of Article 10 rights in assessing whether it is in the public interest that the information be published.

**15. In the context of sexual conduct, should it be the case that a person’s conduct in private must constitute a significant breach of the criminal law before it may be disclosed and criticised in the press?**

We agree with the analysis of Eady J in *Mosley v Newsgroup Newspapers*<sup>48</sup>, in which he ruled that anyone indulging in sexual activities is entitled to a degree of privacy especially if it is on private property and between consenting adults and so there must be serious reasons before interferences can be justified. Eady J observed that illegal behaviour does not automatically undermine a persons Article 8 rights, as illustrated by the *Naomi Campbell* case in which it was recognised that drug dependency (which concerned questions of health) was a matter which ordinarily a person might expect to keep private.

**16. Could different remedies (other than damages) play a role in encouraging an appropriate balance?**

It is our experience that injunctive relief is the only adequate remedy for a threatened infringement of privacy, and that once the information is published irreparable harm is done.

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<sup>47</sup> *Campbell-v-MGN Ltd* [2004] UKHL 22

<sup>48</sup> [2008] EMLR 20

**17. Are damages a sufficient remedy for a breach of privacy? Would punitive financial penalties be an effective remedy? Would they adequately deter disproportionate breaches of privacy?**

It was acknowledged by the Court of Appeal in *Douglas v Hello (no.8)*<sup>49</sup> that damage, “cannot fairly be regarded as an adequate remedy”. No amount of damages can adequately replace the remedy of injunctive relief. The current low level of damages awarded in breach of privacy claims is inadequate to compensate a claimant where information has already been published. The low damages are also inadequate as a deterrent to the press. It is our view that the level of damages ought to be sufficiently high to act as a deterrent to the publication of material that infringes privacy rights. Newspapers weigh up the relative commercial advantages and disadvantages to publication. As Sedley LJ put it in *Douglas v Hello* [2001] 2 All ER 289 at para 142, “There is no reason in law why the cost to the wrongdoer should not be heavy enough to demonstrate that such activity is not worthwhile”.

We believe that the court should be empowered to award exemplary damages in privacy cases for flagrant breaches of an individual’s privacy.

**18. Should we introduce a prior notification requirement, requiring newspapers and other print media to notify an individual before information is published, thereby giving the individual time to seek an injunction if a court agrees the publication is more likely than not to be found a breach of privacy? If so, how would such a requirement function in terms of written content online eg blogs and other media?**

We are mindful of the conclusions of the ECHR in the case of *Mosley v UK*.<sup>50</sup> However, there is a current imbalance, since a claimant applicant is required to notify the press of an intention to apply for an injunction. We consider that, save in circumstances where the public interest justifies it, there should be a presumption in favour of giving prior notification and an unjustified failure to give prior notification should lead to sanction in the form of increased damages if the newspaper is found to have committed a breach of privacy rights. We agree with the recommendations of the CMS Select Committee.<sup>51</sup>

Applying the *Reynolds* public interest defence in libel claims, a factor that is taken into account in assessing whether or not a journalist has behaved responsibly is whether or not the journalist has made contact with the relevant subject of the article to seek their response to allegations prior to publication.

**19. Should aggravated damages be payable if a media publisher does not give prior notification to the subject of a publication which a court finds is in breach of that individual’s privacy?**

Yes; see above. An additional reason why aggravated damages should be payable if a media publisher does not give prior notification to the subject of a publication is that, in practice, this is the only effective sanction the courts can apply. In theory, a claimant should be able to seek an account of profits as the court noted in *Douglas v Hello (no.8)* [2005] EWCA Civ

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<sup>49</sup> [2005] 3 WLR 881 (paragraph 256)

<sup>50</sup> 48009/08 [2011] ECHR 774 (10 May 2011)

<sup>51</sup> Culture Media and Sport Select Committee on Press Standards, Privacy and Libel 24 February 2010 at (93)

595, 'If, however, *Hello* had made a profit on the publication, we would have had no hesitation in accepting that the *Douglases* would have been entitled to seek an account of that profit. Such an approach may also serve to discourage any wrongful publication, at least where it is motivated by money' (para 249). In reality, however, it is almost impossible to delineate how the unlawful breach of privacy may have impacted on the sales and profits of a particular publication. For that reason, aggravated damages would be the more equitable sanction.

**20. Is section 12 of the Human Rights Act 1998 appropriately balanced? Should the media's freedom of expression be protected in stronger terms? Or is there a disproportionate emphasis on the media's freedom of expression over the right to privacy? Has Section 12 of the Human Rights Act 1998 ensured a more favourable press environment than would be the case if Strasbourg jurisprudence and UK injunctions jurisprudence were applied in the absence of Section 12?**

In our view section 12 is appropriately balanced and it is being correctly applied.<sup>52</sup> We should add that, in our experience, the Court's application of section 12 is always an exercise of the utmost scrutiny and consideration and is never glib as sometimes suggested by the media.

**21. Is the test in section 12 for an injunction to be granted too high a threshold? Should that test depend on the type of information about to be published? Has the court struck the right balance in applying section 12?**

See above. Whilst the courts acknowledge, 'There are undoubtedly different types of speech, just as there different types of private information, some of which are more deserving of protection in a democratic society than others' as Baroness Hale noted in *Campbell v MGN Limited* [2004] UKHL 22 at para 148, the most appropriate basis on which to assess the threshold, in light of the type of information, is within the confines of the court process with all the evidence available.

**22. Is there an anomaly requiring legislative attention between the tests for an injunction for breach of privacy and in defamation?**

In our view there is an anomaly. There is an overlap between the law of privacy and defamation as both concern Article 8 and Article 10 rights and the Court of Appeal in *McKennitt v Ash*<sup>53</sup>, held that information does not have to be true to be private (thus giving rise to the possibility of "false privacy" claims). The rule in *Bonnard v Perryman*<sup>54</sup> which prevents an applicant from obtaining injunctive relief in circumstances where a defendant indicates its intention to justify a defamatory allegation does not apply to privacy cases, where the truth or falsity of the facts are not determinative to the question of whether the information is private or whether publication is in the public interest. In our view this test should be brought into line with the current approach to privacy. As Article 8 and Article 10 are equal rights, logically the approach to curtailing either of those rights should be the same.

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<sup>52</sup> see *Cream Holdings Ltd-v-Banerjee & Anor* HL [2004] 3 WLR 918

<sup>53</sup> [2008] QB 73

<sup>54</sup> [1891] 2 Ch 269

***Issues relating to the enforcement of anonymity injunctions and super-injunctions, including the internet, cross-border jurisdiction within the United Kingdom, parliamentary privilege and the rule of law***

- 23. How can privacy injunctions be enforced in this age of ‘new media’? Is it practical and/or desirable to prosecute ‘tweeters’ or bloggers? If so, for what kind of behaviour and how many people – where should or could those lines be drawn?**

It is undoubtedly difficult, if not impossible, to enforce an injunction against individual tweeters or bloggers outside the jurisdiction. It is also undoubtedly the case that very significant harm can be caused to a person’s reputation by the publication of private (or indeed defamatory) information on the internet. It seems to us that more could be done on an international level to create a framework for reciprocal action to ensure the preservation of Article 8 rights, as the internet provides a forum for Article 10 rights to be exercised unfettered. Orders for an injunction can be registered and enforced in some jurisdictions but not others and the system would benefit from certainty and simplicity. We consider that there is scope for discussion on an international level, in consultation with search engines such as Google and ISPs about putting uniformly accepted “take-down” procedures in place, which would provide private individuals a swift and cheap remedy in cases of abuse.

- 24. Is it possible, practical and/or desirable for print media to be restrained by the law when other forms of ‘new media’ will cover material subject to an injunction anyway? Does the status quo of seeking to restrict press intrusion into individual’s private lives whilst the ‘new media’ users remain unchallenged represent a good compromise?**

It may be difficult under the current regime to obtain an effective remedy against individual bloggers, but injunctive relief preventing publication will apply not just to “print media” but the online versions of newspapers and the injunction will limit very significantly the exposure of the information. In other words, we consider that restraint is of practical benefit notwithstanding the difficulties. Often the issue is one of visibility of private information. Having private information published in a national newspaper may cause a very high level of distress and damage. Having the same information published online on one or more websites which lack credibility and/or profile may not have the same effect. In cases of deliberate breach of an injunction by an identifiable person or entity within the jurisdiction, the Attorney General has powers to intervene and in our view robust action needs to be taken in cases of flagrant abuse.

- 25. Is enough being done to tackle ‘jigsaw’ identification by the press and ‘new media’ users? For example see Mr Justice King’s provisional view in *NEJ v. Wood* [2011] EWHC 1972 (QB) at [20] that information published in the Daily Mail breached the order of Mr Justice Blake, and the consideration by Mr Justice Tugendhat in *TSE and ELP v. News Group Newspapers* [2011] EWHC 1308 (QB) at [33]-[34] as to whether details about TSE published by The Sun breached the order of Mrs Justice Sharp.**

In our view more needs to be done to tackle this problem. In *NEJ v Wood*, Mr Justice King [21] stated “*If it were the case that a publication in breach or apparent breach of an existing court order would of necessity compel a court...to the conclusion that because the dam has been*

*breached there is nothing the court can do to repair the breach, this would be a sad day for the rule of law*". It is our experience that details are routinely published in breach of court orders and, even where anonymity is granted or details redacted so as to try to prevent the injunction being undermined, the detail published by the press frequently enables "jigsaw" identification to occur. However, it seems to us that the only way in practice to solve the problem of "jigsaw" identification is to take tough action against those who deliberately set about undermining the effect of an injunction.

**26. Are there any concerns regarding enforcement of privacy injunctions across jurisdictional borders within the UK? If so, how should those concerns be dealt with?**

We consider that it is undesirable for a UK resident to have to make separate applications in separate jurisdictions within the UK. We consider that the separate jurisdictions within the UK would benefit from putting in place efficient reciprocal arrangements, pursuant to which an injunction obtained in one jurisdiction could be registered and enforced in another jurisdiction.

**Parliamentary Privilege**

***With regard to the enforcement of privacy injunctions and the breaching of them during Parliamentary proceedings, is there a case for reforming the Parliamentary Papers Act 1840 and other aspects of Parliamentary privilege? Should this be addressed by a specific Parliamentary Privilege Bill or is it desirable for this Committee to consider privilege to the extent it is relevant to injunctions?***

**27. Should Parliament consider enforcing 'proper' use of Parliamentary Privilege through penalties for 'abuse'?**

The question of how to strike the balance between the constitutional role of parliament and the constitutional role of the courts was considered in detail by Lord Neuberger's Committee. The Committee observed that the *sub judice* rules support the rule of law through ensuring Parliament does not undermine the efficacy of court judgments. We agree with that Committee that it is of particular concern to all that the *sub judice* rules are neither inadvertently nor deliberately subverted, particularly having regard to the rights of the press, acting without malice, to report parliamentary proceedings by virtue of the Parliamentary Papers Act 1840<sup>55</sup>. We consider that it is for Parliament to determine the appropriate process to be followed, but we respectfully agree with the conclusions of Lord Neuberger's Committee.

**28. What is 'proper' use and what is 'abuse' of Parliamentary Privilege?**

See above.

**29. Is it desirable to address the situation whereby a Member of either house breaches an injunction using Parliamentary Privilege using privacy law, or**

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<sup>55</sup> Report of the Committee on Super-injunctions para 5.4



**is that a situation best left entirely to Parliament to deal with? Indeed, is it possible to address the situation through privacy law or is that constitutionally impermissible? Could the current position in this respect be changed in any significant way? If so, how?**

See above. The matter is best left to Parliament to deal with.

***Issues relating to media regulation in this context, including the role of the Press Complaints Commission and the Office of Communications (OFCOM)***

**PCC**

**30. Do the guidelines in section 3 of the Editors' Code of Practice correctly address the balance between the individual's right to privacy and press freedom of expression?**

It is notable that the PCC Code does not say that intrusions into privacy can only be justified if publication is in the public interest and that editors are not reminded that what is interesting to the public is not necessarily in the public interest.

**31. How effective has the PCC been in dealing with bad behaviour from the press in relation to injunctions and breaches of privacy?**

With the possible exception of its handling of the harassment by the press in "door-stepping" public figures, we do not consider that the PCC is effective because it has very limited sanctions at its disposal.

**32. Does the PCC have sufficient powers to provide remedies for breaches of the Editors' Code of Practice in relation to privacy complaints?**

No.

**33. Should the PCC be able to initiate its own investigations on behalf of someone whose privacy may have been infringed by something published in a newspaper or magazine in the UK?**

An independent regulator should have the power to initiate its own investigations.

**34. Should the PCC have the power to consider the balance between an individual's privacy and freedom of expression prior to the publication of material – or should this power remain with the Courts?**

It should remain with the court.

**35. Is there sufficient awareness in the general public of the powers and responsibilities of the PCC in the context of privacy and injunctions?**

We are not in a position to judge this.

## **OFCOM**

- 36. Do the guidelines in Section 8 of the Ofcom Broadcasting Code correctly address the balance between the individual’s right to privacy and freedom of expression?**

Like the PCC Code, save in the case of surreptitious filming, the circumstances in which privacy intrusion may be “warranted” is not defined in the Ofcom Code and “warranted” intrusion is not limited to situations where publication is in the public interest.

- 37. How effective has Ofcom been in dealing with breaches of the Ofcom Broadcasting Code in relation to breaches of privacy?**

We have insufficient knowledge of this to be able to comment.

- 38. Is there a case that the rules on infringement of privacy should be applied equally across all media content?**

Yes. The distinction between “print” and “broadcast” media is increasingly blurred; online versions of national newspapers contain video footage. We consider that the regulatory function currently vested with the PCC should be vested with Ofcom, and that there should be a review of the sanctions and remedies that can be given pursuant to the Ofcom Code.

6 October 2011

Carter Ruck Solicitors, Schillings, and Hugh Tomlinson QC—Oral evidence (QQ 65–118)

**Carter Ruck Solicitors, Schillings, and Hugh Tomlinson QC—Oral evidence (QQ 65–118)**

[Transcript to be found under Hugh Tomlinson QC](#)

## **Carter-Ruck Solicitors—Supplementary Written evidence**

During the evidence given on Monday 24 October, there were various questions asked, including to me, about access to justice in privacy cases. I stated that there is no practical access to justice in relation to privacy injunctions for most people. I said, however, that there was access to justice for privacy cases generally due to the Conditional Fee Agreement system. The best example of this are the numerous telephone hacking cases being brought against News Group Newspapers, which are being brought as complaints of breach of privacy. I understand that in many of these, including some being conducted by my firm, the lawyers are acting under CFAs with After The Event insurance in place in relation to the costs risk of losing.

There appears to be misconception that privacy cases are brought only by the famous and the powerful who are presumed to be able to afford legal representation. This is simply not the case. By way of example, my firm has acted under a CFA for the following:

- A junior PR worker whose privacy was grossly infringed when the Evening Standard published a photograph of and named her, wrongly stating that she had been raped.
- A police officer who was identifiable from a local newspaper trial report as being the victim, when a child, of a sexual assault.
- A farm estate worker falsely accused in an anonymous poison pen letter of having an affair with husband of local MP, reported in national newspaper.
- An unemployed man who was the subject of false statements on ITV concerning a medical condition.

While during my evidence I mentioned in passing that the CFA system was under review and likely to be changed in the near future, I do not believe that I made it clear that if this happens as currently proposed by the Government, access to justice in this area is likely to be significantly curtailed. This is because the success fees and insurance premiums will no longer be recoverable from the losing party and there are no proposals to introduce Qualified One Way Cost Shifting in any type of civil litigation apart from personal injury cases.

In addition, the damages currently awarded for breach of privacy are very low, thus making recovery of success fees out of damages (as proposed by the Government in its Bill) of little practical value to compensate lawyers for the risks of taking on such cases under CFAs.

1 November 2011

## **Carter-Ruck Solicitors—Further Supplementary Written evidence**

### **Joint Committee on Privacy and Injunctions (the "Committee") Written evidence submitted by Guardian News and Media Limited**

We refer to the written evidence submitted to the Committee by Guardian News and Media Limited ("GNM") in October 2011.

GNM's submission refers to the case of *OPQ v BJM & CJM* and the "contra mundum" order granted by Mr Justice Eady in April 2011. The submission states that "[t]here were no media defendants or interveners in this matter, and none had been invited to attend" and that "GNM believes that contra mundum orders which clearly engage Article 10 rights should not be made without the media being given proper notice and the opportunity to oppose".

We acted for the Claimant in the case of *OPQ v BJM & CJM* and believe that we should draw the following matters to the Committee's attention in order to correct GNM's submission.

First, we served the Claimant's application seeking the "contra mundum" order on several media organisations, including GNM, a number of days in advance of the hearing before Mr Justice Eady (indeed, Gill Phillips, Director of Editorial Legal Services at GNM, acknowledged receipt).

Secondly, Reynolds Porter Chamberlain LLP (RPC) and Andrew Caldecott QC were then instructed on behalf of four newspaper groups, including GNM, in respect of the application. We served the evidence in support of the application on RPC several days in advance of the hearing. We were subsequently informed by RPC that "now that we have seen your evidence, [RPC's] clients are not going to be involved in your application".

Thirdly, we refer to paragraph 24 of Mr Justice Eady's judgment of 20 April 2011:

"It is clear that publicity relating to the subject-matter of the present dispute could have very serious consequences. It may well be that this is one of the main reasons why opposition was withdrawn by various newspaper groups shortly before Mr Price made his application before me. The Claimant's advisers had been notified that leading counsel was to be instructed on their behalf to resist the order, but once the evidence was disclosed to them the matter was not pursued. I have no idea, therefore, what the grounds of opposition might have been. The only representations I have are in the form of a letter from MGN Ltd querying the jurisdiction (a concern I have endeavoured to answer) and urging that the order should contain a public domain proviso. In those circumstances, I have to carry out the balancing exercise as best I can on the information before me."

Please do not hesitate to contact us should you have any queries or require any further information.

22 November 2011

## **Professor Brian Cathcart—Written evidence**

The views expressed here are personal.

### Summary

1. There is no conflict between commitment to freedom of expression and the desire to protect privacy, nor is the latter the same as advocating censorship. Balancing freedom of expression and the right to privacy is essential in a healthy democracy, and this is what the Human Rights Act explicitly requires.
2. The aggressive campaign waged by the British mass-circulation press against the privacy law, though expressed in the language of free expression, is underpinned by a financial interest in intrusion which papers rarely declare to their readers.
3. The arguments frequently advanced against the privacy law are, on examination, largely self-serving and ill-founded, so this is a moment when Parliament should stand up against the power of the press in the interests of the rights of citizens.
4. If we want a new statute whose aims are to make the law more obviously British and to reduce the role of judges, it is difficult to see how that can be achieved without compromising the right to privacy itself.
5. By contrast, better regulation of the press accompanied by a general improvement in ethical awareness and rigour among journalists has the potential to reduce the number of contentious cases reaching the courts while at the same time giving support to good journalism carried out in the public interest.

### Privacy and freedom of expression

1. The debate about privacy is sometimes presented as one that pits believers in free expression against those who seek censorship and state control of the media. This is a caricature.
2. I have been a journalist for more than thirty years and I believe passionately in freedom of expression. I see it as essential for the functioning of democracy and for the protection of all the liberties described in the Human Rights Act -- for example the right to fair trial, the right to participate in elections and the right not to be discriminated against. In my journalism I have come across many stories which showed those rights being denied and I have seen it as my role, with others, to draw attention to those cases.
3. Early in my career I recall reporting on campaigns in support of dissidents in the Soviet Union and against the abuses of dictators in Africa and elsewhere. Later I wrote for a variety of publications about the Stephen Lawrence case, about the wrongful conviction of Barry George, about the denial of justice to families of those who died at Deepcut army base, and most recently about the criminal hacking of voicemails by employees of a multinational corporation -- and the subsequent cover-up. I am in no doubt about the priceless character of freedom of expression through newspapers, magazines and online and its absolute necessity as a means of exposing wrongdoing.

4. I am a teacher these days as well as a journalist and I try my best to communicate these values to tomorrow's journalists. If there is a threat to freedom of expression I want to resist it both on my own behalf and on theirs; I like to think that I will be in the first rush to the barricades.

5. There is no conflict between this commitment to freedom of expression and my desire to see that privacy is protected in the United Kingdom and that there are sufficient restraints on press intrusion. It is obvious that freedom of expression is not and can never be absolute. The most famous illustration of this point is that we do not have the right to shout "Fire!" in a crowded theatre when there is no fire. By the same token it is generally agreed that we need laws or regulation in relation to libel, contempt of court, incitement to violence and more banal matters such as dishonest advertising. Freedom of expression, therefore, while it is vital to democracy, must also be restrained in some respects. Accepting that principle does not automatically imply accepting or advocating state control of the media.

#### The press and freedom of expression

6. Tempting and familiar though the idea may be, the modern British press and freedom of expression are not two sides of the same coin. It is obvious that even at its best, the press could not reflect all the views of society, nor could it address the full range of society's interests. There is just too much to cover. But if the press aims to be a true medium of freedom of expression it should make the effort. C.P. Scott wrote in 1921:

*A newspaper is of necessity something of a monopoly, and its first duty is to shun the temptations of monopoly. Its primary office is the gathering of news. At the peril of its soul it must see that the supply is not tainted. Neither in what it gives, nor in what it does not give, nor in the mode of presentation must the unclouded face of truth suffer wrong. Comment is free, but facts are sacred. "Propaganda", so called, by this means is hateful. The voice of opponents no less than that of friends has a right to be heard. Comment also is justly subject to a self-imposed restraint. It is well to be frank; it is even better to be fair. This is an ideal. Achievement in such matters is hardly given to man. We can but try, ask pardon for shortcomings, and there leave the matter.*  
<http://www.guardian.co.uk/commentisfree/2002/nov/29/1>

7. Scott was writing of the need for plurality and openness within one newspaper. Not only do most of our national newspapers not even try to achieve this on their own accounts, but, far worse, there is also a general absence of plurality and openness across most of the papers as a group. A substantial majority of titles representing an overwhelming majority of daily sales present their readers with a remarkably similar world view which draws on a similar and limited pool of information.

8. This is not a party political point: the consistency lies in general values and attitudes shared by all mass-circulation papers. Crudely put, people claiming benefits are frequently spongers, politicians are generally corrupt, members of ethnic minorities are suspect or worse, the courts are too soft, the European Union is a plot against Britain, protesters and strikers are irresponsible and so on. Whatever our views on these matters, we have to accept that these are not the only perspectives available. Why this set of attitudes has become so uniformly established across so many papers is a subject for another day; the point is that it has, and that contrary views struggle to make themselves heard.

9. One vivid example of what Scott might have called monopolistic reporting across most of the press is the coverage of the phone hacking scandal. Three national daily newspapers -- the three with the smallest circulations -- reported the unfolding of this scandal from mid-2009 to mid-2011. The remaining papers, commanding the overwhelming majority of daily sales, barely mentioned it, and when they did so it was often in oblique or partisan terms. In short, they withheld an important story from their readers in a manner that is hard to square with the principle of freedom of expression through the national press.

10. A second example, pertinent to this committee, is the reporting of the so-called superinjunction scandal this spring. Again, whatever our views on the subject, it is surely beyond dispute that for more than two weeks a single, partisan and emotionally-charged version of events dominated the mass-circulation press. That version was presented almost without qualification, and voices raised in opposition were either ignored or howled down. This too is hard to reconcile with the idea that our national press embodies freedom of expression. As Scott might put it, in what it gives and in what it does not give, in terms of news and views, it is monopolistic.

11. The partisans of the mass-circulation press speak of giving people what they want, and they may do so, but this has little relation to freedom of expression. That freedom has no meaning if it is not a freedom for the expression of inconvenient or unattractive ideas, of unwelcome and contentious information. The mass-circulation press patently does not devote itself to upholding freedom of expression on those terms; on the contrary, it often withholds even relatively mainstream information and ideas from its readers.

#### The press and privacy

12. Whatever shortcomings the press may have, it is imperative that the constraints placed upon its journalism should be kept to a minimum. However monolithic and one-sided the national press may become, there can be no question of imposing upon newspapers or their editors obligations to print some things or not to print others, or of making them beholden to any licensing or censorship authority.

13. Equally, however, there are inevitable restraints on journalists, as there are on all citizens, including in the field of privacy. The right to privacy is established in Article 8 of the European Convention on Human Rights (as it is recognized in Article 12 of the Universal Declaration of Human Rights). There can be very few people who would dispute that right in principle and so, whatever the future holds, it will always be necessary to find a balance between that right and the right to free expression.

14. In balancing these rights, as the courts have recognized, the public interest is the key. At its simplest, breaches of privacy may be justified if they are knowingly done with a view to advancing the public interest -- where the public interest is, very roughly, what makes society better or prevents it becoming worse.

15. This has very little to do with the interest of the public, nor does the public have a general "right to know" about the private lives of individuals. The presumption must be that what people do in private places is their business alone, providing it is within the law. It follows that "fishing expeditions" -- intrusions made without strong prior evidence of wrongdoing -- cannot be permitted; otherwise the press (or anyone else) would have a licence to pry.



16. The committee will know that these principles are already well established in the case law arising from the Human Rights Act.

Should Parliament enact a new privacy law?

17. As we have seen, the mass-circulation press has campaigned with one voice against the present legal arrangements on privacy. This cannot be described as a disinterested campaign, because whatever else they are doing they are striving to protect practices of privacy intrusion which have historically helped them to sell papers. The loftier opinions of proprietors, editors and columnists may be sincerely held, but these organisations, when they address their readers on privacy, have a financial interest which they very rarely declare.

18. The question about a new law thus arises, so far as there is evidence to judge, not in the first instance because of a deep-seated or widely felt public unease about the operation of the existing law, but because of a campaign by a group with a strong vested interest and unique powers to exert pressure. Those powers have been used in the most aggressive fashion. Where privacy is concerned, judges are always bigoted; politicians are always corrupt; the famous are always unsavoury hypocrites and the rich are always sinister and all-powerful. Details from the available information are cherry-picked to support these views and contrary information is ignored.

19. This crude polarisation of the argument -- newspapers plus public versus corrupt establishment -- may well be the opposite of the truth. By attacking the law, the courts, the judges and, at least indirectly, Parliament itself, newspapers could be said to be jeopardising the rights of ordinary citizens in pursuit of a cause in which they have a strong but rarely acknowledged financial interest.

What arguments are put forward against the present law?

20. *It shields the lifestyles of the powerful and rich from public scrutiny.* The law, as written, protects all citizens and makes no distinction between rich and poor, famous and obscure. It is the newspapers which make that distinction. With some often tragic exceptions, they have no interest in the private lives of the poor and obscure, but they wish to know everything possible about the rich, famous and powerful.

21. This divisiveness is assisted, it must be said, by our glaringly unequal arrangements for access to justice, which leave even the moderately wealthy with little chance of redress not only in privacy matters but across the law. The erosion of legal aid and of Conditional Fee Arrangements will tend to make this worse, but the papers which complain that there is “one law for the rich” in privacy cases have never chosen to make a general cause of “one law for all” -- indeed they tend to oppose the whole idea of CFAs.

22. *It is European and not British-made, so reflecting alien traditions.* The profoundly British character of the European Convention on Human Rights is well known, even if it is rarely mentioned in the press. No country contributed more to the creation and drafting of the Convention, which was in considerable measure an attempt to export British values to a continent whose moral systems had been wrecked by Nazism. One might expect this to be

a matter of pride. More recently, the bill that became the Human Rights Act was put before Parliament in 1998 by a freshly-elected government with an overwhelming mandate which was fulfilling a manifesto promise to voters. The bill was passed into law by both Houses of Parliament and received royal assent in the usual, British fashion.

23. Moreover, the Act's principal effect is that it ensures that British courts and judges can deal with issues of human rights that arise in Britain, where previously complainants had to go to Strasbourg for justice. The corollary of this is that, unless we scrap the HRA and also resile from the European Convention on Human Rights (something not even dubious East European regimes have done), any new law would have to be interpreted by our courts to be compatible with it.

24. *It is vague and so is left to judges to interpret, which is undemocratic.* The privacy law that flows from the ECHR is "judge-made" only in the sense that all laws which require any interpretation by the courts are judge-made. It is not possible to draft laws that are above argument and satisfy all citizens in all circumstances. Hard cases inevitably come before judges, who must interpret the law. It is true that the Human Rights Act is a relatively new law and so the British case law is relatively thin (though it is accumulating rapidly).

25. *It permits arbitrary use of injunctions to gag press reporting.* The committee will hear a great deal of evidence about injunctions. I would urge anyone who suspects that these are granted lightly to read the judgements that appear on the website [www.bailli.org](http://www.bailli.org). It is a complex field and one that is far older than the Human Rights Act. Judges appear to operate conscientiously in accordance with sensible guidelines. No doubt we could all find decisions we disagree with but it is a travesty to suggest that this is nothing more than an arbitrary tool of press censorship.

26. In short, there are no good grounds here for a privacy statute. Nor in my view is that what the mass-circulation press wants. Instead I believe it would prefer there to be no privacy law, so that it could be free to intrude in the private life of anyone it chooses.

27. A further argument is advanced that there would be virtue in a statute which was specific to privacy and which independently expressed the modern will of the public, thus putting an end to the current arguments. Personally, I see this as a counsel of despair.

28. The present arrangements reflect the legitimate will of the electorate and of Parliament at least as much as any other Act. Any pressure for change, I have argued, comes largely from a special interest group which wields unusual power. In my view this is a moment to resist that power and to defend Parliament's authority. It may be similar to that moment in 1931 when Stanley Baldwin issued his famous warning that the proprietors of the Daily Mail and the Daily Express were seeking "power without responsibility".

29. Nor would a new Act be likely to produce a happy consensus; in other words, unless the mass-circulation press gets everything it wants -- an outcome which I believe would involve a wholesale loss of privacy for this country's citizens -- it will always complain.

#### Implications of a new statute

30. What would a new law say, and would it leave us better off? Our law at present is founded on a general right to privacy, expressed in Article 8 of the ECHR, which is qualified by the need to balance it against the right to free expression and the right to free access to information, in Article 10.

31. If the purpose of a new law is primarily to meet the concerns described above, its effect is likely to be to further qualify the right for some people in some circumstances, or withdraw it from them altogether. What sort of people? Likely candidates include public figures, role models, those who “trade on their image”, elected representatives, public servants, directors of public companies, NGO members, those convicted of crimes and employees of registered charities.

32. Of course lines would have to be carefully drawn. Ordinary teachers or nurses in the public service would surely retain privacy rights providing they were not engaged in politics or expressing relevant views in public. A Premiership footballer, by contrast, would presumably in all circumstances be a role model with limited privacy rights, but should the same apply to reserve team players and Championship players? Or to the footballer’s wife? An MP and a local councillor are clearly public figures whose privacy rights might be qualified; but what about a school governor? Is a teenage girl who has appeared on *The X Factor* someone who trades on her image?

33. If the objective is to take the interpretation of privacy law out of the hands of the courts and remove it from the ambit of the Human Rights Act, then one way or another this level of detail must be considered. Look at [www.bailli.org](http://www.bailli.org) and you will see that judges wrestle with just such questions, both in the consideration of injunction applications and in deliberating at trials and appeals.

34. It may be possible to approach such issues from a different direction, by describing the grounds on which journalists (and others) might be entitled to intrude on privacy in the public interest. There is certainly merit in this, but my personal view is that public interest journalism, like access to justice, is a wider issue than privacy and probably requires a broader approach.

#### Privacy, regulation and ethics

35. Statute, whether new or existing, is not the only tool at our disposal when we balance the right to privacy against the right to free expression. This is not the place to discuss precise models of regulation, but it is useful to look at possible consequences of change.

36. Whatever form of regulation emerges over the next year, it will need the authority to hold journalists accountable to a code of practice, and that code will inevitably include respect for privacy. Even the doughtiest defender of the Press Complaints Commission now concedes that its authority has been insufficient. An increase in regulatory authority should in principle increase compliance, which in turn should ease the burden on the courts and indeed on the Human Rights Act.

37. In my view an important element of a new regulatory regime should be a capacity to conduct investigations, not necessarily with a disciplinary aim, but primarily to ensure that failures are understood and lessons are learned. This too has been lacking in the PCC era.

38. A further element in the equation, which has a bearing on privacy, is the potential for greater ethical awareness among journalists and in newsrooms. Everybody with a stake in the future of journalism should be encouraging this, and there can surely be few who deny that improvement is necessary.

39. This can take practical forms. For example, every article through its life from inception to archive could be accompanied by an unpublished electronic record which includes such metadata as recorded interviews, unused video and scanned notes as well as evidence of who wrote what and which editors and sub-editors made which changes. Also included, perhaps in the form of short electronic questionnaires, could be proof that ethical problems have been considered and where appropriate formal decisions have been made. The software exists to make this fairly quick and easy. While it would be a new departure for most journalists, it represents the kind of accountability that we ask of the police, the medial profession and many others.

40. If journalism is important, and it is, then effort of this kind is surely worthwhile. Such measures would not only raise ethical standards, but they would also protect and encourage good journalism. If a journalist is confident he or she is acting in the public interest and can show grounds for that confidence then that journalist will be able to do the job better.

25 October 2011

Professor Brian Cathcart, Joshua Rozenberg, and Professor Steven Barnett—Oral evidence (QQ 119–161)

**Professor Brian Cathcart, Joshua Rozenberg, and Professor Steven Barnett—Oral evidence (QQ 119–161)**

[Transcript to be found under Joshua Rozenberg](#)

## Channel 4—Written evidence

Channel 4 welcomes the opportunity to provide written evidence to the Committee on media regulation and the role of Ofcom.

Channel 4 is a public service broadcaster licensed by Ofcom to broadcast the main Channel 4 service, three free-to-air digital channels (E4, primarily an entertainment channel, More4, primarily a factual channel, and Film4, a film channel). All four channels are regulated, post broadcast, by Ofcom under its Broadcasting Code (“the Ofcom Code”).

The Channel 4 main service itself, E4, More4 and Film4 operate under broadly the same regulatory parameters. Channel 4 is obliged under its licence for all these services to ensure compliance with the Ofcom Code and statutory sanctions may be imposed by Ofcom for a serious, deliberate, reckless or persistent breach of the Code. In the case of the three digital channels, their licences could be shortened or revoked and in the case of Channel 4 and the other three channels fines of up to 5% of qualifying revenue (i.e. all advertising revenue and sponsorship revenue) can be imposed. All UK broadcasters, including the BBC (with some limited exceptions), ITV, Channel 5 and digital channels fall under Ofcom’s jurisdiction.

The remainder of this submission addresses the three questions in the Committee’s terms of reference relating to Ofcom:

I. Do the guidelines in Section 8 of the Ofcom Broadcasting Code correctly address the balance between the individual’s right to privacy and freedom of expression?

Section 8 of the Ofcom Broadcasting Code—“Privacy”—contains one principle, one rule, twenty one “practices to be followed” and accompanying non-binding guidance notes, all designed to assist broadcasters when dealing with individuals participating or directly affected by programmes, or in the making of programmes. Ofcom makes it clear that failure to follow the practices will constitute a breach of the Code only where it results in an unwarranted infringement of privacy i.e. a breach of the rule under Section 8. However, as the practices are not a definitive list, adherence to the practices will not necessarily avoid a breach of the Code.

The rule, practices and guidance are complemented by a body of “case law” set down in Ofcom’s published findings, following the investigation of complaints made to Ofcom under its Procedures for the Consideration and Adjudication of Fairness and Privacy Complaints (“the Complaints Procedures”).

Channel 4 considers that the rule, practices, guidance and the Complaints Procedures have in practice provided a reasonable and effective balance between the individual’s right to privacy and the right to freedom of expression. The practices give working guidance for broadcasters and producers to follow in the production of programmes so as to avoid any unwarranted intrusions into the privacy of individuals. The Complaints Procedures also provide a fair, independent and effective system of redress for complainants without the need for costly or protracted litigation.

The practices have been developed over many years (having originated under the legacy regulators ITC, BSC and BCC, and now Ofcom) and through a process of consultation with broadcasters and stakeholder groups. The introduction of the Human Rights Act in 1998 (“HRA”) has had the most significant impact on this section of the Ofcom Code. The current Code has been drafted in the light of the HRA and European Convention on Human Rights (“the Convention”). It expressly recognises Article 8 rights regarding a person’s right to privacy in respect of their private and family life, home and correspondence. Equally it recognises the right to freedom of expression under Article 10 of the convention, which encompasses the audience’s right to receive creative material, information and ideas without interference but subject to restrictions prescribed by law and necessary in a democratic society.

By way of example, the practices to be followed for surreptitious filming under Practice 8.13 and 8.14 provide an effective balancing of these two Convention rights. The Code sets down the criteria that must be met for the prior authorisation of covert filming or recording (“1st stage permission”) and secondary authorisation for the material recorded to be broadcast (“2nd stage permission”). In addition, Channel 4 has its own written procedures in place which complement and augment Ofcom’s procedures. These are strictly adhered to ensure that any potential infringement of privacy is warranted and in the public interest.

2. How effective has Ofcom been in dealing with breaches of the Ofcom Broadcasting Code in relation to breaches of privacy?

In Channel 4’s view, Ofcom has been effective in dealing with breaches of the Code in relation to Section 8. Privacy complaints are often made in connection with Fairness complaints under Section 7 of the Code and Ofcom has been effective in dealing with privacy complaints which are effectively fairness complaints. Whilst upheld privacy complaints against Channel 4 are relatively uncommon, we are not complacent and take great care to ensure that any infringement is warranted under the Code and our own internal procedures. As a responsible Public Service Broadcaster we take very seriously our obligations to comply with the Code and in particular with the sensitive issue of an individual’s privacy.

Whilst the stringent procedures which Channel 4 has in place generally avoid any breaches of privacy in respect of intentional intrusions into privacy—e.g. surreptitious filming or recording—the most common concern about potential breaches of privacy are likely to be in unintentional circumstances e.g.—filming in a public place. In such cases there is often a misunderstanding by individuals as to whether or not they have a legitimate expectation of privacy.

Ofcom’s view that such complaints can be resolved informally with the complainant has often been effective in allowing amicable resolution. This informal process between the parties without the need to engage Ofcom’s formal complaints procedures is a cost effective and proportionate way of dealing with such privacy complaints.

3. Is there a case that the rules on infringement of privacy should be applied equally across all media content?

## Channel 4—Written evidence

In Channel 4's view, there is an arguable case for the rule and practices under Section 8 of the Code to be applied in a consistent manner across other media content, as this would create a level playing field amongst publishers and broadcasters in those media, and provide clarity and consistency to individuals who have a legitimate expectation of privacy. The Press Complaints Commission's Editors' Code of Practice already contains some corresponding provisions which address the issues covered under Section 8 of the Ofcom Code.

Currently there is little parity between broadcasters and other media, and whilst the Ofcom Code can be enforced using the statutory sanctions referred to above against any party which breaches its rules, there are no comparable sanctions which can be imposed on other media, such as the print media or web content producers.

October 2011



Prash Naik, Controller of Legal & Compliance, Channel 4, David Jordan, Director of Editorial Policy and Standards, BBC, and Valerie Nazareth, Head of Programme Legal Advice, BBC—Oral evidence (QQ 273–325)

**Prash Naik, Controller of Legal & Compliance, Channel 4, David Jordan, Director of Editorial Policy and Standards, BBC, and Valerie Nazareth, Head of Programme Legal Advice, BBC—Oral evidence (QQ 273–325)**

Evidence heard in Public

Questions 273–325

MONDAY 7 NOVEMBER 2011

Members present:

Mr John Whittingdale (Chairman)  
Lord Black of Brentwood  
Lord Boateng  
Mr Ben Bradshaw  
The Lord Bishop of Chester  
Lord Dobbs  
George Eustice  
Lord Gold  
Lord Harries of Pentregarth  
Lord Hollick  
Martin Horwood  
Lord Janvrin  
Mr Elfyn Llwyd  
Lord Mawhinney  
Penny Mordaunt  
Lord Myners  
Ms Gisela Stuart  
Lord Thomas of Gresford  
Nadhim Zahawi

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**Examination of Witnesses**

*Witnesses:* **Prash Naik**, Controller of Legal & Compliance, Channel 4, **David Jordan**, Director of Editorial Policy and Standards, BBC, and **Valerie Nazareth**, Head of Programme Legal Advice, BBC.

**Chairman:** We will now hear from the broadcasters. I welcome the director of editorial policy and standards at the BBC, David Jordan; the head of programme legal advice, Valerie Nazareth; and, from Channel 4, Prash Naik, controller of legal & compliance. I invite Lord Janvrin to start.

**Q273 Lord Janvrin:** Perhaps I may start by asking you to set the scene for the evidence session, if you like. At the heart of this is the balance between privacy and freedom of expression. How do you see that operating in the broadcast media, as opposed to the printed media, given the nature of the regulatory environment in which you operate? Could you also give an indication of whether there have been issues of privacy recently in your fields that have prevented from you carrying stories that you might have wanted to?

**David Jordan:** As you are probably aware, the BBC operates within a regulatory structure for which Ofcom provides the overarching framework, and the BBC Trust also regulates us in this area. In both the Ofcom code and the BBC editorial guidelines there are strict and stern tests as to the balance between freedom of expression and privacy. Both define some public interest test. Neither of them regards it as being exhaustive, but a public interest test should be applied. They also apply the notion of proportionality, in that any intrusion into the privacy of individuals should be proportionate to the public interest being pursued. In both codes that is very explicit. In the BBC's editorial guidelines the definition of public interest is probably the most extensive one that exists in any code of ethics in journalism in this country, but the Ofcom code is not that far behind.

We operate within a very strict sense that, if you want to intrude into anybody's privacy for any purpose, whether it is to report something—for example if there were pictures of those injured or killed in the terrible M5 accident—or something in relation to an investigative programme, you would need a high level of public interest justification before you were able to do anything. Perhaps Valerie would deal with the legal aspects.

**Valerie Nazareth:** Unlike at Channel 4, where they have one team that deals with both legal and compliance, David's team at the BBC does the editorial side and my team does the legal side, but in this area the issues overlap very greatly, so I endorse what David says.

**David Jordan:** It goes without saying that we operate within the law as well, but the regulatory position is very clear.

As to your second question about whether there is anything we have not done that we would have liked to do but for the existence of these codes and the present law, I am not aware of anything. That does not mean there are not some difficult judgments that must be made from time to time about whether or not things are appropriate, but there is nothing we have not done we would have liked to do. Perhaps I may point to one matter that causes us some difficulty in terms of the ethical judgments involved. For example, we may receive secretly recorded material that we would not have recorded ourselves but others have done, not necessarily on the basis that we would have done it, and that becomes generally available in the public domain. One very good example would be what in broadcasting terms could be described as the *Daily Telegraph's* fishing expedition with various Liberal Democrat Ministers and others, which was then made generally available. The fact it is generally available makes it difficult in situations when you want to apply your own principles to the matter. That causes us difficulty in reaching a judgment, but there is nothing inherent in the regulation that causes that difficulty in particular.

Prash Naik, Controller of Legal & Compliance, Channel 4, David Jordan, Director of Editorial Policy and Standards, BBC, and Valerie Nazareth, Head of Programme Legal Advice, BBC—Oral evidence (QQ 273–325)

**Q274 Lord Boateng:** How did you resolve that particular instance?

**David Jordan:** We resolved it by not using the material other than in the case of Vince Cable, where it was felt the public interest justification reached a new level. Incidentally, I should say we told the story but did not use the recorded material.

**Prash Naik:** Channel 4 is in a rather unique position. We do not make any of our own programmes; we work with a sector of several hundred independent producers. So the extent to which we are required to comply with the code and the imposition of sanctions, which would ultimately be imposed on the broadcaster, we have to instil a culture of ethics and standards at arm's length, but it is a very collaborative process. In addition to the regulatory framework for the broadcaster, which has existed for several years, under its legacy regulators, the ITC, BSC and BCC, we ensure that within that framework we support it with our own supplementary codes and editorial protocols backed up with extensive training, and we provide this service free to the independent producers. Effectively, we provide them with free legal and compliance advice, so it is an integrated system. If you are the producer and you need advice, you can pick up the phone 24 hours a day and talk to any one of my team. We ensure, therefore, that we are working within the regulatory framework to get programmes to air safely. It is not necessarily only because there is a threat of statutory sanctions being imposed; in part, it is also a reputational thing. We want to have high-quality programming. Viewers and the public look badly on us for having regulatory decisions against us. It is in our interests, therefore, to maintain certain standards, so working within that system is in our best interests.

As to whether there have been any inhibitions in our airing programmes, very rarely do we have injunctions against us. On average in the last eight years we have probably had about five or six privacy injunctions, which we have won on all counts. We are not in a position when we regularly have to fight in the courts on privacy issues; it simply does not happen. Perhaps part of the reason is that we do not engage in kiss-and-tell stories, where the bulk of privacy injunctions have predominated. The fact that under our regulatory framework we have a right to reply, and therefore have to give individuals an opportunity to respond to allegations before broadcast, means that often we will already have worked through our public interest justification and, that will be communicated to the other side. Therefore, they are less likely to want to go to the court because they are less likely to be successful.

**Q275 Lord Janvrin:** Would both BBC and Channel 4 say that they are engaged in constant pre-broadcast mediation with producers, looking at the codes and the balance between freedom of expression and privacy? Have you always got a queue of producers knocking at your door so there is a constant stream of mediation or discussion going on, or do they tend to be few and far between?

**David Jordan:** Given the amount of output of the BBC, nothing is ever “few and far between”, but in that context this is not something that crops up on a daily basis by any means, particularly in relation to investigations. We do quite a lot of secret recording, for example, in relation to investigations that clearly raise important privacy issues, particularly where we might be dealing with vulnerable adults and sometimes children. Those raise very

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important issues. Those issues crop up from time to time in our programming, but this is not something that occurs on a daily basis. I would not describe it as “mediation”, but we do give advice to our editorial line management. Within the BBC the editorial decision-making line management lies within the line management of the division concerned. For example, in the case of news it goes up to the director of news, and my small department and I offer advice on what would comply with the editorial guidelines and the Ofcom code in making those programmes. We have had many and varied discussions about our output, but I do not want to give the impression that this occurs on an hourly basis, and I do not think it does in the legal department either.

**Valerie Nazareth:** No. In terms of our day-to-day work, we are regularly discussing with programme makers privacy issues as well as defamation issues. It is a normal part of the day-to-day work of pre-publication in-house lawyers. They now deal with privacy issues as well as defamation.

**Prash Naik:** At Channel 4 we have an integrated system, so the legal team sits on the editorial floor. We work collaboratively with the editors. We also sit in edit suites with the independent producers, so discussions about privacy, which are often linked to fairness, and editorial ethics and defamation, are all very much integrated. My team is relatively small. We are already dealing every day with several hundred issues of this kind. They are often run of the mill and straightforward but they involve an element of debate and discussion. We have a built-in editorial reference up system, so fine cut judgments can be referred up to more senior executives, to our chief creative officer and ultimately to the chief executive. There is a sense that individuals have autonomy to make judgments, which is their proper role, but if there are particularly sensitive issues someone at a more senior level can make the final decision and it can be debated and discussed.

The central point is to discuss these things prior to transmission; there is no point in having a debate afterwards. We want to test and scrutinise whether the public interest is sufficient and whether compliance with the code are relevant before we go forward, not after the event.

**Q276 Chairman:** In the case involving Georgina Baillie, Jonathan Ross and Andrew Sachs you were found to be in breach of the broadcasting code. Was that at least in part on the ground of breach of privacy?

**David Jordan:** Yes.

**Q277 Chairman:** On how many occasions has the BBC been found to be in breach of privacy by Ofcom?

**David Jordan:** On a tiny number of occasions. I cannot think of another one.

**Q278 Chairman:** That is the only one you can think of?

**David Jordan:** Yes.

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**Q279 The Lord Bishop of Chester:** How confident are you that you know what is or is not legally covered by privacy law? The Channel 4 submission to us drew attention to a possible unintended breach of law. The Princess Caroline case in Europe has, it seems to me, thrown down the gauntlet as to when a photograph can be taken of a well-known person in a public place. How confident are you that the law is clear enough for you to offer clear advice?

**Prash Naik:** To the extent that the law is an ever-changing thing and the Ofcom code will reflect changes in it, the basic structure of privacy under the Ofcom code reflects the common law on privacy cases. First, you have to establish whether there is a reasonable expectation of privacy. You have to consider: whether the individual was filmed in a public or private place; the context of the material; the extent to which it might be sensitive; and the extent to which it might already be in the public domain. Second, has there been an infringement of privacy? In some cases there may not have been an infringement. Has the individual consented? Has he or she given informed consent? They are relevant factors on which we would make judgments. Third, if there has been an infringement, is it warranted? By that I mean “warranted by the public interest”. Although the Ofcom code has a list of potential criteria, it is not an exhaustive one. The courts have already stated that public interest turns very much on the facts of the particular case, but we have vast experience from doing several thousand programmes for many years, plus the legacy regulator’s adjudications and existing case law in this country to which we can refer. We have quite a body of information to advise our producers, so we are pretty much in a safe place, in that we can make very clear and precise judgments as to where the line is drawn.

One thing we flagged in our submission is that occasionally there is a perception by a minority of individuals that they have a reasonable expectation of privacy when they do not. This may be a reflection of the extent to which privacy has been covered extensively in the press. People often come to us saying their privacy has been infringed when the issue is one of fairness, or they have consented, or it is an incidental inclusion in a public place. Often, we will be dealing with members of the public where we will simply explain to them that we do not think this is the issue and their concern is *x*, not *y*. In many cases, by the time we have explained it to them they are quite accepting of it. There is a lower percentage of those who feel they need to take it further with Ofcom because they do not agree with us, but we are not dealing with a huge number of cases in those circumstances.

**Valerie Nazareth:** There have been very few cases over the years, but the law is developing. Every time there is a privacy decision we look at it very carefully and consider whether we need to alter the advice we give. That will always be the case with any developing area of law. On the whole, given our guidelines and the Ofcom code, compliance has been a good basis on which to defend any complaints, and we have been able to say that the public interest warrants any infringement of the person’s privacy.

**Q280 Lord Dobbs:** First, I must declare an interest. I have known Mr Jordan for many years professionally and personally—for more years than we care to remember—and I have been in receipt of Valerie Nazareth’s very wise and cautious advice on matters of privacy in my own work. Therefore, I have some understanding of how they work. I will not be able to stay for the entire session, so I apologise in advance for leaving early. Is there ever any justification for a journalist to take out a privacy injunction on his own behalf?

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**Valerie Nazareth:** I do not think it is appropriate for an organisation to say to its members of staff or presenters that they cannot avail themselves of a remedy that is available in law. If that legal remedy is available it is very difficult to say to people, “You cannot go ahead and use this particular law.” You may, however, say to them, “If you are going to use this particular law”, for example to take out an injunction, “that may raise conflicts of interest or other issues of compliance with your own internal guidelines”, and that would raise line management issues to ensure compliance. It is difficult to say that you cannot ever use a particular remedy that is legally available.

**Q281 Lord Dobbs:** Let me rephrase it. Should it be an issue for BBC management that some of their very senior journalists take out entirely personal privacy injunctions, possibly without reference to the management for many years?

**David Jordan:** It could be an issue. Let us leave to one side for a moment the second part of the question about “without reference”. Depending on the job of the individual, it could be an issue. If the presenter of *Law in Action*, for example, had such an injunction, did not make it clear that was the case and was conducting interviews and discussions about the very subject we are talking about, or about injunctions more generally, clearly there would be an editorial issue about conflict of interest which would need to be resolved. One can see situations in which it might be an issue. On the other hand, if an entertainment presenter did the same thing, it might raise no issues at all. It would depend very much on the circumstances of the case.

**Q282 Lord Dobbs:** Would the BBC understand, particularly in the present climate, that someone like Andrew Marr taking out a privacy injunction raises all sorts of questions that put the BBC corporately effectively in the dock over these issues?

**David Jordan:** I am not sure I would agree that it puts the BBC in the dock, but it raises some interesting questions about whether that is an appropriate thing to do given the role that the individual is playing. I would expect that in those circumstances an individual who did take out an injunction, even if it was one not generally known about—a so-called super-injunction—would disclose it to the relevant line managers and there would be discussion about the editorial implications of having taken that course of action. For the reasons I raised in relation to *Law in Action*, clearly it would not be appropriate for certain sorts of discussions to be conducted on programmes by people who had those kinds of interests at heart.

**Q283 Martin Horwood:** Thereby, breaking their own injunctions, presumably?

**David Jordan:** They would not be discussing their own injunctions but they might be discussing other people’s.

**Q284 Martin Horwood:** By telling their line managers?

**David Jordan:** I think we have to say that falls into the same category as the demands we make upon journalists to reveal their sources from time to time, even when

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they will not reveal them to anybody else. Sometimes journalists are required—I know this having conducted investigations myself for *Panorama* and others—by their editors to reveal sources they would not reveal even in a court of law. They reveal them to their editors to make sure that the sources are credible and appropriate for the allegations that are to be made. Sometimes journalists have to reveal information to their line managers that they would not necessarily reveal anywhere else, and this may be one instance of that.

**Q285 Lord Boateng:** Mr Jordan, in response to the Chairman you said that the BBC had been found to have failed by Ofcom in respect of the privacy requirements in the Brand case.

**David Jordan:** That is right.

**Q286 Lord Boateng:** Did your department offer any advice to the producers of that programme before it went out?

**David Jordan:** No, and I think that was one of the problems.

**Q287 Lord Boateng:** May we take it that as a result of the Ofcom adjudication your department is now regularly consulted by such shows when they are thinking of engaging in that sort of journalism?

**David Jordan:** We would certainly expect to be consulted if anybody is going to do anything as daft as that again, but, thankfully, most of the cases do not fall within that rather extreme range. Unfortunately, in that instance nobody from editorial policy was consulted. If you were to breach someone's privacy in that rather extraordinary way, we would expect to be consulted and to advise against it rather strongly.

**Q288 Lord Boateng:** Mr Naik, we are getting the sense that the profusion of media outlets, including online media, has led to a degree of competition. Everybody is anxious to get the audience and their share of the market. Do you sense in relation to producers of programmes who come to Channel 4 and say, "Put this on" or "This is a great idea" that there is pressure to go downmarket that you have to restrain?

**Prash Naik:** I think Channel 4's unique remit to innovate, experiment and explore new content, and the fact that we choose to push boundaries means that we encourage our producers to come to us and push the envelope. In a sense, they would not be doing their job if they did not come to us with this purpose. I do not suggest that it is always downmarket; it may be a new way of doing something creatively. Our role is ultimately to get their programme to air, but within the law and the code. That is something they have to accept, and a great many of them do accept that.

**Q289 Lord Boateng:** Are you aware of new pressures?

**Prash Naik:** It is not really a new pressure. There have always been commercial pressures on producers to deliver the next best programme. That is quite healthy and I do

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not see anything wrong with that. I do not sense there is desperation to move downmarket into the kiss-and-tells. It is not really the domain within which broadcasters generally work. That said, I am sure that if there were something more innovative in terms of gossip, and so on, we would look at it, as we would look at any new production, and advise on those parameters. Sometimes we can find a way of getting it to air; and other times we simply cannot.

**Q290 George Eustice:** Do you think that the current Ofcom rules are tough or detailed enough as they stand?

**Prash Naik:** I think they are a very good balance between article 8 and article 10 rights. They clearly reflect the law as it currently stands. Ofcom consults regularly on updating the code to reflect current trends in privacy case law and other changes in the law, etc. There is a very good body of material and “case law” from past adjudications published every two weeks. There is a very clear understanding between broadcasters and producers about where the lines are drawn. It is not that new.

If you look at most privacy and fairness issues, they go back prior to the Human Rights Act 1998. We were already looking in this area long before the Human Rights Act came into force. There is a very clear understanding as to where those lines are drawn. There will be a tendency for some producers to want to push it a bit. I see no problem with that, but there is pushing and then there is breaking the code. I believe the code is a fairly robust piece of regulatory framework, and I certainly do not have a problem with it.

**David Jordan:** I agree. Ofcom is very robust in defending freedom of expression, but it does that within a very clear framework in which, as it says, any intrusion into privacy must be warranted. In effect, it calls for a substantial level of public interest justification for those intrusions into privacy that do occur.

**Q291 George Eustice:** I thought you would say that, but it seems curious, since you all have your own supplementary codes, and the BBC Trust is a new parallel system in some ways. Why do you feel the need for these supplementary codes? Is it because you do not think the Ofcom code goes far enough, or is it an attempt to take responsibility for this from Ofcom and do it yourself? Maybe the BBC view it on the basis, “We know what we are doing better than Ofcom, so we have our own trust.” Is there an element of that?

**David Jordan:** I do not think that is the motivation. The BBC has been producing editorial guidelines for a very long time; from the late 1980s for the BBC as a whole. These issues have been addressed in them since then. But if you look at the structure of the Ofcom code and the BBC’s editorial guidelines, you will see that both are now set out in principles and practices. The principles enunciated in both the Ofcom code and the editorial guidelines are very similar. If you go to the practices, the BBC goes through a substantial number of extra practices to what is required under the Ofcom code, but they are about how you realise the principles more than the principles themselves. I am sure all in this room would agree that the standards expected of the BBC are often just that bit higher, rightly, as a public service broadcaster paid for by licence fee, than is often required of anyone else, even our commercial public service broadcaster friends. It would not be surprising that the BBC has some areas where it wants to have even higher standards than are available under the Ofcom code.



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**Q292 George Eustice:** One of the crucial matters in the inquiry we are conducting is whether a statutory code of privacy, or a change to the current PCC regime for national papers, might have a chilling effect, which is the term used. You said earlier that in your view the Ofcom code had not stopped you from doing anything you would want to do. Is that true? Is there anything that programmes like *Panorama* or *Dispatches* would like to be free to do but cannot do because of the code?

**David Jordan:** Not in my experience, and I have edited as well as advised on *Panorama*. These are not considerations that have stopped us carrying out the most difficult kinds of investigations. Perhaps I may point to recent investigations in a care home. We have done a few of those. They are as difficult as they get in terms of the vulnerabilities of those concerned and the sensitivities of the situations. As far as I am aware, it has never stopped us doing anything of that sort. I do not believe the existence of the code stops us from doing public interest investigations. That is the critical thing. The newspapers might say there is a chilling effect, but the chilling areas are ones we would not necessarily want to go into. They have a different market and cater for different things. A public service broadcaster has a very high public interest hurdle, which is not the kind of thing that necessarily would be chilled because there is a strong public interest justification for what we are doing and the reasons we decide to intrude on someone's privacy.

**Prash Naik:** From Channel 4's point of view, the two reasons we supplement the code are: first, the parts of the code are the basic framework. There is no meat on the bones, so effectively we add an extra layer. For example, in the case of secret filming, the code requires that you have prima facie evidence; the story must be in the public interest; you must have reasonable grounds to believe that you will gather more information; and it must be essential for the authenticity and credibility of the story. That is all it says. What we do internally is have a process of documentation in terms of obtaining permission to film secretly in advance. Producers need to set out in writing the public interest; what the criteria are; and what evidence they have already collected. That will give them permission to undertake the filming. That is approved at quite a senior level.

Second, once we have filmed and collected the evidence it is reprocessed and reviewed with the producers and lawyers. If it meets the criteria again it can be given second stage permission for it to be broadcast. Again, it has to be documented. One of the reasons is to have an audit trail, partly for legal and partly for regulatory claims. It is also good practice. Therefore, that extra layer on top of the code is part of the best practice of responsible broadcasters. I know that the BBC and other broadcasters do it as well. It is a valuable tool.

As to your second point, it is also about creating a cultural ethos within our independent sector and the broadcasters about ownership of compliance. It is not about lawyers telling producers what they can and cannot do. Good programme makers embrace compliance and understand the code; they can use it to their advantage and make better programmes. It is not something that inhibits good-quality programme making. In terms of investigative reporting, recently we have done two football *Dispatches* and something on violence towards children in mosques and Madrassas. We are doing something on grooming tonight. It has never inhibited our ability to do that. We have hurdles to get over, but they are good, solid, journalistic hurdles and they serve a good purpose and strengthen our journalism.

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**Q293 George Eustice:** Is there a difference between the designated investigative journalist programmes that you do and your mainstream news? Quite often, broadcasters rely quite heavily on the print press to do the dirty work and break news in whatever way they can, and then follow it. If you look particularly at Sunday political programmes, it is all about newspaper reviews. Do you have a different approach with your news? Is there a reason why broadcast news is typically less aggressive?

**David Jordan:** Less aggressive than newspaper news? I do not think so, other than that we have different agendas. We are trying to fulfil different purposes. What fulfils our purpose might not be sufficient for a newspaper with a particular point of view that wants to look at something in a rather different way. I do not think this touches very often on the issue of privacy in that sense. It is true that sometimes there are difficulties about things that become commonly known. You have to ask yourself whether there is any point in anybody not using that information in the public discourse in which they are involved, namely telling people about the news. There comes a point at which that issue becomes quite difficult sometimes.

There may be occasions when the broadcasters ride on the back of newspaper revelations. I am thinking, for example, of the exposé by the *Daily Telegraph* of expenses. Clearly, nobody else was party to the information being used. Other than checking it to the greatest extent you could, there was very little you could do other than use the information that had been disclosed in the best possible way. In those instances you use the information that is available from elsewhere in your news bulletins, but they do not pose huge problems provided you do it responsibly and you do your level best to check the information that has been made available. For the most part, you still would not be interested in what Prash described earlier as kiss-and-tell revelations.

**Q294 Chairman:** I recall that when John Hemming named Ryan Giggs on the floor of the House of Commons Sky went live instantly and named him. The BBC waited at least half an hour. I can remember a BBC reporter saying, “We think we are going to name the individual who has been named in the House of Commons at five o’clock,” and so your viewers were encouraged to wait until then. Why was it that Sky instantly thought this was the green light and could go ahead but you spent quite a considerable time thinking about it?

**David Jordan:** I think you would have to put the first part of the question to Sky. I was not party to their editorial discussions. Valerie may want to add something because there is a legal question here. We had a long discussion about whether in this particular aspect of the law the fact that somebody had been named in these circumstances in the House of Commons allowed us to do so without breaching the injunction; and, if it did so, whether we should nonetheless do it. That discussion took a little time because it was conducted between me and other senior members of the BBC. We came to the decision that we would do it. A little before five o’clock we decided that we would do it from five o’clock so everybody was starting from the same place. Valerie might want to elucidate the legal issue.

**Valerie Nazareth:** I do not think the legal position is entirely straightforward. The Master of the Rolls’ report on injunctions explained that there might be a lacuna in the law in relation to breaches of court orders and whether the media had qualified privilege in

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relation to that. Therefore, there were issues to be discussed. As David said, having made the decision that we would report this, we did not want to do so straight away and so give some of our internal outlets an advantage over others; we waited until five o'clock when everybody was ready and it went out all in one go.

**Q295 Chairman:** Did it not create a rather absurd situation where one 24-hour news channel was telling the world who this person was and at the same time you were saying, “We cannot tell you yet”?

**David Jordan:** Yes, but I think the BBC would rather do that than make the mistake of revealing it when it should not be revealed. There are occasions when Sky makes that mistake, and I am afraid that occasionally we do things too quickly. For the most part, we would prefer in the BBC to deliberate and get it right rather than rush and get it wrong.

**Q296 Lord Hollick:** I would like to follow up the question of the public interest, which lies at the heart of striking the right balance between articles 8 and 10. A number of witnesses from whom we have heard suggested that a statutory definition, which would have democratic legitimacy, would be very helpful. Do you agree?

**Prash Naik:** If I am honest, I think it is a mixed bag. When we are looking at public interest assessments we use the criteria currently within the code, which reflect a lot of privacy case law. The PCC code's definition includes a limited list of public interests, is also not that far off the definition, included in the BBC producer guidelines. You know it is public interest when you see it; it is obvious. My worry about having a definition is that inevitably you invite satellite litigation. There is a danger of drawing it too narrowly or too widely. The courts have been very clear that public interest is very case specific, but, by and large, looking at a lot of the investigative pieces we do, we do not have that much difficulty knowing where the right side of the line is drawn. I hear what others have said about the difficulty of that and how a statutory definition would help. Sometimes, it is glaringly obvious where it is drawn.

**Valerie Nazareth:** I agree with Prash. The codes work very well and give us sufficient flexibility. They are easy to change if values change. If circumstances people have not considered come up, the codes are more likely to be able to deal with that. They are easier to change; they may reflect changing circumstances more easily than a statutory definition. I think what we have got works very well for broadcasters.

**Q297 Lord Hollick:** Can you think of no examples where the balance of public interest has not been properly struck, as it were?

**Valerie Nazareth:** In what sense?

**Q298 Lord Hollick:** Where you have disagreed with the judgment made?

**Valerie Nazareth:** Not in relation to a BBC case.

**Prash Naik:** I cannot think of a Channel 4 example. There was much debate about the PCC's decision in relation to Vince Cable. I know that the *Daily Telegraph* argued that it

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had what it considered to be sufficient prima facie evidence in advance. There was clearly a good public interest there. The issue was less about public interest than about whether there was sufficient evidence in advance and whether it was a fishing expedition. In most of the kiss-and-tells cases I can think of, most people would concur that public interest was probably on the wrong side of the line. Interestingly, in many of those cases the papers did not contest the public interest on the injunctions, which begs the question: was there a public interest to start with?

**Valerie Nazareth:** There are not that many applications to injunct BBC programmes on the basis of privacy, but if you look at those cases over the last few years, by and large they have failed, which would suggest to us that our balance and sense of where public interest lies is roughly right.

**Q299 Penny Mordaunt:** Are commissioning editors able to act against the advice of an internal compliance team either if they want to go further than the advice given to them or if compliance says something is okay but they are concerned about those actions?

**David Jordan:** They can certainly do the latter if they want to be more cautious than the advice that is offered. Clearly, that is up to them. Can they go against advice that is offered? Our system works on the basis—I think it is similar to Prash’s—of escalating these decisions to higher levels of authority within the line management of the division concerned. If I was to offer advice to a programme that it needed to do such and such a thing to remain within the editorial guidelines and Ofcom code and they indicated that they would not take that advice, I would be able to escalate that issue to more senior managers within the division and ask them to intervene. Ultimately, it could get as high as the director of the division or the director general. Therefore, a decision would have to be taken at a very high level to go against advice that I had given. Technically, it is possible that could happen, but it would not happen without very careful consideration of all the implications and the reason it was worthwhile. In this case presumably one would be assessing whether the public interest demanded that you went further than I would advise in relation to an intrusion into privacy.

**Prash Naik:** Because Channel 4 works with external independent producers we often expect them to fight their corner, which is perfectly acceptable. We encourage quite heated debates about where we think the lines are drawn with the commissioner, lawyer and programme maker. We try to work by consensus to find a sensible way forward. If there is conflict, it can be referred up to a senior editorial executive for approval. In reality, we do not have that many referrals up because the lines are drawn very clearly. Although you might have someone pushing back on something, we can have a reasoned debate and talk it through. It is never us directing them that they have to do this; we try to achieve it by consensus, partly because we have a returning relationship with lots of our producers, and also it is in their interests to get something out without being in breach of the code or law. Therefore, there is an incentive for everyone to get it right. Generally, commissioning editors would not independently take a view contrary to legal and compliance advice; but if they did; it would have to be referred up through the executive chain for approval.

**Q300 Penny Mordaunt:** Will you say a little about the training in your organisations? Clearly, you might have some unique problems with a very large, devolved

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organisation; you might have problems with working with a number of partners. How do you make sure that people are aware, informed and up to date?

**David Jordan:** There are a number of ways in the BBC. There are two ways of approaching issues of editorial compliance: one is top down, which we have been talking about here, through advice and the codes; the other one is that referred to by Prash: making sure that the culture of the organisation is such that people know what is expected of them and do not attempt to do things outwith the code. That does not always succeed, but that is part of what we try to do. My own team holds large numbers of meetings and issues newsletters, which are available externally and internally, to all programme makers, independents and our own staff. We issue a newsletter about recent decisions by Ofcom and the BBC Trust on complaints that have been made and the case law in relation to the regulations. Every couple of years the BBC sends out to every programme maker an email requiring them to respond that they will make their programmes compliant with our editorial guidelines.

We have recently developed a series of 25 interactive editorial policy online modules lasting 15 or 20 minutes, which apply to large numbers of bits of the editorial guidelines. Each division and department can insist on those being undertaken by those who are appropriate to do them. For example, our children's department insists that everybody who works for it must do four modules on working with children before they can work in the department. There are large numbers of ways in which we try very hard to inculcate the appropriate culture into all our programme makers, which is not easy in terms of having to go out to freelancers, casuals and independent programme makers and teams.

We distribute about 17,000 or 18,000 copies of our editorial guidelines to all programme makers internally and externally each time they are revised. The last occasion was last year. We do an awful lot to try to make sure people are aware of the standards we expect of all our programme makers, whether they are working within or outside the BBC.

**Q301 Penny Mordaunt:** When you are putting together a training package or those standards, what external advice, if any, do you take on ethical issues? I remember a former BBC journalist telling me that she had training about what to do if, for example, a guest left a handbag, document file or something. What external advice do you take, if any, when putting together that level of advice for your journalists?

**David Jordan:** We would not need to take a lot of external advice on our editorial policy modules. I write the editorial guidelines with my team and therefore we know what is in them. We know how the BBC Trust view them, what the Ofcom code is doing and what decisions have been made on the basis of them. All of that has an impact on the advice we offer, but if there is a need to seek external advice, or legal advice, on any issue that crops up, there are other people we can go to in the BBC and elsewhere. I would be interested to know what advice was given to your friend about picking up somebody's documents.

**Q302 Penny Mordaunt:** Apparently, it is fine to take a peek.

**David Jordan:** I wondered whether that might be it.

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**Q303 Penny Mordaunt:** That was a few years ago and it might have changed.

**David Jordan:** There are people who would appear before you who would say you must deal with that before doing any further. We have handled very difficult issues. If you take that example, I with others handled a case where secret documents left on a train by a civil servant travelling from Waterloo were handed in by members of the public. Clearly, they were officially secret and had to be handled very carefully, so we also take care about those kinds of issues popping up.

**Valerie Nazareth:** On top of the editorial and compliance training, we have a legal training programme. We have a compulsory online course that everybody has to do, and we update it with face-to-face training from time to time. We have just put all our senior news staff through an advanced law seminar, trying to bring them up to date with legal developments.

**Prash Naik:** At Channel 4 we adopt a four-tier process. We run a series of master classes each year, two in London and one regionally, aimed at about 500 independent producers. They consist of commissioning editors, lawyers and experienced programme makers talking to programme makers. We include editorial ethics; we have a mock cross-examination; we do role-playing. It is not just about law and compliance; it is about the practical reality. It is very Channel 4 in its style. In addition, we do about 100 to 150 bespoke training sessions each year, for productions that are high profile and need face-to-face training. That is backed by a series of written protocols provided by the channel, which are in our independent producer handbook that we circulate to all independent producers. That is subject to a current annual cyclical review, and a new version will be released in January.

In addition, where relevant we will have funded training programmes. We have announced today that we are funding a new investigative journalist training programme. My team will contribute to the training of those new investigative journalists through bespoke training for their particular genre. We make it quite flexible. It is very hands on. I go back to David and Valerie's point: it is about a cultural ethos and getting people in the mindset that this is how you do it; this is best for standards and quality; and embracing it and getting them to work with it.

Editorial ethics are dealt with by my team. We advise senior management and the board. We also advise external producers on editorial ethics. Ethics, compliance and legal are often integrated. It is very much about training people in a mindset, getting them to exercise proper judgment. When the issue of phone hacking came up someone said to me, "No lawyer has ever told me about phone hacking." You do not need to be a lawyer to know the rights and wrongs of phone hacking. You must have a moral compass to start with. We expect our producers to know what is right and wrong. We are not there to teach them to suck eggs but to teach them the basics, and therefore for them to exercise that judgment on their own.

**Q304 Lord Black of Brentwood:** One aspect of personal privacy is harassment. It might be harassment from the formation of a media scrum; it might be harassment in the physical coverage given to an event like a funeral. As I understand it, harassment at the moment is not included in the Ofcom code but the broadcasters and the PCC deal with these matters through informal channels. I would be grateful to know, first, how well you

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think that set of arrangements works, and, second, whether you think it would now be appropriate for harassment to be included in the Ofcom code.

**Prash Naik:** Although harassment is not specifically included in the code, there are already specific provisions on—doorstepping, fairness issues for dealing with contributors; basic issues on privacy intrusion; and the gathering of evidence—if there is an issue of harassment. I am not aware there has ever been noticeable concern among broadcasters about it. I think Ofcom would already have jurisdiction to deal with that.

My understanding is that a number of years ago the main issue on harassment was about media scrums. Channel 4 news has its own legal and compliance team that runs it through ITN. They are a very experienced producer and quasi-broadcaster. They voluntarily liaise with the Press Complaints Commission, which issues alerts in relation to media scrums and sensitivity about victims. Police forces also do that on a number of occasions. They voluntarily comply, partly because it is good practice. Having spoken to the head of compliance before I arrived here, he said that in his experience there had not been a noticeable increase or concern about broadcast news journalists harassing individuals. Often, the most common complaints relate to paparazzi. I do not believe there is a concern about broadcast journalists. It is already covered and we take it seriously in any event, particularly on issues of sensitivity related to suffering of victims and funerals.

**David Jordan:** I agree. We also participate in the PCC's advisories about media scrums and our newsroom abides by those. Another problem for Ofcom in this area is that Ofcom is a post-transmission regulator and unlike the PCC, which does a lot of pre-publication work, it would be difficult for it to get involved in pre-transmission issues with broadcasters. The weapons available to Ofcom to which Prash referred are post-transmission and are about redress rather than prevention; PCC interventions are about prevention and stopping things getting out of hand.

**Q305 Lord Harries of Pentregarth:** Do you feel that the issues facing the print and broadcast media are sufficiently different to justify two separate regulatory bodies, Ofcom and the Press Complaints Commission, or is there enough commonality particularly in the area of privacy that in theory it would be possible to have one overseeing regulatory body?

**David Jordan:** That is the \$64,000 question, isn't it? In theory, it would be possible to have a single overarching regulator, but for me the question is whether in practice that would be a good thing. Fortunately, I have the guidance of my director general on this issue to refer to. He has already made it clear that he thinks that in terms of press regulation it would be better if there was a form of self-regulation. For the press, there are substantial issues about statutory regulation and freedom that need to be addressed and involve crossing a quite considerable Rubicon, if you are to go in that direction. I understand why my press colleagues are very reluctant to have any form of statutory regulation impinging on the freedom of the press in this country as they see it. It is a big issue that I do not feel entirely qualified to answer, but my director general has already made it clear in speeches and remarks that he thinks a self-regulatory system, perhaps one that has more teeth than the current one, would be better for the press in this country.

Broadcasters, particularly public service ones and those paid for by the general public as is the BBC, are clearly in a different position and owe their

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listeners, viewers and users a different level of assurance in relation to their own practices than is perhaps due from commercial newspapers.

**Q306 Lord Harries of Pentregarth:** You mentioned practical difficulties. I do not know whether you can indicate what those might be. You said you thought that where public money was involved a rather different level of reassurance was required by the general public from that where commercial interests are involved. I found that somewhat surprising. Surely, on crucial issues of privacy and free expression the public want the same assurance, whether public money or commercial interests are involved.

**David Jordan:** I am not sure whether it is true that the public requires the same level of assurance in relation to the different bodies. For example, the way in which the public believes different news outlets or different institutions suggests they understand very well the difference between a publicly funded body like the BBC, which they regard as being highly accountable to them and requiring the highest possible standards, and some newspapers where they are quite happy to see a different standard apply, but they still buy them and read them. I am not sure the public requires every outlet to be treated in exactly the same way.

The result is that you get different levels of trust for those institutions. I am glad to say that the public's trust in the BBC and other public service broadcasters is very high, but the level of trust in some newspapers is considerably lower. That may reflect the different views that the public has, but it does not mean the public does not value having those two different sorts of approaches and will not happily buy a newspaper and, I hope, subscribe to the BBC licence fee at the same time.

**Q307 Lord Harries of Pentregarth:** You mentioned practical difficulties. Could you indicate what you think they might be?

**David Jordan:** I mean the practical difficulties of imposing a code across the whole of broadcasting and newspapers.

**Q308 Martin Horwood:** I am also puzzled by the distinction you draw. Setting aside these technical and practical areas like expertise in a particular medium, surely for a start Ofcom and the broadcasting code do not apply only to publicly funded broadcasters but to all broadcasters, so that distinction really cannot be made. I suppose the question is: do you think you are more or less free than the print media?

**Prash Naik:** We are equally free.

**Q309 Martin Horwood:** Then why can you not have one regulatory body that applies equally to all?

**Prash Naik:** If you were to wipe the slate clean and start afresh it would be an ideal model to have a level playing field and provide clarity for members of the public to go to one body and provide continuity of approach, but unfortunately we have a system where statutory regulation for broadcasters is very well established. It was originally set up under



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the Broadcasting Act 1990. It is very well understood and has a good cultural ethos behind it. Viewers understand the basic principles of television regulation. Television comes into your living room in a way papers do not, and due impartiality obligations cover our news coverage in a way that does not apply to newspapers. It is a different type of product. I think that members of the public are much more forgiving in many ways about the content of newspapers. They know the difference between broadsheets and tabloids. As to the element of trust that David raised, I think there is a greater recognition of trust in television content than in some newspapers at the lower end of the market, but probably equally good trust at the broadsheet end. They are two different models, so to try to shoehorn them into a new system to cover both now is too late in the day.

**Q310 Martin Horwood:** But in other areas of public policy where we have some sectors that are working well and some that clearly are not working very well we generally try to emulate one with the other.

**Prash Naik:** There are certainly elements of the way we are regulated that provide a helpful model. We pay a licence fee. The ultimate sanction in certain cases, but not for Channel 4, is revocation of a licence or shortening of a licence. I am not sure how you would emulate that model with newspapers.

**Q311 Martin Horwood:** Perhaps Mr Jordan would comment on this. The broadcasting code applies also to non-publicly-funded broadcasters and appears to work equally well.

**David Jordan:** I think there is something pretty fundamental about the state licensing newspapers, as it were. The really difficult question to answer is whether you believe that should be the case in any free society. I think that is a very difficult hurdle to cross.

**Q312 Martin Horwood:** But do you also agree that in practice the broadcast media are just as free as the print media in this country?

**David Jordan:** For example, the BBC has had to struggle hard and long to assert the independence it now has. I am not sure it would be a good idea for newspapers to have to go through the same process. If you read the history of the BBC, it is in effect a series of, shall we say, disagreements—at their politest—between government and the BBC about certain issues in which the BBC has struggled to assert its editorial independence. It has succeeded in doing so and is now viewed the world over as being independent and impartial. But I am not sure you would want newspapers to go through the same process in a bid to prove they were in fact independent of whatever the regulator or licensing system was. There are profound and fundamental implications in going down a statutory route for newspapers in terms of freedom of the press. We need to think about them very carefully before venturing down that road.

**Q313 Mr Llwyd:** What do you think would be the impact on broadcasters of a statutory tort of privacy, essentially along the lines of the current privacy law?

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**Valerie Nazareth:** I am not sure that in the long term it would have very much impact, or that it is necessary. We have article 8, which the courts interpret and balance with article 10. Any statutory tort would have to have regard to the same factors, and the courts would in effect have to decide on those competing factors. In the long term it probably would not have that much impact.

My view is that it is not necessary, and that in the short term it might have a slightly negative impact on the media because any new legislation has a period in which it has to bed down; there will be more litigation. We have just had 10 years in which the courts have got used to the Human Rights Act and balancing articles 8 and 10. A body of case law has emerged over that period. If we introduce now a new statutory tort, we might have to go through another rebalancing period. The courts would have to get used to that. I am not sure we need it. It could add extra litigation for a longer period. The balancing acts will still have to be done by the courts. We now have 10 years' experience of the Human Rights Act and we are beginning to understand where we are.

**Q314 Mr Llwyd:** In other words, it would cloud the issue at this stage?

**Valerie Nazareth:** Yes, absolutely.

**Prash Naik:** With all new legislation that does not have an established basis there is the danger of unintended consequences, and the unintentional inconsistency between existing regulation, which works perfectly well for broadcasters at the moment, and creating a new body of case law that is then taken forward. Inevitably, you get a two-tier process. There will be those who will use the courts because they can afford to—they have money and resources—and those who cannot. You would end up effectively with a two-tier process.

**Q315 Lord Gold:** Do you not think we should try to find a way of helping those people who cannot afford to go to court when they feel their right to privacy is under attack?

**Valerie Nazareth:** The regulator, Ofcom, and the BBC's complaints process offer a free way of seeking redress. To go to court is very expensive, but you can get Ofcom to hear your complaint. The result is published, and at the moment that is completely free.

**Q316 Lord Gold:** Can that prevent publication in the first place?

**Valerie Nazareth:** No, not pre-transmission; it is post-transmission.

**Q317 Lord Gold:** How do you find that protection?

**Valerie Nazareth:** Because it has created a culture in which broadcasters take their obligations under the codes very seriously.

**Q318 Lord Gold:** So, it is okay for the next person?

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**Valerie Nazareth:** One would hope that we are already at a place where people's rights are respected.

**Prash Naik:** Often, when we have privacy complaints pre-transmission and Ofcom does not have jurisdiction we enter into a dialogue with individual complainants, and in the vast majority of cases we can address their concerns. In some cases we cannot. We articulate our position very clearly; we do not shy away from telling them why we think it is a warranted infringement. Obviously, post-transmission they can pursue it. In the vast majority of cases we are successful because they are infringements of privacy that are justified.

**Q319 Lord Gold:** It is fine if you are responsible in the way you conduct yourselves, and it may be said that some others are not so responsible. How does one find the protection then?

**Prash Naik:** If those who are not responsible are working under our regulatory framework sanctions will be imposed upon them. They are quite severe financial penalties, with the potential for revocation and shortening of licences. That will act as the ultimate deterrent to repetition.

**David Jordan:** All of this stems from a clear sense of what the public interest is.

**Q320 Lord Thomas of Gresford:** What remedies do people who complain seek?

**Prash Naik:** It can vary. Quite often, if we are doing undercover filming for example, individuals want reassurances that they will not be identified. They accept the public interest justification for the filming but do not wish to be singled out. We are quite sensitive to that if they are merely incidental; they are junior members of staff and are not senior management. The assurance they seek is that they will be blurred.

**Q321 Lord Thomas of Gresford:** That is before the programme is made.

**Prash Naik:** Yes.

**Q322 Lord Thomas of Gresford:** What about people who complain as a result of a programme? What do they look for—compensation in money, apologies or what?

**Prash Naik:** In many cases they are looking for a finding, which will subsequently be published, that effectively the broadcaster took a decision on the wrong side of the line, and the infringement was therefore unwarranted. It is not money because no compensation is offered under the Ofcom scheme. We can be directed not to repeat a programme. Ofcom's rules do not apply to our online content, but we voluntarily read across Ofcom's procedures to all our online material, so we have a consistent approach. For example, if we have lost, Ofcom may say that we cannot repeat it. We would have to remove it from our VOD platform; we would not sell it. There would not be wider distribution of the content if we lost at that stage.

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**Q323 Lord Thomas of Gresford:** But you would offer no ex gratia payment as a result of a complaint?

**Prash Naik:** No, we would not.

**David Jordan:** No. In most cases people are simply looking for an apology, and if it is possible to give one before going through the whole process, all to the good. Sometimes, however, it is not possible to arrive at an agreement, but wherever possible if we think we have done something wrong we try to apologise without having to cause people to go through a long complaints process.

**Q324 Chairman:** If Ofcom had found against you, presumably the person whose complaint had been upheld could still take legal action.

**David Jordan:** Yes.

**Q325 Chairman:** So, their case might be strengthened by the Ofcom ruling?

**Prash Naik:** Yes.

**David Jordan:** Yes.

**Chairman:** Thank you very much.`

## Channel 5—Written evidence

Following on from the meeting of the Joint Committee on Privacy and Injunctions on Monday 7 November, please find attached a list of questions which the Committee would be interested in receiving written evidence on from Channel 5. If possible, I should be grateful if you could please submit a response by Wednesday 30 November 2011.

- 1. Do you think that broadly the right balance is struck between privacy and freedom of expression in the context of broadcasting?**

Yes

- 2. Has privacy regulation ever restricted your ability to report on particular issues which you would otherwise have reported?**

We cannot recall a specific instance where privacy regulation has significantly restricted our ability to report on a particular issue. However, due to the low threshold for Article 8 to be engaged, our approach to privacy issues is quite conservative and that impacts more upon the way issues are reported than whether they are reported. For example, names and faces are more likely to be obscured.

- 3. Are you happy with the Ofcom rules and practices in this area? Should any of them be revised or redrafted? How does Ofcom interpret and apply its privacy code?**

- a. If you are happy with the Ofcom Code, why do you supplement it with your own editorial guidelines on privacy?**

We are generally happy with the privacy section of the Ofcom Code as it largely reflects the law in this area and is interpreted by Ofcom in accordance with the law of privacy as it has been developed by the courts.

Our own guidelines on privacy do not depart from the principles set out in the Ofcom Code, they simply try to expand upon the interpretation and implementation of those principles in the various different circumstances that our production companies are likely to encounter.

- 4. There are examples of what constitutes the “public interest” in the Ofcom Broadcasting Code, the BBC guidelines, the Independent Producers handbook etc., but there is no statutory definition. Should there be?**

We do not believe that there should be a statutory definition of the public interest. In our experience the public interest is a well understood concept over which there has been little dispute. The codes and guidelines do not seek to confine the public interest and give illustrative examples only. The danger of a definition is that it could inadvertently exclude matters of clear public interest and lead to a period of uncertainty and litigation over interpretation.

**5. Should individuals have a reasonable expectation of privacy that they are not filmed when in public places, for example, whilst out shopping or relaxing in a park?**

Individuals should not assume that they are not being filmed in public, as programme makers may be filming in an area for a variety of reasons and it would be unreasonable to pre-warn everyone who might enter that area that they are at risk of being filmed. The key decision for a broadcaster is whether to transmit such footage and that will depend upon the specific circumstances.

**6. Are commissioning editors able to act against the advice of internal compliance teams? Are there repercussions if there is then a complaint?**

The compliance team provides advice and commissioning editors are able to accept or reject that advice. In practice however this is subject to the compliance team and commissioning editors working together to arrive at solutions to issues and there are recognised escalation processes which involve our Director of Legal and Commercial Affairs and Director of Programming. As a result, decisions are always collaborative, and at least since Northern and Shell have owned Channel 5 there has never been an instance of the commissioning editors 'over-riding' the compliance team – we have always reached an acceptable consensus between the respective compliance and editorial teams.

**7. Would it be beneficial for commissioning editors to have an external body from which they could seek pre-transmission advice on privacy issues?**

As we said above, the compliance team and commissioning editors tend to work together to arrive at solutions to issues and are accustomed to dealing with such decisions on a daily basis. It is very rare for external advice to be required.

**8. Should there be a higher threshold for holding that Article 8 privacy is engaged? Is it a problem for broadcasters that the courts have sometimes protected anodyne information?**

It does sometimes appear that the threshold for Article 8 to be engaged is very low and that too little consideration is given to whether the information attains a sufficient level of seriousness.

As a result of the time and expense involved in responding to complaints to Ofcom or engaging in litigation over such matters, broadcasters are reluctant to expose themselves to such risks. Setting the threshold too low therefore has the effect of inhibiting broadcasters in the exercise of their rights to freedom of expression.

**9. Should Ofcom consider harassment as a specific issue within the Broadcasting Code?**

Although the Ofcom Code does not have a specific section covering harassment, we believe that the Code's privacy provisions are sufficiently wide to cover harassment and that the provisions work well in practice.

- 10. Should the same privacy rules apply in principle equally to all media—print, broadcasting and online?**
- a. If so, which body should have authority to apply these rules? (Ofcom, ATVOD, a new media tribunal?)**

We believe that the same privacy rules do apply in principle equally to all media as both the PCC and Ofcom Codes endeavour to reflect the law of privacy.

While it might be possible for one body to apply the privacy rules to both print and broadcast media, the fact that broadcasters are subject to statutory regulation and licensing and the print media are not makes it difficult to envisage that one body would be appropriate to apply the totality of the print and broadcast codes to both industries.

Most on-demand content regulated by ATVOD is content originally broadcast on linear television services. ATVOD has no power to enforce specific privacy rules; any content available only online that might be in breach of privacy would need to be pursued through the courts. It should also be noted that much online content falls outside the remit of ATVOD as many sites emanate from outside the UK and any UK content regulation would be unlikely to impact upon or be enforceable against organisations based abroad.

- 11. What impact would a statutory tort of privacy—essentially along the lines of the existing privacy law which is being implemented by judges in individual cases—have upon broadcasters?**

As case law in relation to privacy has developed over the last few years there has been more certainty over where the boundaries lie. Our concern is that the introduction of a statutory tort of privacy, even if it sought to reflect the existing law, could lead to a period of uncertainty and litigation over interpretation.

- 12. Do you fear that the process of negotiating and drafting a statutory tort might upset the balance which currently seems to exist in the broadcasting media between respect for privacy and freedom of expression?**

We have no doubt that any statutory tort would seek to reflect the existing balance between privacy and freedom of expression. However, as set out above, the implementation rather than the drafting of a statutory tort could upset the current balance as it would take time for the interpretation of the tort to be settled and until there was a body of case law testing the limits of the tort there would be uncertainty.

November 2011

## Chartered Institute of Journalists—Written evidence

The Chartered Institute of Journalists and its sister organisation, the Institute of Journalists (Trade Union), welcomes the opportunity to respond to the Joint Committee on Privacy and Injunctions.

The Institute represents staff and freelance journalists in every sector of the industry including local and regional newspapers, periodicals, television and radio broadcasting.

The Institute recognises the many complex issues involved in considering privacy in the media and the impact that new technology has had on it.

### Questions:

I. How the statutory and common law on privacy and the use of anonymity injunctions and super-injunctions has operated in practice

- Have anonymous injunctions and super-injunctions been used too frequently, not enough or in the wrong circumstances?

**Yes. All too often these types of injunction have been used by celebrities and others in the public eye to cover up wrongdoing or to protect their public image which is their 'brand' – i.e. there is a commercial incentive. This practice enables celebrities to control the news agenda, which can be an infringement of article 10 of the ECHR. They will encourage media attention for stories and photos that benefit them, and rush to litigation for stories that do not.**

- Are the courts making appropriate use of time limitations to injunctions and of injunctions contra mundum (i.e. injunctions which are binding on the whole world) and how are such injunctions working in practice?

**It is hard to see how Contra Mundum injunctions can be effective as a means of control when the internet quickly and easily transgresses any state boundaries when it comes to the communication industry. Complications regarding legal jurisdiction where breaches of the injunction occur also bring difficulties.**

- What can be done about the cost of obtaining a privacy injunction? Whilst individuals the subject of widespread and persistent media coverage often have the financial means to pursue injunctions, could a cheaper mechanism be created allowing those without similar financial resources access to the same legal protection?

**Privacy injunctions have become the prerogative of the rich and powerful. They have also been mis-used by big companies who seek to protect their commercial interests. The average person in the street has little recourse to this powerful restriction. Perhaps there should be a cap on how much**



**the legal profession can charge for services in this area. Also, see answer to Part 2 (Different remedies other than damages).**

- Are injunctions and appeals regarding injunctions being dealt with by the courts sufficiently quickly to minimise either (where the injunction is granted or upheld) prolonged unjustifiable distress for the individual or (where an injunction is overturned or not granted) the risk of news losing its current topical value?

**The courts usually respond with utmost speed when someone applies for an interim injunction to restrain publication, and this is to the media's disadvantage, as interim injunctions are usually passed to preserve the status quo. Hearings for an application for a full injunction are not always granted so quickly, which means that news value is often compromised. This creates a worrying trend towards prior restraint which is not helpful in encouraging freedom of speech.**

- Should steps be taken to penalise newspapers which refuse to give an undertaking not to publish private information but also make no attempt to defend an application for an injunction in respect of that information, thereby wasting the court's time?

**No. You cannot punish a 'crime' that has not yet been committed. It may be hard for the newspaper to adequately defend itself without leaking the facts of the case, so making the story available to rival publications.**

2. How best to strike the balance between privacy and freedom of expression, in particular how best to determine whether there is a public interest in material concerning people's private and family life

- Have there been and are there currently any problems with the balance struck in law between freedom of expression and the right to privacy?

**The main problem with the current privacy laws is that they have been put together jig-saw fashion. This is as a result of the effect of the Human Rights Act being interpreted by our judiciary system and in effect 'added to' on a case by case basis. There is a danger the situation is growing out of control and is now having the effect of curtailing freedom of expression, which may never have been intended.**

**The danger with this system is that precedents are often set in cases involving celebrities, the rich and the powerful – and these restrain future publication of cases involving the 'man in the street' that bear little resemblance.**

- Who should decide where the balance between freedom of expression and the right to privacy lies?

**This balance is often a subjective view and will vary with the individual circumstances. Ultimately the courts have the power to decide, which is a position we feel is the correct given the importance of the subject and that whoever decides should be genuinely impartial.**

**Also, the balance between freedom of expression and the right to privacy has to some extent been decided by the European courts, and the UK cannot go back on this unless the HRA is repealed.**

- Should Parliament enact a statutory privacy law?

**No. This would place undue restrictions on the media.**

- Should Parliament prescribe the definition of ‘public interest’ in statute, or should it be left to the courts?

**Every case needs to be judged on its merits. To impose such a prescribed definition of interest would place dangerous restrictions on the media.**

- Is the current definition of ‘public interest’ inadequate or unclear?

**The current definition is too restrictive in some ways and too lax in others.**

**Allowance might be made for ‘what is of interest to the public’. This is currently excluded. The result is that the courts use injunctions to restrict the public from seeing certain types of information, when the public has demonstrated, by the tens of thousands, that it is interested in it. This places the courts in the role of a censor.**

**A definition such as: ‘Of broad and genuine concern to right thinking members of society’ should be added to the current PCC definition – but tempered with a condition that material cannot ‘be published with malice’.**

- Should the commercial viability of the press be a public interest consideration to be balanced against an individual’s right to privacy?

**Yes, to some extent because good investigative journalism is expensive and has to be funded in some way. Newspapers need to make money to keep going, like any other business. They perform a vital public role of exposing wrong-doing and, therefore, it is ‘in the public interest’ that their commercial viability is taken into consideration.**

- Should it be the case that individuals waive some or all of their right to privacy when they become a celebrity? A politician? A sportsperson? Should it depend on the degree to which that individual uses their image or private life for popularity? For money? To get elected? Does the image the individual relies on have to relate to the information published in order for there to be a public interest in publishing it (a ‘hypocrisy’ argument)? If so, how directly?

**The relative use of a persons image is already taken into consideration by journalists when judging their right to privacy. If the person concerned is**

**relatively unknown to the public there will be relatively little interest in their lives.**

**However, celebrities and others who make their living out of being in the public eye need to accept that there will always be a level of interest in them that exceeds that given to the average person. If you don't like the heat, stay out of the kitchen.**

**People like Paul Scholes, the former Manchester United footballer, have proved very adequately that it is possible to be famous and retain a high level of personal privacy. The people who struggle with this are the ones who want things both ways – plenty of publicity on the one hand; but only on issues of their choice on the other.**

- Should any or all individuals in the public eye be considered to be 'role models' such that their private lives may be subject to enhanced public scrutiny regardless of whether or not they make public their views on morality or personal conduct (i.e. in the absence of a 'hypocrisy' argument)?

**Yes. Being a 'good' role model does necessarily mean being 'of good behaviour'. Many rock stars profit from being 'bad' role models by living lives of excess. Some sport stars benefit from being a 'notorious' role model.**

**The problem arises when someone tries to live two lives.**

**A Premiership footballer cannot claim to be a good role model on the pitch if he is involved in adultery, drug taking, gambling or excessive drinking off it.**

- Are the courts giving appropriate weight to the value of freedom of expression in 'celebrity gossip' and 'tittle-tattle'?

**No.**

- In the context of sexual conduct, should it be the case that a person's conduct in private must constitute a significant breach of the criminal law before it may be disclosed and criticised in the press?

**Criticised or reported upon?**

- Could different remedies (other than damages) play a role in encouraging an appropriate balance?

**This may well reduce the tendency of some individuals to seek redress not for the sake of their reputation, but for the sake of their bank balance. Perhaps a better way of redress would be through accord and satisfaction (an agreement between the paper and the applicant, for example involving printing a retraction and an apology). The money from any 'damages' could then go into a fund to help pay for legal help for people who cannot currently afford such injunctions.**

- Are damages a sufficient remedy for a breach of privacy? Would punitive financial penalties be an effective remedy? Would they adequately deter disproportionate breaches of privacy?

**Punitive financial penalties would have the effect of gagging press freedom, since editors would have to weigh up whether they can afford to gamble such high stakes on one story. For a local newspaper, such high damages could even close them down.**

- Should we introduce a prior notification requirement, requiring newspapers and other print media to notify an individual before information is published, thereby giving the individual time to seek an injunction if a court agrees the publication is more likely than not to be found a breach of privacy? If so, how would such a requirement function in terms of written content online eg blogs and other media?

**No. This is an unwarranted intrusion into press freedom and effectively gives the courts the power to decide what is published and what isn't. That is a decision that should rest with the editors concerned.**

- Should aggravated damages be payable if a media publisher does not give prior notification to the subject of a publication which a court finds is in breach of that individual's privacy?

**No – see last answer.**

- Is section 12 of the Human Rights Act 1998 appropriately balanced? Should the media's freedom of expression be protected in stronger terms? Or is there a disproportionate emphasis on the media's freedom of expression over the right to privacy? Has Section 12 of the Human Rights Act 1998 ensured a more favourable press environment than would be the case if Strasbourg jurisprudence and UK injunctions jurisprudence were applied in the absence of Section 12?
- Is the test in section 12 for an injunction to be granted too high a threshold? Should that test depend on the type of information about to be published? Has the court struck the right balance in applying section 12?
- Is there an anomaly requiring legislative attention between the tests for an injunction for breach of privacy and in defamation?

3. Issues relating to the enforcement of anonymity injunctions and super-injunctions, including the internet, cross-border jurisdiction within the United Kingdom, parliamentary privilege and the rule of law

- How can privacy injunctions be enforced in this age of 'new media'? Is it practical and/or desirable to prosecute 'tweeters' or bloggers? If so, for what kind of behaviour and how many people – where should or could those lines be drawn?
- Is it possible, practical and/or desirable for print media to be restrained by the law when other forms of 'new media' will cover material subject to an injunction anyway? Does the status quo of seeking to restrict press intrusion into individual's

private lives whilst the ‘new media’ users remain unchallenged represent a good compromise?

**It presents difficulties for print media, and is unfair, when they are bound by laws which new media are flouting daily, due to the problems of regulating internet communications.**

- Is enough being done to tackle ‘jigsaw’ identification by the press and ‘new media’ users? For example see Mr Justice King’s provisional view in *NEJ v. Wood* [2011] EWHC 1972 (QB) at [20] that information published in the Daily Mail breached the order of Mr Justice Blake, and the consideration by Mr Justice Tugendhat in *TSE and ELP v. News Group Newspapers* [2011] EWHC 1308 (QB) at [33]-[34] as to whether details about TSE published by The Sun breached the order of Mrs Justice Sharp.
- Are there any concerns regarding enforcement of privacy injunctions across jurisdictional borders within the UK? If so, how should those concerns be dealt with?

### **Parliamentary Privilege**

With regard to the enforcement of privacy injunctions and the breaching of them during Parliamentary proceedings, is there a case for reforming the Parliamentary Papers Act 1840 and other aspects of Parliamentary privilege? Should this be addressed by a specific Parliamentary Privilege Bill or is it desirable for this Committee to consider privilege to the extent it is relevant to injunctions?

- Should Parliament consider enforcing ‘proper’ use of Parliamentary Privilege through penalties for ‘abuse’?
- What is ‘proper’ use and what is ‘abuse’ of Parliamentary Privilege?
- Is it desirable to address the situation whereby a Member of either house breaches an injunction using Parliamentary Privilege using privacy law, or is that a situation best left entirely to Parliament to deal with? Indeed, is it possible to address the situation through privacy law or is that constitutionally impermissible? Could the current position in this respect be changed in any significant way? If so, how?

4. Issues relating to media regulation in this context, including the role of the Press Complaints Commission and the Office of Communications (OFCOM)

### **PCC**

- Do the guidelines in section 3 of the Editors’ Code of Practice correctly address the balance between the individual’s right to privacy and press freedom of expression?

**Broadly, yes. These guidelines have been in use for many years and have provided a framework without over-regulating the situation. However, thought might be given to ways in which more guidance might be provided.**

- How effective has the PCC been in dealing with bad behaviour from the press in relation to injunctions and breaches of privacy?

**Where it has been asked to deal with breaches of this kind then yes it has done a good job. In other cases breaches of this type have been dealt with by the courts and this should remain the case.**

- Does the PCC have sufficient powers to provide remedies for breaches of the Editors' Code of Practice in relation to privacy complaints?

**No. It doesn't really have the tools to do the job. It needs revamping to meet the needs of the modern world. But it has never been the case that the PCC is, or should be, responsible for dealing with publications that break the law.**

- Should the PCC be able to initiate its own investigations on behalf of someone whose privacy may have been infringed by something published in a newspaper or magazine in the UK?

**No – it should concentrate on prevention rather than cure.**

- Should the PCC have the power to consider the balance between an individual's privacy and freedom of expression prior to the publication of material – or should this power remain with the Courts?
- Is there sufficient awareness in the general public of the powers and responsibilities of the PCC in the context of privacy and injunctions?

6 October 2011

**Rachel Donoghue and Monica Bhogal, Berrymans Lace Mawer LLP—  
Written evidence**

Submission to be found under Monica Bhogal

## Robert Rogers, Clerk of the House of Commons—Written evidence

1. The freedom of speech in Parliament is a cardinal principle of the United Kingdom's constitutional arrangements.
2. The Bill of Rights 1689 is a statute of fundamental constitutional importance, as it provided the basis for a permanent settlement following the upheavals of the 17th century and is the cornerstone of the subsequent constitutional evolution of political institutions, and not only in the United Kingdom.

### **Article IX of the Bill of Rights 1689**

*“The freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament.”*

3. The parliamentary privilege of free speech did not *originate* in statute: Article IX of the Bill of Rights 1689 is ‘declaratory of a longstanding privilege of Parliament’ and provides the ‘final legal recognition of the constitutional principle’ [Erskine May 23rd edition, page 78-82 and page 95, cited in the Report of the Committee on Super-Injunctions].
4. By 1563, the Speaker’s claim for freedom of speech in debate was justified as “according to the old antient order” [D’Ewes 66, cited in Erskine May, 24th edition page 207]. It remains the custom at the commencement of every Parliament for the Speaker to inform the House of Commons that he has in its name and on its behalf by humble Petition to Her Majesty made claim to all its ancient and undoubted Rights and Privileges, particularly to freedom of speech in debate, freedom from arrest, freedom of access to Her Majesty whenever occasion may require, and that the most favourable construction should be placed upon all its proceedings; and he then tells the House that Her Majesty has been pleased to allow and confirm to it in as ample a manner as they have ever been granted or confirmed by Her Majesty or any of Her Majesty’s Royal Predecessors.
5. Article IX of the Bill of Rights preserves the freedom of speech in proceedings, which freedom, if it is to mean anything, must include a freedom to say that which would otherwise be unlawful, whether as a matter of the civil or criminal law. It is also clear that no court order can extend to Parliament so as to restrict or prohibit Parliamentary debate or proceedings. This is not constitutionally possible, as has recently been acknowledged by the Report of the Committee on Super-injunctions chaired by the Master of the Rolls. The freedom of speech of Members of the House of Commons must in principle include the freedom knowingly to act in breach of an injunction by revealing information which would otherwise be protected.
6. On the other hand, the exercise of an absolute freedom in this way risks setting court orders at naught and undermining the rule of law (as well as depriving an individual of respect for his or her private life contrary to Article 8 of the European Convention on Human Rights) and does so in a way for which there is no remedy in domestic law, there being no redress in domestic law for words spoken in Parliament.



7. The privilege of freedom of speech applies to debates and other proceedings in Parliament and is not a personal immunity conferred upon individual Members of Parliament. It also covers witnesses before committees appointed by either House, or by both in the case of Joint Committees.
8. The practice of the House is to temper the exercise of its privileges with caution. A prime example of this is the self-denying ordinance of the *sub judice* Resolution, under which the House generally refrains from interfering in matters currently before the criminal or civil courts. The existence of the Resolution is an aspect of the comity between the judiciary and the legislature, each being ‘astute to recognise their respective constitutional roles’ — as Lord Browne-Wilkinson explained in *Prebble v. Television New Zealand* [1995] 1 AC 321.
9. In case where an interim injunction has been ordered, the *sub judice* Resolution will apply if the proceedings are ‘active’. Whether the proceedings are ‘active’ will depend on whether arrangements have been made for a hearing, either for an application in the case or for trial. It is therefore possible for a civil action to go through periods when proceedings are not ‘active’. During such periods, the *sub judice* Resolution will not apply. Neither will it apply in the case of a final injunction unless, of course, an appeal is outstanding.
10. Where the *sub judice* Resolution does not apply there is the potential for conflict between the undoubted freedom of speech of a Member in proceedings and the maintenance of the rule of law. If a Member were deliberately to breach the terms of a court injunction, Parliament — or, more accurately, a single Member of Parliament — without requiring any debate or decision in the House could set at naught the judgment of the court, and thereby deprive an individual of the rights conferred on him by the judicial process. As I have noted above, such deprivation of rights would leave the individual with no redress in domestic law, even where the rights he seeks to exercise derive from the European Convention on Human Rights.
11. The subject has been considered before, notably by two select committees: the Committee of Privileges in 1978 (the Colonel B case) and the Select Committee on Procedure in 1996 (Baby Z), whose Reports are annexed to this paper.
12. In the former case, the Committee of Privileges recognised and endorsed the public interest in the freedom of the media to report fairly and accurately what is said and done in Parliament—

“They accept also that any doubts which may exist as to the extent of, or the limits upon, that freedom could affect the relationship between Parliament, the Press and the public. They are therefore most anxious that any such doubts should be removed as soon as is practicable. They recognise also, however, that other factors of public interest must be taken into account in addition to that of the freedom to report proceedings in Parliament. The public interest involved in maintaining fair trials and national security cannot be ignored. Your Committee are conscious moreover, that the greater the extension of the boundaries of freedom to report, the greater is the need for Members of the House to exercise self-discipline and for the House, if necessary, to exercise discipline over its Members. Parliament’s task, in

considering these broader questions, will be to achieve the most satisfactory balance between the conflicting aspects of the public interest and to give effect to such changes in the law or in the practice of Parliament as may be needed. [HC 667 of Session 1977-78, paragraph 14]

13. Legal advice to the Committee of Privileges in 1978 from H K Woolf (later Lord Woolf) suggested that it was probable that a Court would come to the conclusion that if an extract from Hansard were to be used with the deliberate intention of frustrating the arrangements which the Court had made to preserve a person's anonymity this was not a publication which was *bona fide* and without malice, for the purposes of section 3 of the Parliamentary Papers Act 1840. There would be the necessary ulterior or wrong motive to destroy the statutory protection [HC 667 of Session 1977-78, page xi]. While this proposition, to the best of my knowledge, has not been tested in court, the Joint Committee may wish to consider whether, even it were desirable to deter the media from using parliamentary reports to breach court orders, it would be proportionate to restrict the freedom of speech in those proceedings themselves. The remedy may lie elsewhere than in Parliament applying new restraints to its freedom of speech.
14. In the Baby Z case, the Select Committee on Procedure concluded in May 1996:  
If there were strong evidence to suggest that breaches of court orders as a result of proceedings of the House represented a serious challenge to the due process of law, we would not hesitate to recommend a further limitation on the rights of free speech enjoyed by Members, whatever the practical difficulties.[...] We do not, however, consider it necessary to take action as a result of one specific case, given the importance the House rightly attaches to protecting the right of Parliament to freedom of speech.[...] We urge Members to exercise the greatest care in avoiding breaches of court orders [Second Report from the Select Committee on Procedure, HC 252 of 1995-96, paragraph 16].
15. The Joint Committee on Parliamentary Privilege in 1998-99 concurred with this view [Report from the Joint Committee of Parliamentary Privilege, HL 43/ HC 214 of 1998-99, para 210]. The Joint Committee referred to the well-known comment by the Rt Hon Enoch Powell on the use and abuse of privilege—  
“a privilege which cannot be abused is no privilege, for that which constitutes abuse is a matter of opinion and it is part of the privilege of this House and of individual Members to be able to say in this place not only what they could not say outside without risk of process but to be able to say that to which grave objection is taken by every other hon. Member. Unless an hon. Member could do that, or if it were possible for his doing of it somehow to be undone, we would have lost our power to serve those who sent us here.”
16. Mr Powell had continued—  
“It so happens that, though I did not catch the actual words of the hon. Member for Barking on the relevant occasion, I took some objection, as a matter of taste, to her decision to utilise what I regard as her undoubted privilege. I am not on the matter of *sub judice* now; I am on the matter of privilege. Speaking loosely, I might have said that the hon. Lady was abusing

her privilege. But there is no real distinction in this context between using and abusing privilege, or, if there is, it is a subjective decision—a matter of taste and of no more than of taste.” [HC Deb 2 May 1978 vol 949 col 43-44]

- Privilege certainly applies in the sense that a Member could not be proceeded against in the courts for anything said in parliamentary proceedings. However, the Powell argument does not mean that any Member has complete licence to do as he or she wishes. A Member must act within the House’s own rules, and the House itself retains the right to take action in respect of a Member’s conduct.
17. The Select Committee on Procedure suggested that the onus lies with Members, individually and collectively, to maintain high standards of conduct: parliamentary proceedings should not be entered into “unadvisedly, lightly or wantonly”. [Second Report from the Select Committee on Procedure, HC 252 of 1995-96, paragraph 15]
  18. The Joint Committee may consider the possibility of action to seek to prevent any conflict between the rule of law and the freedom of speech in Parliament.
  19. In my view, it would be a grave error, and contrary to established constitutional principle, for Parliament to legislate to limit the effect of the Bill of Rights in order to allow the courts to penalise Members or witnesses or others taking part in proceedings who had breached court injunctions in proceedings in Parliament. To do so would be to move the present boundaries between the judiciary and the legislature and lead to questioning by the former of the latter’s proceedings.
  20. On the other hand, I recognise that the existing situation may not easily be sustained. Public opinion might react strongly to anything other than the rarest breaches of court orders protecting individuals’ court-sanctioned rights to privacy or anonymity, through the unfettered reporting of what has been said by a single Member of Parliament acting entirely according to his or her own conscience. It would make more likely a challenge to the UK’s constitutional arrangements before the European Court of Human Rights.
  21. A possible way forward, which would preserve the essential comity between the legislature and the judiciary, would be for each House to pass a self-denying ordinance, on the pattern of the Resolution on matters *sub judice*. This would be a flexible and proportionate approach, allowing the rule to be modified in the light of experience or even waived on occasion, though only at great need, as judged by the Speaker.
  22. The Joint Committee may in that event wish to prepare for each House a Motion for a Resolution stating the determination of each House to preserve Parliament’s freedom of speech, uphold the rule of law and to respect the rulings of the courts in such matters, save either for the purpose of changing the law or where the Chair had given prior authority for the rule to be set aside in order to assist in the remedying of an injustice in a particular instance.
  23. If both Houses of Parliament were to express their determination to respect court orders in the way I have suggested, it would be matter for each House through its

own self-regulating processes to take any necessary disciplinary action where a Member chose deliberately to break the rule.

24. The House of Commons does not operate in a vacuum: on the contrary, its proceedings are broadcast “live” and published as promptly as possible on the internet, followed by the printed copies of Hansard and the House’s business papers by the following morning. The Parliamentary Papers Act 1840 was passed to establish that no civil or criminal legal proceedings could be taken in respect of reports published by Order of the House. This absolute privilege conferred by statute on all publications made by Parliament is complemented by the privilege under section 3 of the Parliamentary Papers Act (referred to above in the context of HK Woolf’s advice to the Committee of Privileges) extended to *bona fide* publication without malice of extracts or abstracts from Hansard or other Parliamentary papers.
25. This privilege is not derived from the Bill of Rights. Since the protection of section 3 applies to all proceedings, whether criminal or civil, it is more extensive than the qualified privilege under the law of defamation currently afforded by Part 1 of Schedule 1 to the Defamation Act 1996 for fair and accurate reports of proceedings in legislatures anywhere in the world.
26. The protection afforded to the press in its fair and accurate reporting of proceedings in Parliament raises the risk of information flowing in the other direction: in effect, the “laundering” of secret details, withheld names or dodgy allegations by encouraging Members to plant them in questions, early day motions or speeches in the House.
27. The Joint Committee on Parliamentary Privilege recommended in 1999 that the Parliamentary Papers Act 1840 should be replaced by a modern statute [Report from the Joint Committee of Parliamentary Privilege, HL 43/ HC 214 of 1998-99, paragraphs 376 & 377]. The orotund Victorian style of its drafting (see Annex) certainly contrasts with the terseness employed by our contemporary parliamentary counsel. The Joint Committee on Privacy and Injunctions may wish to consider whether it is time to legislate on this single aspect of press freedom, or to wait for what will emerge in a year or two from Lord Justice Leveson’s wide-ranging inquiry. In my view, it is essential that any recasting of the 1840 Act continues to make protection conditional upon acting with good faith and without malice.
28. Whatever the timing of such legislation — should it be desired — I would not recommend brigading it with any wider legislation on parliamentary privilege, about which I have considerable concerns. In any event, the apparently most pressing need for the latter has been conclusively obviated by the UK Supreme Court judgement in *R. v Chaytor* [2010 UKSC 52].

**November 2011**

Annexes:

*Sub Judice* Resolution

Second Report from the Committee of Privileges, Session 1977-78 (HC 667)

Second Report from the Select Committee on Procedure, Session 1995-96 (HC 252)

*Stockdale v. Hansard*: the background to the Parliamentary Papers Act 1840

Parliamentary Papers Act 1840

*MATTERS SUB JUDICE*

That, subject to the discretion of the Speaker, and to the right of the House to legislate on any matter or to discuss any delegated legislation, the House in all its proceedings (including proceedings of committees of the House) shall apply the following rules on matters sub judice:

1. Cases in which proceedings are active in United Kingdom courts shall not be referred to in any motion, debate or question.

(a)(i) Criminal proceedings are active when a charge has been made or a summons to appear has been issued, or, in Scotland, a warrant to cite has been granted.

(ii) Criminal proceedings cease to be active when they are concluded by verdict and sentence or discontinuance, or, in cases dealt with by courts martial, after the conclusion of the mandatory post-trial review.

(b)(i) Civil proceedings are active when arrangements for the hearing, such as setting down a case for trial, have been made, until the proceedings are ended by judgment or discontinuance.

(ii) Any application made in or for the purposes of any civil proceedings shall be treated as a distinct proceeding.

(c) Appellate proceedings, whether criminal or civil, are active from the time when they are commenced by application for leave to appeal or by notice of appeal until ended by judgment or discontinuance.

But where a ministerial decision is in question, or in the opinion of the Speaker a case concerns issues of national importance such as the economy, public order or the essential services, reference to the issues or the case may be made in motions, debates or questions.

2. Specific matters which the House has expressly referred to any judicial body for decision and report shall not be referred to in any motion, debate or question, from the time when the Resolution of the House is passed, until the report is laid before the House.

3. For the purposes of this Resolution—

(a) Matters before Coroners Courts or Fatal Accident Inquiries shall be treated as matters within paragraph 1(a);

(b) 'Question' includes a supplementary question.

SECOND REPORT FROM THE COMMITTEE OF PRIVILEGES  
SESSION 1977-78 (HC 667)

*The Committee of Privileges, to whom was referred the matter of publication of the proceedings of the House, other than by order of the House, in so far as the Privileges of this House are concerned, and the matter of the application of the sub judice rule during Business Questions on Thursday 20 April, have agreed to the following Report:-*

1. During proceedings at Tottenham Magistrates' Court in November 1977 in connection with charges under the Official Secrets Acts, a witness who was an officer of the security services was allowed, under a ruling of the Court, to give evidence anonymously, as Colonel "B". The Colonel's name was subsequently published in December by the *Leveller* magazine and by others, who were then charged in March 1978 with contempt of court. The hearing of the case was set down for 24 April, but judgement was not given until 19 May. Meanwhile, on 20 April the officer's name was disclosed in the House, during questions following the Business statement, by the honourable Members for Barking, Lewisham West, Ormskirk, and Bristol North-West. The name was thereafter published in the Official Report, in certain newspaper reports on the following day and in that day's broadcast of the House's proceedings.

2. During the evening of 20 April, the Director of Public Prosecutions issued the following statement as a result of enquiries by the Press: "The legality of revealing the identity of Colonel B, a witness in the prosecution of Aubrey, Berry and Campbell, is the subject matter of pending proceedings for contempt of court before the Divisional Court of the High Court of Justice. It is not accepted, despite the naming of the colonel on the floor of the House of Commons, that the publication of his name would not be a contempt of court, even if it was part of a report of proceedings in the House."

3. The Director of Public Prosecutions' action was raised at 10 p.m. in the House, and on a submission by the Rt Hon Member for Crosby, Mr Speaker ruled, on the morning of 21 April, that the issuing of the statement was not a matter which he considered should have precedence over the Orders' of the day. Mr Speaker further informed the House on 24 April that he considered that, in view of the fact that proceedings for contempt of Court were pending on 20 April, the identification of Colonel "B" by the four Members had been an infringement of the House's *sub judice* rule. A number of early day motions were simultaneously tabled on various aspects of the situation, namely the action of the Director of Public Prosecutions, the conduct of the Members who identified Colonel "B", and Mr Speaker's ruling of 21 April.

4. On 2 May, the House agreed to a Government motion referring the whole matter to Your Committee. In the course of his speech, the Leader of the House expressed the opinion 'that the motion was wide enough to enable Your Committee to consider all relevant questions, including those raised in the early day motions.

5. From these facts a number of questions arise, some of which fall outside the area of investigation which is normally referred to Your Committee.

*Statement by the Director of Public Prosecutions*

6. However, Your Committee consider that there is one matter which can and should, be disposed of as soon as possible. That is whether the action of the Director of Public

Prosecutions in issuing his statement on 20 April 1978 amounted to a contempt of the House.

7. In Your Committee's view the terms of the statement, issued on the Director's instructions require to be examined with care. Its first sentence was no more than a factual statement, which drew attention to the undisputed fact that the legality of revealing the identity of Colonel "B" was already the subject matter of proceedings then pending in the courts. No complaint could be made of this. Its second sentence, couched in careful phraseology, reserved the Director's position as to whether the further publication of Colonel "B"'s name would amount to a contempt of court even if its publication formed part of a report of proceedings in the House. It is plain from the context and circumstances that the Director was not referring, and could not properly have been understood to be referring, to a report in Hansard (which would be the subject of absolute privilege from civil or criminal proceedings by virtue of section 1 of the Parliamentary Papers Act 1840) but to reports in the Press and by the broadcasting authorities.

8. Upon this second sentence two issues of law arise. The first is whether, other matters apart, the publication of Colonel "B"'s name by the Press and in broadcasts amounted, or would have amounted, to a contempt of court. The Queen's Bench Divisional Court, in the case of *Attorney General v. Peace News and others*, has held that such publication prior to 20 April 1978 did amount to a contempt of court. But leave to appeal to the House of Lords has been granted and the issue is again sub judice. Your Committee do not comment further upon that issue.

9. The second issue is whether, assuming that the Divisional Court's view was right, publication of the name would, by reason, and solely by reason, of its being part of a Press or broadcast report of what happened in the House, be protected by privilege from condemnation as a contempt of court. Your Committee do not find it necessary to reach a final view on this question. They note, however, that when in 1840 Parliament addressed itself to the problem created by *Stockdale v. Hansard*, it passed legislation according absolute protection to the publishers of Parliamentary papers, including the official reporters of its proceedings in Hansard, but only qualified privilege to anyone who published extracts or abstracts from Hansard or other Parliamentary papers. The contention that nonetheless absolute privilege applies to Press reports of speeches made or events occurring in Parliament seems to Your Committee to be plainly inconsistent with Parliament's intentions in passing the 1840 Act. Moreover, whilst the 1840 Act applied the privilege to both civil and criminal proceedings, there are no common law authorities which establish the like privilege for reports of speeches made or events occurring in Parliament in respect of criminal proceedings. Your Committee therefore think it improbable that the common law privilege protecting Press and broadcast reports of proceedings in Parliament extends to criminal proceedings, including proceedings for contempt of court. They note that the memoranda submitted by representatives of the media do not claim that it does. Whether it should is a different question.

10. But even if Your Committee's tentative view that it does not extend so far is ultimately held to be mistaken, it is plain to Your Committee that the Director was fully entitled to reserve his position by means of the careful phraseology which he used. That phraseology, addressed to the media which were seeking guidance, was intended as a warning to them that they should not regard it as established law that reports of things said in Parliament were *ipso facto* protected by privilege against proceedings for contempt of court.



11. Your Committee have to consider whether it would be right to construe the Director's statement as an improper obstruction, or attempt at or threat of obstruction, such as would be likely to cause substantial interference with the performance by Members of their functions. In Your Committee's view, it is not reasonable so to construe it and accordingly Your Committee are satisfied that the Director's statement was not a contempt of the House.

12. Your Committee have had regard to the circumstances in which the Director's statement was made, and in particular to the requests for immediate guidance which the Press were making to him, to the care which he took to obtain speedy legal advice before giving such guidance, and to the careful wording of the statement. It is Your Committee's opinion that, even if they had taken the view that the Director's statement was capable of amounting to a contempt of the House, this could not possibly be a proper case for the exercise of the penal jurisdiction of the House.

13. Your Committee regret that it has not been possible, in the time available, to report on the remainder of the matters referred to them by the House. The four honourable Members principally concerned in the events in the House on 20 April raised with Your Committee during the last weeks of July various preliminary procedural points which made it impossible to reach conclusions about their conduct. Moreover the issues before Your Committee involved far-reaching consideration of the law as it now is, or as it should be adapted for the future.

14. The broader questions concerning the law were the subject matter of many of the speeches during the debate in the House (Official Report, 2 May 1978, cols. 36-101) and of most of the memoranda which have been submitted to Your Committee during recent weeks by bodies representative of the media and others. Those speeches and memoranda require detailed consideration to enable Your Committee to reach conclusions about the existing state of the law, having regard to the differing contentions which have been advanced about it. Your Committee recognise and endorse the public interest in the freedom of the media to report fairly and accurately what is said and done in Parliament. They accept also that any doubts which may exist as to the extent of, or the limits upon, that freedom could affect the relationship between Parliament, the Press and the public. They are therefore most anxious that any such doubts should be removed as soon as is practicable. They recognise also, however, that other factors of public interest must be taken into account in addition to that of the freedom to report proceedings in Parliament. The public interest involved in maintaining fair trials and national security cannot be ignored. Your Committee are conscious moreover, that the greater the extension of the boundaries of freedom to report, the greater is the need for Members of the House to exercise self-discipline and for the House, if necessary, to exercise discipline over its Members. Parliament's task, in considering these broader questions, will be to achieve the most satisfactory balance between the conflicting aspects of the public interest and to give effect to such changes in the law or in the practice of Parliament as may be needed.

15. For these reasons, Your Committee recommend that the remaining matters referred to them should be considered by a Select Committee in the next Session of Parliament.

## **SECOND REPORT FROM THE SELECT COMMITTEE ON PROCEDURE, Session 1995-96 (HC 252)**

### REFERENCE TO MATTERS SUBJECT TO INJUNCTION

*The Procedure Committee has agreed to the following Report:*

#### **Origin of inquiry**

1. On 30th January of this year, the Speaker told the House in response to a point of order that she was referring to this Committee the wider issues raised by an Early Day Motion, the terms of which breached a court order prohibiting identification of the parties in a particular case concerning a child referred to by the courts as Child Z. In a letter to the Chairman of the Committee of the same date, the Speaker asked us to inquire into and report on “whether it would be desirable or practicable to establish a rule, under which reference to matters subject to injunction by the courts was prohibited in debate (including Questions) or on the Notice Paper”. Our inquiry has from the outset been concerned not with the particular case which gave rise to the Speaker’s reference but with the general issues arising, as set out in the Speaker’s letter. There has been no suggestion that the motion offended against any rule of the House.

2. We heard oral evidence on this subject on 21st February from the Master of the Rolls, Rt. Hon. Sir Thomas Bingham, and from the Official Solicitor and his deputy. We have also received a memorandum from the Clerk of the House.

#### **Sub judice rule**

3. Article IX of the Bill of Rights states that “the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament”. This means that parliamentary proceedings enjoy absolute privilege — in other words, they cannot be used as the basis for any criminal or civil prosecution. The House has always jealously guarded this privilege, and rightly, so. It has however in one important respect chosen to restrain itself in the exercise of this freedom, by resolving not to refer to matters awaiting or under adjudication in the courts. Until 1963 this self-imposed limitation, known as the *sub judice* rule, was a matter of practice, set out in successive editions of Erskine May. Following the first recorded application of the prohibition to a civil action in December 1961, the Procedure Committee considered the rule and recommended that it be incorporated in a Resolution. This was agreed by the House on 23rd July 1963. In 1972 the Procedure Committee considered the operation of the rule, in particular as it related to questions awaiting adjudication in the National Industrial Relations Court. As a result of the Committee’s recommendations, the House agreed to a further Resolution on 28th June 1972. It has become apparent to us in the course of this inquiry that the *sub judice* Resolutions suffer from inaccessibility, as, do, other significant Resolutions of the House. We recommend that consideration be given by the authorities of the House to the publication of Resolutions of this nature in some accessible form, perhaps at the back of the volume of Standing Orders.

4. The rule is by no means absolute. It is “subject always to the discretion of the Chair and to the right of the House to legislate on any matter”. In civil cases the rule does not apply until the case has been set down for trial or otherwise brought before the court. It does not apply to cases relating to a Ministerial decision which cannot be challenged in court except on grounds of misdirection or bad faith, or which concern issues of national importance,

unless it appears to the Chair that there is a real and substantial danger of prejudice to the outcome of the case. Once a final verdict is reached, the *sub judice* rule explicitly ceases to apply.

5. We set this out to illustrate how the House has in the past approached the question of placing any limit on the exercise of free speech in parliamentary proceedings. This has been done cautiously, gradually, and leaving much to the discretion of the Chair. We see no reason to depart from that approach in this matter.

### **Previous consideration of the issue**

6. On 20th April 1978, in the course of oral supplementary questions following the weekly business statement, several Members revealed the name of *Colonel B*, a witness from the security services at a recent trial, whose identity had been protected by order of the court. The Privileges Committee looked into the case, primarily at the statement put out the same evening by the Director of Public Prosecutions to the effect that publication of the name in parliamentary proceedings did not necessarily mean that its re-publication by the press would not be a contempt of court. Attempts in 1987 to show a film in the precincts of Parliament which the courts had ordered not to be shown—the *Zircon* affair—and the House's consideration of the *Spycatcher* affair in 1986-87 also gave rise to some incidental consideration of issues related to the application of court orders to parliamentary proceedings; but in none of these cases was the question now under consideration considered in any detail.

### **Criminal law**

7. The possibility that publication of matter in parliamentary proceedings, whether the identity of an individual or other matters, would be in breach of the criminal law if committed outside the Chamber was considered in general terms in 1938, in the Duncan Sandys case. The Member concerned had forwarded to a Minister a draft parliamentary question based on information protected by the Official Secrets Act, and was warned by the Attorney General that he might face prosecution. The subsequent Report of the Select Committee on the Official Secrets Act left some uncertainty as to whether circumstances could arise in which a Member could be prosecuted under the criminal law for a parliamentary proceeding: but it is generally accepted that no court would uphold such a charge once it was established that the action complained of was indeed a parliamentary proceeding. This is of relevance to our inquiry, since the publication of the identity of children protected by an order under section 39 of the Children and Young Persons Act 1933 or of alleged rape victims would be a criminal offence if done outside Parliament. Breach of a similar order made under section 12 of the Administration of Justice Act 1960 would however be a contempt. If reference in parliamentary proceedings to matters subject to injunction was to be prohibited, consideration would also have to be given to extending any rule to cover publication of similar matters prohibited by the criminal law.

### **Nature of orders**

8. The case which gave rise to our inquiry concerned the publication in an Early Day Motion of the name of a child whose identity was protected by a court order. Evidence submitted by the legal adviser to a television company revealed that another Early Day Motion submitted earlier this Session may also have, inadvertently or not, breached a court order of a similar nature. Beyond these two cases, we have sought to establish what other classes of order might conceivably be of interest to Members and which were capable of being breached by parliamentary proceedings. The principal class of order which could be

breached by a parliamentary proceeding is that prohibiting publicity. The Master of the Rolls told us that “restraints on any form of publication ... are few and far between”. The identity of parties in a case, particularly but not exclusively those involving children, is one major category. Another consists of publication of matter which a court has ordered not to be published—for example, because to do so would be a breach of the general duty of confidence or because it might be an infringement of intellectual property rights. The Master of the Rolls referred to orders on price-sensitive information, trade secrets or alleged defects in equipment. The Official Solicitor offered the example of a potentially controversial technique in genetic engineering. **It is apparent that there are several categories of court order in addition to those relating to the identity of children in legal proceedings which might be expected to be of some general interest.**

### **Case for a new rule**

9. The case for the House taking action to prevent proceedings breaching court orders was put to us by the Master of the Rolls—in effect the President of the Court of Appeal, Civil Division—and by the Official Solicitor, who acts for otherwise unrepresented minors and others in many of the cases where orders restraining identification of parties are sought and made. The fundamental problem is that Parliament—or more accurately a single Member of Parliament without requiring any debate or decision in the House—can set at naught the judgement of the Court, arrived at with great care, and thereby render ineffective the remedy afforded. As the Master of the Rolls emphasised in relation to orders under section 39 of the Children and Young Persons Act 1933, “...the courts do not make these orders lightly. They certainly do not make them frequently and they do not make them for any purpose other than that which they assert, namely for the benefit of the child..”. Publication of matters subject to such orders goes far beyond criticism of a particular judgement or taking issue with the operation of the judicial process; it effectively interferes with the administration of justice. While recognising the importance of the principle that Parliament is supreme, those seeking a rule prohibiting reference to such matters argue that it is surely not unreasonable for Parliament to pay due regard to a decision of the High Court arrived at with considerable care and intended to provide a very specific form of protection: and that such protection, in law which is after all laid down by Parliament should not be set aside without the greatest care and due attention.

### **Case against a new rule**

10. Against that must be set the fact that the sort of proceeding complained of is extremely rare. The case which gave rise to the reference was almost the only one known to the authorities of the House. The memorandum from the Clerk of the House observed that, although there might have been revelations, deliberate or otherwise, among the thousands of motions and tens of thousands of questions tabled annually of matter publication of which had been banned by injunction, no such case had been drawn to his attention or to that of the Chair. Compared with the number of occasions on which the *sub judice* rule was invoked or its possible application considered, he told us that “the issue of injunctions banning publications of names or more general information almost never arises”. While accepting the point made by the Official Solicitor that having happened once it might happen again, we have no reason to foresee any greater incidence in future. The House should beware of imposing restrictions on its much-valued freedoms on the basis of one or two cases.

### **Remedy in the courts**

11. It can also be argued that the remedy for any ill-effects of breaches of the sort of court orders under examination lies in the courts. It is accepted that the damage is done, not so much by the publication of prohibited matter in written or oral parliamentary proceedings themselves, but in their re-publication and dissemination outside Parliament. Although proceedings in the House are immune to prosecution, the same may not be true of other publication. In 1975 the Privileges Committee printed as an annex to their Report on the Colonel B case a Counsel's opinion by the then Mr Woolf QC (now Lord Woolf). He drew attention to the likelihood that the same limitations which applied to the protection given to reporting of court proceedings would be extended to parliamentary proceedings, and that circumstances could arise where the reporting of parliamentary proceedings could give rise to proceedings for contempt. He went on to suggest that "It is probable that a court would come to the conclusion that if an extract from Hansard were to be used with the deliberate intention of frustrating the arrangements which the court had made to preserve a witness's anonymity, particularly when these arrangements had been made in the Interests of national security, this was not a publication which was bona fide and without malice, for the purposes of section 3 [of the Parliamentary Papers Act 1840]". It is clear that, by extension, a court might come to a similar view on publication of a child's name which the court had ordered be not published. In other words, a prosecution for contempt could be brought against those publishing parliamentary proceedings which breached a court order. Those concerned might not wish to do so since a prosecution could simply exacerbate the damage done by earlier publicity. That does not alter the point of principle, that the remedy for the damage complained of may lie elsewhere than in Parliament applying new restraints to its freedom of speech.

### **Practical considerations**

12. For the House of Commons, there would also be severe if not insuperable practical problems in enforcing the sort of prohibition envisaged, particularly as regards oral proceedings. The main practical problem is the absence of any central source of information on court orders in force. The Official Solicitor offered to ensure that the parties in cases where publicity about a child was to be restrained would be advised to send a copy of any such order to the House authorities, and to send any such order himself where he was a party to proceedings. As regarded other divisions of the High Court, he suggested that the editor of Supreme Court Practice be invited to insert an appropriate note in that publication asking for copies of orders restraining publication to be so forwarded. He also pointed out that newspapers made some effort to keep track of such orders in order to avoid breaches. The Press Association apparently used to circulate such information but are now reluctant to do so". The Official Solicitor estimated" that there were only around "the low tens" of restraining orders current in the Family Division, and subsequently confirmed that there were 28 such orders. There are an unknown number of orders in the other divisions, as well as orders on publicity made ancillary to other orders. Many will continue in force for some years. While similar difficulties subsist in the enforcement of the *sub judice* rule, the potential scope of matters which might be covered by a similar rule on injunctions would make it more difficult for the Chair or the Clerks to "scent" a potential breach.

13. Experience with the Sub judice rule also suggests that it can take a long time in parliamentary terms for the exact legal position in a particular case to be established. Given that many Early Day Motions and Questions are handed in after normal office hours, it proves impossible to procure even provisional advice from the courts. As the Clerk of the House told us in his memorandum, any new rule would give rise to difficulty when a matter

arose late at night or in the course of debate. Although many Members may in some circumstances be willing to accept the delay of a day in tabling a motion or question, they may prefer to use other means of bringing the matter before the House in oral proceedings. The difficulties in enforcing such a rule in written proceedings are multiplied in proceedings on the floor, since it is only after the Member has spoken that any breach can be apparent. Even if a breach is foreshadowed by the subject matter of a speech or intervention, there is great difficulty in stopping a determined Member. If, for example, the Speaker had sought to prevent the reevaluation of the identity of Colonel B on the floor of the House in 1978, it is by no means clear how he could have done so. A rule could therefore be partially enforced, in particular against gross breaches of orders in written proceedings, but only imperfectly in oral proceedings and in respect of inadvertent breaches.

### **Form and content of a new rule**

14. Were the House to wish to introduce such a rule, it should be in the form of a Resolution along the lines of the two *sub judice* Resolutions. We believe that it should cover injunctions generally rather than those applying to a particular category, such as those restraining the publication of the identity of children. The exercise of the Speaker's discretion could ensure that the rule be waived in cases where the public interest so demanded, such as *Spycatcher*. We also believe that it should cover at least some matters the publication of which would be a crime, as we set out in paragraph 7. We set out a possible text as an Annex.

### **Conclusion**

15. Committees of this House have been obliged to conclude more than one report over the years with the observation that privilege carries with it responsibilities as well as rights, and that the onus lies with Members, individually and collectively, to maintain high standards of conduct. Parliamentary proceedings should not be entered into "unadvisedly, lightly or wantonly". The Clerk of the House drew to our attention the rule in relation to parliamentary questions to the effect that the names of individuals should not be introduced "invidiously". We are aware that many Members already follow the practice of bringing particular cases to the attention of the House in Questions and Motions without identifying those concerned; we commend this practice to the House.

16. If there were strong evidence to suggest that breaches of court orders as a result of proceedings of the House represented a serious challenge to the due process of law, we would not hesitate to recommend a further limitation on the rights of free speech enjoyed by Members, whatever the practical difficulties. We consider there is much judicial weight behind the suggestion of the Master of the Rolls that, where an order has been made restraining publication of a name or other information, Parliament would want to support the High Court. We do not however consider it necessary to take action as a result of one specific case, given the importance the House rightly attaches to protecting the right of Parliament to freedom of speech. We urge Members to exercise the greatest care in avoiding breaches of court orders. Should there be a number of instances of such breaches, the House would be well advised to adopt a Resolution along the lines we set out.

**ANNEX to Report from Procedure Committee: POSSIBLE TEXT OF A RESOLUTION**

*That, subject always to the discretion of the Chair and to the right of the House to legislate on any matter, no reference should be made in any motion, in debate or in a question or supplementary question to a Minister to any matter (a) the publication of which is subject to restraint by order of a court of law in the United Kingdom, or (b) is of a class of information the publication of which is expressly prohibited by the criminal law.*

### **Stockdale v. Hansard: the background to the Parliamentary Papers Act 1840\***

1. The Parliamentary Papers Act 1840 was passed to bring to an end the long-running legal saga of *Stockdale v. Hansard*. John Joseph Stockdale was the publisher of, among other things, *The Generative System* by John Robertson. A copy of the book was found in Newgate Prison by the Revd Whitworth Russell, a prisons inspector, who described it as ‘a book of a most disgusting nature, and the plates are obscene and indecent in the extreme’.<sup>56</sup> The Report was made to the Home Secretary who laid it before the House of Commons under the Prisons Act 1835. The House ordered it to be printed and put on sale to the general public. It is worth noting that these were the early days of Parliamentary publications: papers had only been sold to the general public since 1835, following the Report of the Printed Papers Committee.<sup>57</sup> Thus there had been little previous opportunity for the question of privilege and Parliamentary papers to be addressed.
2. Stockdale sued Luke Hansard, the House’s publisher, for libel. Hansard was represented by the Attorney General, who argued that the publication, having been ordered to be printed by the House of Commons, was protected by Parliamentary privilege. Hansard won the case on a defence of justification—after some confusion in which the jury awarded token damages on the ground that they agreed the book was indecent and obscene, but not disgusting—but the Judge, Lord Denman, found for the plaintiff on the constitutional point. He accepted that privilege applied to ‘what the House may order to be printed for the use of its Members’ but not to material which was published and sold ‘indiscriminately’:

‘I am not aware of the existence in this country of any body whatever that can privilege any servant of theirs to publish libels of any individual. Whether arrangements may be made between the House of Commons and any publisher in their employ, I am of the opinion, that the publisher who publishes that in his public shop, and especially for money, which may be injurious, and possibly ruinous to any one of the King’s subjects, must answer in a court of justice to that subject if he challenge him for a libel, and I wish to say so emphatically and distinctly, because I think that if, upon the first opportunity that arose in a court of justice for questioning that point, it were left unsatisfactorily explained, the judge who sat there might become an accomplice in the destruction of the liberties of the country, and expose every individual who lives in it to a tyranny that no man ought to submit to.’

3. In response to Lord Denman’s comments, the House passed a Resolution, ‘That the power of publishing such of its reports, votes, and proceedings as it shall deem necessary, or conducive to the public interests, is an essential incident to the constitutional functions of Parliament, more especially of this House, as the representative portion of it.’ It further resolved that it was for the House, not the courts, to determine the scope

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<sup>56</sup> There is some doubt about the nature of the book. The City Aldermen who were responsible for the Prison took issue with Russell and argued that the plates were ‘purely anatomical, calculated only to attract the attention of persons connected with surgical science’. They went on to offer the observation that the prisoner to whom the book belonged ‘had been a captain of a whaler, and had devoted himself to such studies’. The book was described by a modern writer as looking like a *bona fide* medical book, but the half-dozen additional plates included by Stockdale appear ‘as though they were added to appeal to the non-scientific reader’. See Judge Eric Stockdale, ‘The Unnecessary Crisis: the Background to the Parliamentary Papers Act 1840’, *Public Law*, 1990, p. 30.

<sup>57</sup> *Erskine May*, 23rd Edition, p. 266.



of its privileges and that any attempt to institute a suit to call its privileges into question, or any attempt by a court to decide on a matter of privilege in a way which was inconsistent with the determination of either House was, in itself, a breach of privilege.

4. Stockdale brought another action against Hansard, which was tried solely on the privilege issue, since the Attorney General directed Hansard not to enter an alternative plea of justification. Notwithstanding the earlier Resolutions of the House, Stockdale won the case; the court ruled that it, not the House of Commons, had jurisdiction regarding Parliamentary privilege. Another select committee was appointed but the House ultimately decided to pay the damages and costs. It was decided that any future action should not be defended in court but that anyone breaching the earlier Resolutions of the House would be pursued by the House itself for contempt. Stockdale sued Hansard for a third time, in respect of another copy of the Report. Judgement was entered in default and the Sheriffs of Middlesex seized Hansard's presses to raise the £600 damages.<sup>58</sup>
5. The House committed Stockdale to Newgate for contempt, he having breached the Resolution of May 1837. He was followed by the Sheriffs of Middlesex, who refused to return the proceeds of the sale of the presses to Hansard. Stockdale began two more actions against Hansard, for which his Attorney and two of his clerks were also locked up by the House.
6. It was at this point that the Act was passed, in order to bring the Stockdale debacle to an end and enact in law the House's own interpretation of its privileges. A few points about *Stockdale v. Hansard* are worth noting:
  - the case was brought against the House's publisher, not the author of the publication in question;
  - it was the first time an action had been brought in relation to a Parliamentary publication which was on sale to the general public: there are no earlier or (given the passage of the Act) later judgements which address the status of these documents;
  - it was the clear view of the House and the Government at the time that the privilege of free speech did extend to publications of this kind,<sup>59</sup> but the courts, largely in the person of Lord Denman, took a different view; and
  - the case involved an Act paper, produced by a body outside Parliament but published by Order of the House—precisely the category of paper from which the Joint Committee proposes privilege should be removed.

[\* from a 2005 working party report on *parliamentary papers and the Parliamentary Papers Act 1840*]

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<sup>58</sup> Erskine May describes the Commons' predicament: 'The position of the Commons was surrounded with difficulties. Believing the judgment of the court to be erroneous, they might have sought its reversal by a writ of error. But such a course was not compatible with their dignity. It was not the conduct of their officer that was impugned: but their own authority, which they had solemnly asserted. In pursuing a writ of error, they might be obliged, in the last resort, to seek justice from the House of Lords,—a tribunal of equal but not superior, authority in matters of privilege; and having already pronounced their own judgment, such an appeal would be derogatory to their proper position in the state. They were equally unwilling to precipitate a conflict with the courts. Their resolutions had been set at defiance; yet the damages and costs were directed to be paid! Their forbearance was not without humiliation'. Sir Thomas Erskine May, *The Constitutional History of England Since the Accession of George the Third 1760–1860*, Seventh Edition (London, 1882), Volume II, Chapter VII.

<sup>59</sup> The Attorney General argued in court that the Commons, in publishing the report, were exercising 'a privilege which they have enjoyed from ancient times—long before the Revolution—a privilege which is recognised by the Bill of Rights, and which since the Revolution has never been questioned by anyone but Mr Stockdale'.

## Parliamentary Papers Act 1840

AN ACT to give summary Protection to persons employed in the Publication of Parliamentary Papers. [14th April 1840.]

[1.] It shall and may be lawful for any person or persons who now is or are, or hereafter shall be, a defendant or defendants in any civil or criminal proceeding commenced or prosecuted in any matter soever, for or on account or in respect of the publication of any such report, paper, votes, or proceedings by such person or persons, or by his, her, or their servant or servants, by or under the authority of either House of Parliament, to bring before the court in which such proceeding shall have been or shall be so commenced or prosecuted, or before any judge of the same (if one of the superior courts at the Royal Courts of Justice), first giving twenty-four hours' notice of his intention so to do to the prosecutor or plaintiff in such proceeding, a certificate under the hand of the lord high chancellor of Great Britain, or the lord keeper of the great seal, or of the speaker of the House of Lords, for the time being, or of the clerk of the Parliaments, or of the speaker of the House of Commons, or of the clerk of the same house, stating that the report, paper, votes, or proceedings, as the case may be, in respect whereof such civil or criminal proceeding shall have been commenced or prosecuted, was published by such person or persons, or by his, her, or their servant or servants, by order or under the authority of the House of Lords or of the House of Commons, as the case may be, together with an affidavit verifying such certificate; and such court or judge shall thereupon immediately stay such civil or criminal proceeding; and the same, and every writ or process issued therein, shall be and shall be deemed and taken to be finally put an end to, determined, and superseded by virtue of this Act.

2. In case of any civil or criminal proceeding hereafter to be commenced or prosecuted for or on account or in respect of the publication of any copy of such report, paper, votes or proceedings, it shall be lawful for the defendant or defendants at any stage of the proceedings to lay before the court or judge such report, paper, votes, or proceedings, and such copy, with an affidavit verifying such report, paper, votes, or proceedings, and the correctness of such copy, and the court or judge shall immediately stay such civil or criminal proceeding; and the same, and every writ or process issued therein, shall be and shall be deemed and taken to be finally put an end to, determined, and superseded by virtue of this Act.

3. It shall be lawful in any civil or criminal proceeding to be commenced or prosecuted for printing any extract from or abstract of such report, paper, votes, or proceedings, to give in evidence . . . such report, paper, votes, or proceedings, and to show that such extract or abstract was published bonâ fide and without malice; and if such shall be the opinion of the jury a verdict of not guilty shall be entered for the defendant or defendants.

Proceedings, criminal or civil, against persons for publication of papers printed by order of Parliament, to be stayed upon delivery of a certificate and affidavit to the effect that such publication is by order of either House of Parliament.

Proceedings to be stayed when commenced in respect of a copy of an authenticated report, &c.

In proceedings for printing any extract or abstract of a paper, it may be shewn that such extract was bonâ fide made

4. Provided always, that nothing herein contained shall be deemed or taken, or held or construed, directly or indirectly, by implication or otherwise, to affect the privileges of Parliament in any manner whatsoever.

Act not to affect the privileges of Parliament.

## David Beamish, Clerk of the Parliaments—Written evidence

1. I have read the memorandum submitted to the Joint Committee by the Clerk of the House of Commons, and broadly endorse his analysis and conclusions. It may be helpful if I add brief comments from the House of Lords perspective on the issues raised in the Committee's call for evidence.
2. Attempts to frustrate injunctions or court orders have tended to be less common in the House of Lords than in the Commons. Reasons are not hard to find: they include the different character of the membership of the two Houses, the lower level of media interest in the Lords, and the lack of constituency correspondence for Members of the Lords.
3. Nevertheless, cases do sometimes occur. In 2006, in the course of a series of debates on the anonymity afforded to complainants in rape cases, Lord Campbell-Savours named the complainant in one particular case.<sup>60</sup> In a more recent example, on 19 May 2011, Lord Stoneham of Droxford referred to the Fred Goodwin case as follows:

“Does [the Minister] accept that every taxpayer has a direct public interest in the events leading up to the collapse of the Royal Bank of Scotland? So how can it be right for a super-injunction to hide the alleged relationship between Sir Fred Goodwin and a senior colleague?”<sup>61</sup>

Until then there had been no reference in the news media to the nature of the matter covered by the court order.

4. I make no comment on the merits of these specific cases, but they both illustrate the dilemma faced by Members of the House, in seeking to address issues of “direct public interest” while paying appropriate respect to court orders. I do not believe that any Member of the House of Lords would take the decision to frustrate a court order lightly.
5. As a point of general principle it is indisputable that parliamentarians are required to act in the public interest. Indeed, the House of Lords Code of Conduct states that Members of the House “shall base their actions on consideration of the public interest”. Parliamentary privilege—freedom of speech in Parliament—provides the immunity which enables Members of the two Houses to act in the public interest without fear of the consequences. As the Clerk of the House of Commons has stated in his memorandum (paragraph 5), “freedom of speech in proceedings ... if it is to mean anything, must include a freedom to say that which would otherwise be unlawful”.
6. Moreover, the legitimacy of the principle of parliamentary immunity, and the proportionality of its application in a case of alleged defamation by an MP, were both endorsed by the European Court of Human Rights in *A. v. the UK*. The Court further noted that “the creation of exceptions to that immunity, the application of which

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<sup>60</sup> HL Deb., 20 November 2006, column 110.

<sup>61</sup> *Ibid.*, 19 May 2011, column 1490.

depended upon the individual facts of any particular case, would seriously undermine the legitimate aims pursued”.<sup>62</sup>

7. I therefore start from the position that a decision by a Member of the House to frustrate a court order may in some circumstances be justified by reference to the public interest. It is for the Member, subject to the House as a whole, to judge when such justification exists. A blanket prohibition upon such actions by Members, by means of an extension of privacy law, could, in the words of the European Court of Human Rights, “seriously undermine the legitimate aims” underlying the principle of parliamentary immunity. If freedom of speech in Parliament is to be limited or modified, this should be achieved by means of the internal procedures of the two Houses.
8. The Joint Committee has asked whether a distinction can be drawn between “proper use” and “abuse” of parliamentary privilege. While there must be such a distinction, it is difficult, if not impossible, to define it in precise and binding terms. Anecdote suggests that there may on occasion have been collusion between Members of one or other House and media organisations, entered into with a view to frustrating court orders. In some such cases, the media organisation may itself be a party to a case, and subject to the court order. Such cases might well constitute “abuse” of parliamentary privilege, but I believe that the main evil to be addressed is media rather than Member behaviour. Members may occasionally act as willing accomplices, but they have little to gain from instigating attempts to frustrate court orders.
9. Whereas the immunity conferred upon proceedings in Parliament is absolute, the immunity enjoyed by those outside Parliament who report those proceedings is qualified. Under section 3 of the Parliamentary Papers Act 1840, it is for those prosecuted for printing extracts from or summaries of reports of proceedings of the House to show, in their defence, that “such extract or abstract was published *bonâ fide* and without malice”. It is then for a jury to decide whether they agree with this defence. I note from paragraph 13 of the memorandum by the Clerk of the House of Commons the advice given to the House of Commons Committee of Privileges by Mr Harry Woolf (now Lord Woolf): “it was probable that a Court would come to the conclusion that if an extract from Hansard were to be used with the deliberate intention of frustrating the arrangements which the Court had made to preserve a person’s anonymity this was not a publication which was *bona fide* and without malice, for the purposes of section 3 of the Parliamentary Papers Act 1840.”
10. The Joint Committee may well feel that the wording of the 1840 Act is difficult. This was the view of the Joint Committee on Parliamentary Privilege in 1999, which recommended that the protection afforded to the media by the Act “would be more transparent and accessible if it were included in a modern statute, whose language and style would be easier to understand than the 1840 Act”.<sup>63</sup> However, the principle underlying the 1840 Act is, I suggest, correct: that freedom of speech in Parliament should be absolute, subject only to the internal self-regulation of the two Houses; but that those outside Parliament who seek to exploit that freedom to circumvent court orders should, if challenged, be required to demonstrate to the courts that they acted in good faith and without malice.

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<sup>62</sup> *A. v. the United Kingdom*, no. 35373/97 (Sect. 2), ECHR 2002-X – (17.12.02), paragraph 88.

<sup>63</sup> Report of the Joint Committee on Parliamentary Privilege, 1998–99, HL 43/HC 14, Paragraph 374

11. There is a significant overlap between possible replacement of the Parliamentary Papers Act 1840 and current proposals to reform defamation law. The relationship between defamation law, privacy law, and parliamentary privilege, requires careful consideration, and I am sure that this Committee will contribute to this consideration.
12. The effect of the Parliamentary Papers Act 1840 was considered recently by the Joint Committee on the Government's draft Defamation Bill. The Joint Committee expressed the view in paragraph 51 of its report<sup>64</sup> that Lord Lester of Herne Hill's Defamation Bill [HL], introduced in May 2010, "would have replaced the 1840 Act with a modern equivalent that is fit for purpose". I cannot agree with this assessment: Lord Lester's Bill would have repealed the 1840 Act in its entirety, instead conferring absolute privilege on any "fair and accurate report of proceedings in Parliament" in the context of defamation proceedings alone (clause 7(1)).<sup>65</sup> It is in my view essential that any review of the 1840 Act undertaken with a view to its replacement should consider its effect in the context of all categories of legal proceedings to which the Act could apply (including proceedings in respect of breaches of court injunctions), and all types of publication (including, for instance, publications authorised by Parliament itself) for which the 1840 Act presently affords protection.
13. I turn finally to the means whereby the two Houses might adopt a "self-denying ordinance", along the lines of the existing *sub judice* resolutions. It will be clear from what I have said above that in my view the main problem that requires to be addressed is one of media behaviour, rather than parliamentary privilege *per se*. However, I can well see that there may be public concern at the actions of Members of either House, in frustrating individuals' rights to anonymity or privacy.
14. The right to privacy is not absolute; certain restrictions to this right may be necessary to preserve other freedoms which, in the words of Article 8 of the European Convention on Human Rights, are "necessary in a democratic society". The court weighs up those conflicting rights and duties before making a privacy order, and one way forward might be for the two Houses to agree resolutions simply requiring Members to respect decisions reached by the courts, subject to any waiver agreed by the Lord Speaker. The resolution could specify grounds on which the Lord Speaker might grant such a waiver—just as the *sub judice* resolution allows her to grant a waiver where she considers that a case "concerns issues of national importance such as the economy, public order or the essential services".<sup>66</sup>
15. Such an approach could be difficult to operate in the House of Lords, which is self-regulating, so the Lord Speaker has "no power to rule on matters of order".<sup>67</sup> It would take away from individual Members of the House the responsibility to exercise their judgement as parliamentarians on how best to act in the public interest, and in conferring authority to take such decisions upon the Lord Speaker would mark a significant extension of that role. If the Lord Speaker turned down an application for a waiver, she would be powerless to enforce this decision were it to be challenged in the

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<sup>64</sup> Report of the Joint Committee on the Draft Defamation Bill, session 2010–12, HL Paper 203/HC930-I.

<sup>65</sup> The bill received a second reading on 9 July 2010 but has made no further progress.

<sup>66</sup> *Companion to Standing Orders*, 2010 edition, paragraph 4.61.

<sup>67</sup> *Ibid.*, paragraph 4.01.

Chamber.<sup>68</sup> While disorderly conduct in the House of Commons may be punished by “naming” the Member concerned, no equivalent procedure exists in the House of Lords.

16. In conclusion, while I accept that, if freedom of speech in Parliament is to be limited or modified, it would be preferable to achieve this by means of the internal procedures of the two Houses rather than by legislation, I see formidable difficulties in implementing such a change in the House of Lords.

7 November 2011

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<sup>68</sup> I should point out that this is already the case in relation to waiver of the *sub judice* rule.

## **Peter Cohen—Written evidence**

### **Introduction**

I am writing to bring to your attention what I consider to be deficiencies in evidence given to a meeting of the Joint Committee on Privacy and Injunctions which you chaired on Monday 28 November 2011. I am concerned that these perceived deficiencies might result in the committee being misled as to how issues of privacy are often handled on Wikipedia and other open content projects run by Wikimedia.

I have included some case examples to illustrate how individuals have had their privacy invaded on Wikimedia projects and the varying degrees to which privacy issues have been rectified. I am critical of one of the witnesses who testified before you and explain below why I find it hard to reconcile his evidence to you with his history as a contributor to Wikimedia projects including his conduct around the time of the hearing.

I am sending this letter through the clerks of the committee and shall be asking them to kindly forward copies to those members of the committee who asked questions whose answers I consider to be deficient. I am also copying this letter to Ashley van Haften, whose evidence it is that I am criticising, in case he wishes to add something to his evidence, to Roger Bamkin, Chair of Wikimedia UK, the organisation that Mr van Haften was representing, in case he wishes to clarify any information on that charity's behalf, and to the Charity Commission who, I believe, should be concerned about any lack of frankness in evidence given by a charitable trustee to a parliamentary committee.

I am aware that my source for the evidence submitted to your committee is an uncorrected transcript. I ask you to bear this in mind when considering my submission. This transcript is listed as item 1 on the schedule at the end of this letter and I also give its web address. All further cited documents are similarly listed with web addresses.

Mr van Haften's responses to the committee are to be found in answer to questions 554, 555, 571-578 and 579-580 in the transcript. I shall identify specific comments by the number of the question immediately preceding each comment.

### **Wikimedia is more than just Wikipedia**

The first point I wish to draw your attention to is that there are several Wikimedia projects besides Wikipedia. In his first comment at Q554 van Haften refers to Wikipedia rather than to Wikimedia projects in general. Indeed, there are only two references to Wikimedia in this evidence. They consist of a statement at Q571 where he says he is speaking as a Wikipedian and not the Wikimedia Foundation "or anything". (I am uncertain as to whether the "or anything" is meant to disassociate his comments from Wikimedia UK, the organisation that he was representing, and as to how much of his evidence that disassociation is meant to cover.) Towards the end of the same answer he says "That is why Wikimedia is considered Wikipedia." That is the last reference to Wikimedia in the discussion.

The committee may have been left with the impression that Wikimedia is indeed Wikipedia. However, there are other projects most of which have privacy implications. I want, in



particular, to draw your attention to Wikimedia Commons which is of significant relevance to this subject. This project's main page is at the location identified at item 2 on the schedule. Further Wikimedia projects are identified near the bottom of that main page.

What makes Commons so important is that it acts as a repository for images, sounds and videos which are used by other Wikimedia projects but not only by these. All content of Wikimedia Commons has a Creative Commons license or is similarly freely available for use both by any other organisations and by the general public. (Or at least this should be the case. Some people who upload to Commons have a scant regard for other people's copyright.)

This means that once a person's privacy has been invaded through the inclusion of an undesired image in the Commons databases, then it might be invaded again both by Wikipedias in assorted languages and by anybody else, including anyone with malicious intent. I shall discuss some real-life examples of this invasion of privacy later.

### **Key questions that were inadequately answered**

Apart from one comment early on, Mr van Haeften is first brought into the discussion at Q571 when Ms Stuart questions him. In his initial answer, he presents an idyllic picture of Wikipedia where the "community believe they are completely neutral." He cites the lack of advertising as evidence for this supposed neutrality and the conversation then gets rather side-tracked. Just because there is no advertising does not mean that there is no bias or that editors are neutral.

Much of what Mr van Haeften says to the committee itself has the ring of advertising about it. I would have hoped that the trustee of a charity testifying to a parliamentary committee would try to present a picture of both the strengths and weaknesses of his organisation as they relate to the committee's area of interest. Unfortunately I consider that he has not been complete in his answer to this question or in his other evidence to the committee. The result is that your committee has not been shown the "warts and all" portrait of Wikimedia which one of your historic predecessors might have advocated.

At Q575 through to Q578 Yasmin Qureshi questions Mr van Haeften about difficulties in correcting privacy issues on Wikipedia. Ms Qureshi expresses concern about problems she knows that others have experienced in rectifying how they are portrayed on Wikipedia.

Mr van Haeften replies that there are a number of routes that can be taken to fix such problems, such as editing the article oneself, or using one of the noticeboards or a confidential email helpline. He also says that changes are normally agreed consensually and that the community is neutral and dedicated to Wikipedia's editorial policies. He refers to administrators who can help members of the public who feel they may have been damagingly portrayed in Wikipedia and says that he himself is one such administrator.

This might give the impression that there are several excellent methods to resolve privacy issues, that Ms Qureshi's concerns are unjustified and that Mr van Haeften is dedicated to fixing problems of privacy on Wikimedia projects. I shall examine these notions later by means of real life examples that have involved Mr van Haeften.

For now I shall note that half of Wikimedians, including many administrators, are under the age of 22, that they are predominantly male and are otherwise unrepresentative of the global readership. [ 3] I have grave doubts about the ability of a group with this demographic profile to produce genuinely neutral content that is free from privacy issues and shall elaborate some of these concerns later.

The final set of questions where I consider that there is an inadequate reply from Mr van Haefte are Q579-580. Lord Mawhinney asks for suggestions about what can be done to improve privacy for individuals around the world. Mr van Haefte does not mention privacy in his answer at all. Instead he makes some general remarks praising Wikipedia.

If he had actually answered the question in a frank manner rather than evading it, I expect that a number of problems in Wikipedia might have been revealed or, alternatively, he might have been forced to admit that he holds a somewhat cavalier attitude towards other people's privacy. This is a matter for concern given that his positions as an administrator of the English Wikipedia and as a trustee of Wikimedia UK give him access to institutional power that could be potentially used to violate people's privacy.

### **Biographies of living persons**

Before coming to my case examples, I shall introduce some background points which will inform the discussions below.

At Q571 Mr van Haefte refers to Wikipedia policies including one concerning "biographies of living people". The relevant policy on the English-language Wikipedia is called *Wikipedia:Biographies of living persons*. [4] The abbreviation "BLP" is frequently used on Wikipedia and other Wikimedia projects in connection with this subject and I shall use it in this way here.

The following points should be noted. First, the policy applies not only to articles about the person concerned but to any other article that might refer to that person. For example, if the person were to be included in an article listing people who fall under a certain heading, then this is a potential BLP issue. Further, this policy does not apply just to articles on Wikipedia but to other content of the site such as pages used for discussing how to improve the content of articles or for communicating with individuals who contribute content to Wikipedia.

The policy also applies to images and to the insertion of links to internet sites that are not part of Wikipedia. So, if someone were to be pictured in a way that was likely to be interpreted negatively or an article was linked to another webpage that described them in a negative way, then this should be treated as a BLP matter.

### **Ashley van Haefte's Wikimedia accounts**

As mentioned above, Mr van Haefte is currently an administrator on the English Wikipedia. This is through his account User:Fæ. This is not his first account. He has previously operated as User:Ashleyvh, User:Teahot and User:Ash.

Mr van Haefte has had similarly named user accounts on Commons. With one of these accounts, he recently applied to become an administrator on Commons but withdrew the

application following a sometimes tempestuous discussion which will form my last case example. He is also a member of the OTRS team which operates the confidential email helpline mentioned above.

The transitions between the Ashleyvh, Teahot and Ash accounts were transparent. That from Ash to Fæ was a so-called “clean start” which happened at a time when the Ash account was under scrutiny by other Wikipedians.[5]

Clean starts are covered by a Wikipedia policy which allows someone who has previously had some problematic behaviour on Wikipedia to adopt a new identity and to have some level of protection from the repercussions of this past behaviour, provided that it is not reproduced in the contributions of the new identity.[6]

It is my belief that Mr van Haeften is continuing a problematic pattern of behaviour seen in his contributions to Wikipedia with his earlier accounts and that this behaviour is of a nature that potentially impacts the privacy of other individuals. Further, I consider that he was not altogether frank in his evidence to the committee about his attitude to privacy as evidenced in this behaviour.

The issues raised about van Haeften’s earlier accounts include the misrepresentation of references and editing that ran against the spirit of the BLP policy. The individuals who raised these concerns asked that he voluntarily refrain from contributing to Wikipedia in areas relating to BLPs.

Concerns were raised with his editing of the Wikipedia article [List of male performers in gay porn films](#). Blue links were inserted into this list that connected to the Wikipedia biographies of individuals some of whom happened to share the same names as porn actors but were not porn actors themselves. The person who fixed this problem was concerned that Mr van Haeften did not properly co-operate with his efforts to clean up the article.

Previously, Mr van Haeften had created an article [List of gay bathhouse regulars](#). This was deleted after other Wikipedians raised privacy concerns. However, Mr van Haeften vigorously argued against deletion. [7]

I should like to draw attention to one final contribution by Mr van Haeften with one of his old accounts, because it relates directly to a concern raised by Ms Qureshi. In January 2010 someone repeatedly removed some negative coverage from the biography of an Australian educator. Various registered Wikipedians, including Mr van Haeften, reinserted the negative information. When van Haeften reinserted the information he even described the removal as “vandalism”.

There is a rule on Wikipedia that limits how often someone can revert other people’s contributions to any given article in a day. Van Haeften informed the person who reinserted this information of the rule with what was one of several brusque messages posted to this person’s notification page. [8] When this person persisted in removing the negative content, van Haeften reported this contributor to one of the several administrator boards on Wikipedia which are used to deal with problematic behaviour. An administrator temporarily blocked that person from being able to edit Wikipedia. [9]

The biography in question is quite short. The negative information concerns events for which the educator was officially warned by the Australian authorities but they still considered it appropriate for him to continue to be employed in a senior capacity. It is my view that the relative space given to the negative coverage unbalances the article and therefore violates the BLP policy. None of the established Wikipedians who dealt with the person who removed the information, including the administrator, attempted to engage with the person about why he was removing the information.

As I have said earlier, the age profile of Wikipedians is very young. Roughly half are not of an age to have completed undergraduate education. I believe that many Wikipedians, including a substantial number of administrators, lack the maturity to reach wise and informed decisions on such matters.

Instead of considering complex issues such as the balance of articles, most administrators find it easier just to consider whether Wikipedia rules have been technically violated. This results in situations such as I have described here and such as Ms Qureshi raised in her questions to Mr van Haefen. Administrators might be able to help resolve matters such as an individual's date of birth but many do not have the judgment to deal with the issues that so concerned Ms Qureshi.

In recent discussions with myself and others concerning some of the above behaviour, Mr van Haefen has defended himself by saying that he has made a clean start and that all this is in the past. He has implied that it is improper to refer to events that may have happened two years ago.

I believe that, since Wikimedia UK receives tax concessions because of its charitable status, it is entirely proper to consider activities by a trustee related to the charity's scope that took place as recently as two or three years ago. In the case examples below I shall discuss more recent cases involving him where privacy remains a concern.

### **Case Example 1. Picture deletion request by individual well known to Wikimedia**

In 2008 Mr van Haefen uploaded a picture that appears to be of himself onto Commons. This picture was subsequently used on Wikipedia.

On 25 November 2011 this picture was copied to Wikipedia Review, a site where Wikimedia projects are discussed. Many, but not all, participants there hold grudges against Wikimedia as an organisation or against specific individuals who have contributed to Wikipedia or are in the Wikimedia hierarchy. The picture was used to ridicule Mr van Haefen.

He requested that the picture be deleted from Commons. It was deleted on 26 November. This would appear to be a case where privacy concerns are handled well on a Wikimedia project.

Unfortunately, the picture had already spread beyond Commons. Gregory Kohs, a long-term critic of Jimmy Wales and Wikipedia, included a truncated version of the picture in an article on Examiner.com where he ridiculed Mr van Haefen.

According to Mr Kohs's posts on Wikipedia Review, he also emailed members of the Joint Committee inviting them to look at his article containing the picture. He says that the article was accessed by a number of computers using parliamentary servers.

Mr Kohs has continued to write articles for Examiner.com that link to this picture or to another similar picture that also appears to be of Mr van Haeften and was deleted from Commons some months earlier.

My conclusions from this example are that, even when those involved in a Wikimedia project act in a manner that respects an individual's request for privacy, the privacy issue cannot always be fully fixed, because the problematic material may have spread elsewhere.

### **Case Example 2: Picture deletion request by individual not well known to Wikimedia**

On 7 December 2011, someone requested deletion of a picture of a penis, which they had recently uploaded onto Commons. They said that the person depicted no longer wished it to be shown.

The deletion discussion [10] contains sarcastic remarks about the condition (Peyronie's disease) from which the individual concerned suffers. There was speculation about whether the uploader of the picture was the person whose penis was depicted. The request was voted down and was rejected on the grounds that it was against Commons policy to remove images released under a Collective Commons license.

Once it was clear that the voting was going against the deletion request, some participants in the discussion drew a parallel between this case and that described in Case Example 1. They noted that an established Wikimedian's request was successful but that the newcomer's was not.

Mr van Haeften became aware of the discussion and contributed as [Fæ](#) to complain about being harassed. I agree that there might have been maliciousness on the part of some of the people involved in the discussion. However, it was not inappropriate to compare the two cases here.

The picture was not just present on Commons. The original uploader had inserted it into the English Wikipedia article on Peyronie's disease.

The article history [11] shows that, a few minutes before the deletion request was made, someone using an IP address in Pakistan ([119.152.130.146](#)) attempted to delete the image from the Wikipedia article. This deletion was immediately reverted by an established Wikipedian.

The following day another Pakistani IP address ([116.71.171.160](#)) was used to remove the picture again from the Wikipedia article. It was reinserted by another established Wikipedia user.

None of the established Wikimedians who took part in the discussion on Commons and have access to Wikipedia thought to remove the picture from there. (At least one cannot

do so because he has been banned from Wikipedia.) I have now removed the picture from the article myself but it remains to be seen if it is re-inserted again.

My main conclusion from this case example is that individuals who are not well known to Wikimedia may be less likely to have their wishes for privacy respected than are those who hold positions of authority within Wikimedia organisations.

This case confirms the concerns about privacy which Ms Qureshi raised in her questions. It is regrettable that, less than a month after Mr van Haeften told the committee that it was his role as a Wikipedia administrator to help resolve privacy issues, he failed to consider it his responsibility to remove the picture from the Wikipedia article.

I also note that the person who uploaded the picture might not have English as a first language. (There is certainly a grammatical mistake in the deletion request.) This could explain the lack of a clear explanation for the attempts to remove the picture from the Wikipedia article.

As a former mental health professional, I am aware of a further issue that might apply in similar cases. People with bipolar disorder are often unable to consider the consequences of their actions when they are in the phase of their illness where their mood is elevated.

Given the exhibitionist nature of some of the content on Commons, someone who was hypomanic and aware of this content might be inclined to upload a picture of themselves and later come to regret it when their mood returns to normal or is depressed. Having experienced the sort of rebuff and sarcasm that is present in the above deletion discussion, would they be willing to disclose to anyone connected with Wikimedia that it was a stigmatised condition that led to upload the picture in the first place?

### **Case Example 3: Deletion where foreign privacy laws prevailed**

In September 2011 someone identified a file on Commons that purported to be of prostitutes and proposed it for deletion. [12] I do not know how long the picture had been on Commons, but it had been inserted into the English Wikipedia article on the Reeperbahn on 23 July 2008 with a caption labelling the women as prostitutes. I believe it remained there until the image was finally deleted from Commons on 20 October 2011, when an automatic process removed the link from Wikipedia to the now non-existent picture, but have not checked every intervening state of the article. [13]

In September 2011, the Reeperbahn article was viewed over 10,000 times. [14] Even allowing for the statistics including some return visits to the article, it seems likely that a six-figure number of people viewed the Wikipedia page and saw those women pictured and labelled as prostitutes.

Although most participants in the deletion discussion voted for the picture to be deleted, Mr van Haeften (as [Fæ](#)) voted for it to be kept on Commons and asserted that the picture had educational value. After someone else raised the issue of the lack of firm evidence that the women were prostitutes he renamed the file leaving it linked to the source on Flickr that still labelled them as prostitutes.

He went on to make another concession but he showed no proactive interest in protecting the reputation or the privacy of those women. Although another participant in the discussion says that the women were not identifiable, I am certain that if their next-door neighbours saw the picture, then they would recognise them. I could provide details of where the picture is to be found but, out of respect for the women's privacy, I shall not supply these unless required to do so.

The deletion discussion remained open until 20 October 2011, just five weeks before Mr van Haeften gave evidence to you. Mr van Haeften failed to make any changes to the Wikipedia article to protect the reputation of the women, even though the BLP policy he refers to in his answers to Ms Qureshi clearly implies that both the caption and the picture that showed them in a location that reflects unfavourably on them were inappropriate.

When Mr van Haeften applied to become an administrator on Commons, I repeatedly tried to question him on why he argued against the deletion of the picture of the women. I was also curious about how his explanation would fit with the answers he gave in his evidence to your committee. At no point did he address this point, even though he made aggressive responses to other contributors and a misleading response to me on another point. It was therefore not a lack of opportunity that prevented him from answering me.

What finally ensured the deletion of the picture from Commons is that one of the people participating in the discussion referred to a Commons policy which explicitly respects a German law that forbids the publication of pictures of ordinary people without their consent. The other person who wanted to keep the picture changed their mind on reading the policy. Mr van Haeften tried to dismiss its significance.

My conclusion from this case is that the deletion of the picture was guaranteed by a German law which has no direct equivalent in this country. Maybe a quarter of a million people viewed the image with a caption that the women, we can assume, would be unlikely to appreciate before someone finally thought to protect their privacy.

These viewers, who would have included many contributors to Wikipedia including administrators, apparently shared Mr van Haeften's lack of concern for the women's privacy. Although Mr van Haeften tried to dismiss the German legal considerations, once these were drawn to their attention other Wikimedians accepted them. If a similar piece of legislation existed in the United Kingdom, then British Wikipedians might be more likely to remove such a picture from an article in future.

#### **Case Example 4: Events during Mr van Haeften's application to become an administrator on Wikimedia Commons**

I have thought long and hard about how to handle this final case example. I have at times referred to matters that took place during Mr van Haeften's administrator application on Commons but have refrained from referencing them due to the problematic content of the webpages concerned.

In the end, I have decided that it is best that the dysfunctional nature of the events be considered as an example of how discussions on Wikimedia projects can go awry before I make any comments about Mr van Haeften relating to privacy and to his evidence to the committee.

Wikimedia projects have developed practices whereby someone who wishes to become an administrator puts themselves forward or is nominated by someone else. A discussion then takes place online about the appropriateness of their having access to administrator tools.

Due to the content, the file containing the discussion of Mr van Haeften's application was blanked although the content is still accessible through the archive. The last version before this blanking is linked in the fifteenth reference in the schedule.

Mr van Haeften's application was brought to my attention when it was mentioned on Wikipedia Review. Some of those who, like me, decided to formally participate in the discussion of the application after reading about it on Wikipedia Review did so in good faith; others were malicious.

Before the participants from Wikipedia Review joined the discussion, it looked very likely that Mr van Haeften's application would be successful. The voting pattern changed markedly after these contributors arrived.

Mr van Haeften eventually withdrew his application after what appears to have been a crass attempt at blackmail was placed on his personal discussion page.

A number of different agendas are visible among the participants in the discussion. Some are hostile towards the Wikimedia establishment; some have conflicts with Mr van Haeften dating back to before his "clean start". Others are hostile towards anyone connected with Wikipedia Review; others again are strongly identified with the Commons community and resent the influx of a large number of people from the much larger English Wikipedia community; yet others are concerned about whether votes were solicited.

Accusations flew and there were disagreements about which votes should be allowed and whether the problems lay with only one side. Some comments were redacted and people argued about whether this was appropriate or not. The discussion spread to other pages including the board on Commons where issues are brought to administrators' attention.<sup>[16][17]</sup> (I link a snapshot of the conversation as well as the current version, as the conversation is likely to be archived soon to an as yet unknown location.) The conversation proliferated further including to several of the contact pages of participants including both Mr van Haeften and myself.

Even after Mr van Haeften withdrew his candidacy, discussions continued elsewhere about whether any contributors should be banned from Commons and whether some individuals should have their access to administrative tools removed. The discussion spread to the English Wikipedia where actions were taken against some of the participants. No doubt, other discussions took place by email or in discussion groups where I do not participate.

Unlike the other cases examples, this is an incident where I was one of the participants. It is therefore inappropriate for me to impose my interpretation of what occurred and what constituted an invasion of Mr van Haeften's privacy and what did not.

However, this example shows that even experienced Wikimedians cannot predict or control the way that discussions go on Wikimedia projects. How much less would an



ordinary member of the public know what they were getting into when they start a discussion that proves to be controversial, or where they might be discussed?

Further, it was not just Mr van Haeften who was questioned. The motives of many of the participants came under scrutiny and accusations were thrown at them. Therefore multiple questions of privacy arise.

In his answers to Ms Stuart and Lord Mawhinney, Mr van Haeften talks of the professed “neutrality” of Wikipedians. I think that this example makes clear that participants are not neutral. Editorial and conduct policies are seen through the lens of the individual’s prejudices and are often interpreted selectively depending on what the person wants to achieve in the discussion. Both Mr van Haeften and I had reasons for why we said certain things in that discussion.

In my case, you will notice that when I cast my initial vote I referred to a lack of frankness and questioned Mr van Haeften’s suitability not only to be an administrator on the Commons system but also to be a trustee of a Wikimedia-related charity. It is at that point that I decided to re-read his testimony to the committee. I saw the same features in his answers to you as I saw in his answers to questions in his administrator application.

I started to work on this letter at that time and much of my later input to the discussion on his application for adminship was intended to probe Mr van Haeften about matters related to privacy. I hoped that his answers would illuminate or even mitigate the concerns I express in this letter. Unfortunately he failed to address any of those points.

## **Conclusion**

I have written at some length but have tried to focus on issues that will be of concern to your committee, namely problems with privacy in Wikimedia projects and what I see as a lack of frankness in Mr van Haeften’s evidence.

I feel that the case examples illustrate that, while some Wikimedians and Wikimedia administrators are concerned about privacy issues and act on them, others are led by the ideology of open content to disregard the concerns of individuals. Unfortunately, I would place Mr van Haeften in that latter category.

People are entitled to have different perspectives on matters such as this. When an official of an organisation that is dedicated to open content testifies before a parliamentary committee, I would hope that that official would argue strongly about why they feel that the needs of the wider community for information and open content transcend the needs of individuals for privacy. Mr van Haeften did not argue that case. Instead he seems to me to have sought to minimise the ways in which Wikimedia threatens the privacy of individuals.

When the representative of a charity testifies to a parliamentary committee, I would hope that they would repay the community for their organisation’s tax advantages by being open about their organisation’s weaknesses. However, I see a lack of frankness in Mr van Haeften’s evidence. I find it hard to reconcile his lack of concern for the privacy of individuals in the months around the time he gave evidence to the committee as described in two of my case examples with the contents of that evidence.

I ask him now to review his evidence and to provide the committee with supplementary evidence that reflects more accurately the privacy issues that persist in Wikipedia and other Wikimedia projects. I call on Wikimedia UK to review Mr van Haeften's evidence and decide whether they as an organisation wish to stand by his evidence to the committee or whether they wish to provide the committee with further information.

I have shown how legislation in Germany influenced the decision about how a privacy matter was handled on Commons. In his answer to Ms Qureshi (Q571) Mr van Haeften says that knowledge "will always transcend geographical boundaries". I believe that his answer was intended to suggest that it is futile to try to control information. However, he had recently seen that, despite his best efforts, German legislation transcended geographical boundaries and prevented an invasive picture taken in Germany from being displayed in an article on the English Wikipedia that is stored on computers in the United States.

Many Wikimedians, and the open content movement in general, are resistant to attempts to use legislation to regulate their activities. Recently Jimmy Wales, the co-founder and dominant personality of Wikipedia, proposed a "strike" to coincide with discussion in Congress of a bill intended to protect intellectual property. He referred to such a "strike" by Italian Wikipedians that apparently influenced legislation in their country. [18] I imagine that many Wikimedians would support a similar "strike" in this country if legislation that affected Wikimedia were to come out of your considerations. It is therefore doubly unfortunate that Mr van Haeften failed to take advantage of his appearance before you to explain why such legislation might not be desirable

It is difficult to control what appears in an open content project. However, the German Wikipedia has implemented a system that means that all changes to the content of articles are previewed by experienced contributors. Members of the public who are not logged in as contributors are shown a version of an article that does not include content that has not been reviewed.

There was a trial on the English Wikipedia of a similar system although, in this case, it was only applied to biographies of living people. Opponents of the system were able to prevent the trial from being extended.

The system is by no means perfect. Old content has not been reviewed and some of the reviewers would themselves share Mr van Haeften's belief that knowledge is transcendent and that content that invades individuals' privacy should be kept because it is educational or encyclopaedic.

However, since Wikipedia is, as Mr van Haeften repeatedly mentions in his evidence, the sixth most viewed website in the world, I believe that it would be useful if Wikimedia UK were to provide you with further information on this system so that you may consider its appropriateness.

I am, of course, more than willing to answer any questions the committee have on what I have written.

## **Appendix**

### **Schedule of documents and web addresses**

- 1) Uncorrected transcript of the hearing of the Joint Committee on Privacy and Injunctions [http://www.parliament.uk/documents/joint-committees/Privacy\\_and\\_Injunctions/ucJCPi281111ev7.pdf](http://www.parliament.uk/documents/joint-committees/Privacy_and_Injunctions/ucJCPi281111ev7.pdf)
- 2) Wikimedia Commons Main Page [http://commons.wikimedia.org/wiki/Main\\_Page](http://commons.wikimedia.org/wiki/Main_Page)
- 3) Wikimedia strategy document on increasing participation [http://strategy.wikimedia.org/wiki/Wikimedia\\_Movement\\_Strategic\\_Plan\\_Summary/Increase\\_Participation](http://strategy.wikimedia.org/wiki/Wikimedia_Movement_Strategic_Plan_Summary/Increase_Participation)
- 4) English Wikipedia policy on Biographies of living persons [http://en.wikipedia.org/wiki/Wikipedia:Biographies\\_of\\_living\\_persons](http://en.wikipedia.org/wiki/Wikipedia:Biographies_of_living_persons)
- 5) Request for Comments on Ash account [http://en.wikipedia.org/wiki/Wikipedia:Requests\\_for\\_comment/Ash](http://en.wikipedia.org/wiki/Wikipedia:Requests_for_comment/Ash)
- 6) Wikipedia clean start policy <http://en.wikipedia.org/wiki/Wikipedia:CLEANSTART>
- 7) Deletion discussion on “List of gay bathhouse regulars” [http://en.wikipedia.org/wiki/Wikipedia:Articles\\_for\\_deletion/List\\_of\\_gay\\_bathhouse\\_regulars](http://en.wikipedia.org/wiki/Wikipedia:Articles_for_deletion/List_of_gay_bathhouse_regulars)
- 8) Messages to user who attempted to remove negative information [http://en.wikipedia.org/wiki/User\\_talk:94.193.23.189/Archive\\_1](http://en.wikipedia.org/wiki/User_talk:94.193.23.189/Archive_1)
- 9) Complaint by Ashley van Haeften about someone removing negative information from a Wikipedia biography [http://en.wikipedia.org/wiki/Wikipedia:Administrators%27\\_noticeboard/3RRArchive/21#User:94.193.23.189\\_reported\\_by\\_User:Ash\\_.28Result:\\_24\\_hours.29](http://en.wikipedia.org/wiki/Wikipedia:Administrators%27_noticeboard/3RRArchive/21#User:94.193.23.189_reported_by_User:Ash_.28Result:_24_hours.29)
- 10) Discussion of user’s request for deletion of picture of penis [http://commons.wikimedia.org/wiki/Commons:Deletion\\_requests/File:Peyronie%27s\\_disease\\_shown\\_in\\_flaccid\\_penis.jpg](http://commons.wikimedia.org/wiki/Commons:Deletion_requests/File:Peyronie%27s_disease_shown_in_flaccid_penis.jpg)
- 11) Revision history of the English Wikipedia article on Peyronie’s disease [http://en.wikipedia.org/w/index.php?title=Peyronie%27s\\_disease&action=history](http://en.wikipedia.org/w/index.php?title=Peyronie%27s_disease&action=history)
- 12) Commons deletion discussion of picture purporting to depict a group of prostitutes [http://commons.wikimedia.org/wiki/Commons:Deletion\\_requests/File:Prostitutes\\_in\\_the\\_street\\_of\\_Reeperbahn.jpg](http://commons.wikimedia.org/wiki/Commons:Deletion_requests/File:Prostitutes_in_the_street_of_Reeperbahn.jpg)
- 13) Revision history of the English Wikipedia article on the Reeperbahn <http://en.wikipedia.org/w/index.php?title=Reeperbahn&action=history>
- 14) Page view statistics for English Wikipedia article on the Reeperbahn for September 2011 <http://stats.grok.se/en/201109/Reeperbahn>
- 15) Last version of Mr van Haeften’s application for Commons adminship before blanking <http://commons.wikimedia.org/w/index.php?title=Commons:Administrators/Requests/F%C3%A6&oldid=64587953>
- 16) Discussion of adminship request on Commons administrators’ noticeboard [http://commons.wikimedia.org/wiki/Commons:Administrators%27\\_noticeboard#Fear\\_of\\_canvassing\\_of\\_RfA\\_F.C3.A6](http://commons.wikimedia.org/wiki/Commons:Administrators%27_noticeboard#Fear_of_canvassing_of_RfA_F.C3.A6)
- 17) Version of discussion on Commons administrators’ noticeboard as of year-end 2011 [http://commons.wikimedia.org/w/index.php?title=Commons:Administrators%27\\_noticeboard&oldid=64650659#Fear\\_of\\_canvassing\\_of\\_RfA\\_F.C3.A6](http://commons.wikimedia.org/w/index.php?title=Commons:Administrators%27_noticeboard&oldid=64650659#Fear_of_canvassing_of_RfA_F.C3.A6)
- 18) Jimmy Wales proposal of a “strike” [http://en.wikipedia.org/wiki/User\\_talk:Jimbo\\_Wales/Archive\\_91#Request\\_for\\_Comment:\\_SOPA\\_and\\_a\\_strike](http://en.wikipedia.org/wiki/User_talk:Jimbo_Wales/Archive_91#Request_for_Comment:_SOPA_and_a_strike)

8 January 2012

I30H Department for Culture, Media and Sport and Ministry of Justice—Written evidence

**Department for Culture, Media and Sport and Ministry of Justice—  
Written evidence**

Submission to be found under Ministry of Justice

## **Charles Garside, Assistant Editor, *The Daily Mail*—Written evidence**

I am writing to you about a question Paul Farrelly MP put to Lord Rothermere at the hearing of your committee on Monday 12 December 2011. Mr Farrelly said this:

"At the Leveson Inquiry Paul Dacre expressed the opinion that to maintain newspaper circulation, newspapers should have considerable latitude to intrude into private grief. What do you say to that?"

This is far too crude a summary of what Mr Dacre told the Inquiry and is apt to give a misleading - and possibly damaging - impression to anyone who may later consult the transcript of the hearing.

It is true that Mr Dacre gave a prepared address to the third seminar held by the Leveson Inquiry on 12 October 2011. It is apparent that Mr Farrelly was intending to refer to that address, but he did so in a manner that took Mr Dacre's remarks out of context and was unfair to Mr Dacre. The full text of what Mr Dacre said is set out on the website of the Leveson Inquiry. The relevant passage is as follows and it is important to note that it immediately follows the identification by Mr Dacre of two "canards" about newspaper regulation:

"... I would argue that Britain's commercially viable free press - because it is in hock to nobody - is the only really free media in this country. Over regulate that press and you put democracy itself in peril.

Don't listen to me. Listen to the judges themselves.

I quote Lord Woolf in a 2002 Appeal Court Judgment on a footballer's dalliance with a lap dancer:

"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."

Or Baroness Hale in a 2004 Law Lords case:

"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."

And self-regulation, I would argue, is at the very heart of a free press. Which is why I profoundly regret that a Prime Minister - who had become too close to News International in general and Andy Coulson and Rebekah Wade in particular - in a pretty cynical act of political expediency has prejudiced the outcome of this inquiry by declaring that the PCC, an institution he'd been committed to only a few weeks previously, was a "failed" body."

It will be immediately obvious from the above that the words attributed to Mr Dacre by Mr Farrelly were in fact spoken by Baroness Hale of Richmond, one of this country's most senior and respected Supreme Court judges. Not only was that highly salient fact omitted from Mr Farrelly's question; so too was the context in which Mr Dacre's remarks were made. As is usually the case, context is important: Mr Dacre was not, as Mr Farrelly implied, making an unqualified statement that "to maintain circulation, newspapers should have considerable latitude to intrude into private grief". His point was that if you over-regulate the press, you imperil democracy and in support of that he quoted from the judgments of two of this country's most senior judges in order to demonstrate that those judges are alive to the point he was making. It is a travesty of Mr Dacre's speech to the Leveson Inquiry to suggest that he was justifying intrusion into private grief because it would maintain circulation. Such a bald suggestion would be unlikely to meet with anyone's approval, as Mr Farrelly no doubt anticipated, and it is therefore not surprising that Lord Rothermere expressed the view that an intrusion into private grief would have to "pass a very high bar".

I am prepared to accept that Mr Farrelly was not seeking to create a deliberately misleading impression, but such an impression was nonetheless created and I hope you will agree that a copy of this letter can be placed alongside the transcript with a suitable cross-reference to it in the place where Mr Farrelly's question appears so that those who may consult the transcript in the future are not also misled.

I am copying this letter to Mr Farrelly.

## **Paul Farrelly MP—Written evidence**

### **E-mail from Paul Farrelly MP to *The Daily Mail* dated 21 December 2011**

Thank you for your e-mail and, as you will see from the message below, I had already anticipated Mr Garside's letter.

As you will see, my remarks were prefaced by the 'praying in aid', so there is no distortion.

I have not had time to read the official transcript, but I have a note of what I said, and will enquire to make sure that the official record is accurate.

### **E-mail from Paul Farrelly MP to Mr John Whittingdale MP, Chairman, Joint Committee on Privacy and Injunctions dated 12 December 2011**

Just a point arising from questioning of Peter Wright today (as I had put to Viscount Rothermere, and previously to Richard Desmond)....

I have referred to the Editor in Chief of the Mail 'praying in aid' the opinion that newspapers should have 'considerable latitude' in intruding into private grief in the interest of circulation.

Mr Wright said this was not the case. I just therefore wanted to refer you to the relevant part of the address to Leveson, in case they follow this up.

#### **EXTRACT FROM PAUL DACRE ADDRESS AT THE START OF THE LEVESON ENQUIRY:**

'Indeed, I would argue that Britain's commercially viable free press – because it is in hock to nobody – is the only really free media in this country. Over regulate that press and you put democracy itself in peril.

Don't listen to me. Listen to the judges themselves.

I quote Lord Woolf in a 2002 Appeal Court Judgment on a footballer's dalliance with a lap dancer:

"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."

Or Baroness Hale in a 2004 Law Lords case:

“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.”

And self-regulation, I would argue, is at the very heart of a free press. Which is why I profoundly regret that a Prime Minister – who had become too close to News International in general and Andy Coulson and Rebekah Wade in particular – in a pretty cynical act of political expediency has prejudiced the outcome of this inquiry by declaring that the PCC, an institution he’d been committed to only a few weeks previously, was a “failed” body.’



## **Charles Garside, Assistant Editor, *The Daily Mail*—Supplementary Written evidence**

Thank you for your letter of 16 January 2012 and your confirmation that my last letter will be published as written evidence on the Committee's website.

Mr Farrelly argues that because he prefaced the his remark with 'praying in aid', there is no distortion in his comment. That is not the case.

Mr Farrelly's comment gave the misleading impression that the Editor in Chief had (i) expressed the opinion that newspapers should have considerable latitude to intrude into private grief and (ii) produced an extract from Baroness Hale's judgment in which she expressed the same opinion.

That suggestion is misleading on two counts:

1. Mr Dacre did not express the opinion that newspapers should have considerable latitude to intrude into private grief. As is clear from his speech, the opinion he expressed was that a commercially viable free press is important and that to over-regulate it might risk putting democracy itself in peril.
2. Neither did Baroness Hale say that it was her opinion that the press should be allowed considerable latitude in their intrusions into private grief. Her second sentence starts with the words 'It may be said'. As Mr Farrelly observes in his letter, a preface can alter the meaning of a sentence, particularly when that sentence is taken in its proper context – in this case a paragraph of a legal judgment discussing the interests at stake on either side of the case.

Baroness Hale's quote does, however, contain her own opinion that 'one reason why press freedom is so important is that we need newspapers to sell in order to ensure that we still have newspapers at all'. That was the opinion expressed by Mr Dacre in his speech and that is why he included Baroness Hale's quote – because she agrees with that sentiment.

Furthermore, clause five of the Editor's Code of Conduct stats that in cases involving personal grief or shock, enquiries and approaches must be made with sympathy and discretion and publication handled sensitively. Even if Mr Farrelly is unaware that Mr Dacre is the Chairman of the Code of Practice Committee, he might have observed that Mr Dacre's references to the Code in his speech (i) it has been 'rightly strengthened', (ii) it 'imbues every decision made by news desks and back benches', (iii) he notes 'with some pride' that it is rarely if ever criticised) plainly do not suggest that he disagrees with one of its important clauses.

In fact, Mr Dacre specifically told Lord Justice Leveson: "My own view is that as long as the Code is observed and no law is broken, papers should be free to publish what they believe is best for their markets."

In the circumstances, I do not think it appropriate for the record of this correspondence to end with Mr Farrelly's reply to my last letter. I would be grateful if you would also publish this letter on the Committee's website.

26 January 2012

## **Paul Farrelly MP—Supplementary written evidence**

**Paul Farrelly MP to Mr John Whittingdale MP, Chairman, Joint Committee on Privacy and Injunctions dated 27 January 2012**

**Re: Letter from Charles Garside, Assistant Editor, Daily Mail - from Paul Farrelly MP**

From my experience of previous press enquiries, this exchange is becoming predictably tedious.

Given the Daily Mail's strict observance of the Editor's Code in the cases (to name but three) of the McCann family, Joanna Yeates and Christopher Jefferies, and Elisabeth and Josef Fritzl - as well as in what I have seen of the content of the Operation Motorman files – methinks Mr Garside protesteth too much.

I would be grateful if you would publish these observations with Mr Garside's letter.

Jamie East, Paul Staines, David Allen Green, and Richard Wilson—Oral evidence (QQ 326–403)

**Jamie East, Paul Staines, David Allen Green, and Richard Wilson—  
Oral evidence (QQ 326–403)**

[Transcript to be found under Paul Staines](#)

## Dr David Erdos—Written evidence

I am the principal investigator of the Data Protection and the Open Society project (<http://www.csls.ox.ac.uk/dataprotection>) which is based at the University of Oxford and currently funded by the Leverhulme Trust. This project examines, and seeks to help reconcile, the tensions between freedom of expression (and information) and data protection law and practices. My aim in making this submission is to ensure that the general provisions of the *Data Protection Act (DPA) 1998* are not overlooked in this inquiry. The possibility of the media committing the offence of unlawfully obtaining personal data in contravention of section 55 of the *DPA* has received considerable press coverage, especially in the aftermath of the Information Commissioner's Office (ICO) "Operation Motormouth". However, the broader reach of the *DPA* in the free speech context has been underrecognized. This is unfortunate as, far more than the *Human Rights Act 1998* (which only directly applies to "public authorities"), it is the *DPA* which actually does currently constitute the statutory privacy law which the Committee speaks about in its Call for Evidence. Moreover, there are major issues of concern as regards to (i) whether the *DPA* is providing a philosophically coherent regulation of the privacy/free speech interface and (ii) whether it is able to provide real (as opposed to merely theoretical and illusory) protection for the individual in this area. Given that the data protection framework is currently under review at both the domestic and European level,<sup>69</sup> it is vital that these various debates are integrated so as to ensure an effective and balanced regime for the future.

Unfortunately, other work pressures have significantly limited the amount of time I have been able to dedicate to this submission. As a result I have only provided relatively brief answers to the most relevant questions below. These answers are also not as polished or as definitive as I would have wished them to be. I hope that the Committee will nevertheless find them useful. I will naturally be more than willing to provide further evidence should the Committee find this helpful.

### **Overview and General Relevance of the DPA:**

The *DPA 1998* has a truly "breathtaking"<sup>70</sup> scope which is certainly far broader than the tort of the 'misuse of private information' that is likely to form the principal focus of the Committee's inquiry. The *DPA* applies to the 'processing' of any 'personal information' that becomes 'data'. 'Processing' under the *DPA* is defined very widely. As the ICO's Legal Guidance of 2001 stated "it is difficult to envisage any action involving data which does not amount to processing".<sup>71</sup> Meanwhile, information will become 'data' if it is processed automatically (i.e. on computer) – an act which is almost ubiquitous in the modern environment. Finally, data will be 'personal' if it 'relates to' an identifiable individual (the data subject). According to dominant interpretations, even innocuous information about an individual already fully in the public domain may still 'relate to' that individual. Under the *Data Protection Act 1984* (which used the same statutory language) the ICO determined that

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<sup>69</sup> United Kingdom Government Ministry of Justice. "Call for Evidence on the Current Data Protection Legislative Framework." (Ministry of Justice, 2010), <http://www.justice.gov.uk/dpa-call-evidence-02-07-2010.pdf>. European Commission. "A Comprehensive Approach on Personal Data Protection in the European Union." (European Commission, 2010), [http://ec.europa.eu/justice/news/consulting\\_public/0006/com\\_2010\\_609\\_en.pdf](http://ec.europa.eu/justice/news/consulting_public/0006/com_2010_609_en.pdf).

<sup>70</sup> D. Bainbridge, *EU Data Protection Directive* (London: Butterworths, 1996), p. 15.

<sup>71</sup> United Kingdom Information Commissioner's Office, *Data Protection Act 1998 - Legal Guidance* (Wilmslow, Cheshire: Information Commissioner's Office, 2001), 15.

it encompassed even very innocuous information already in the public domain such as an author and book title and the information about individuals included in *Who's Who*.<sup>72</sup> In *Durant v. Financial Services Authority* (2003) the definition was narrowed, holding that, in order to be “personal”, the data must affect the data’s subject’s “privacy, whether in his personal or family life, business or professional capacity”.<sup>73</sup> However, *Durant* was followed by conflicting guidance from both the Article 29 Working Party (2007)<sup>74</sup> and the Information Commissioner’s Office (2007a) and, most importantly, contrary rulings by the European Court of Justice in the cases of *Tietosuojavaltuutettu v. Satakunnan Markkinapörssi* (2008) and *Commission v. Bavarian Lager Co. Ltd* (2010). As a result, a broad understanding of ‘relates to’ remains dominant.<sup>75</sup>

Generally speaking any use of personal information that falls within the scope of the Act must comply with the eight data protection principles together with various associated rules.<sup>76</sup> However, this default requirement is subject to limitations in respect of processing for specific purposes. One of the most far-reaching is the one set out in section 32 of the Act - a provision put in place to safeguard freedom of expression. This section provides an exemption from many of Act’s provisions but only on the following **qualified basis**:

- The processing is **only** for one or more of the purposes of **journalism, literature and art (JLA)**,
- It is undertaken with a **view to the publication** by any person of any journalistic, literary, or artistic material.
- 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
- The data controller **reasonably believes** that, in all the circumstances, compliance with that provision is **incompatible with the special purposes**.

Additionally, the ICO is prohibited from engaging in most forms of regulatory enforcement in relation to such processing. Specifically, no enforcement action at all may take place in relation to special purposes material which is being processed with a view to the publication of as yet unpublished material. In relation to material which falls outside this, enforcement action may only take place after the data controller has had an opportunity to appeal this finding of fact and the Court has granted leave and is satisfied that “the Commissioner has reason to suspect a contravention of the data protection principles which is of substantial

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<sup>72</sup> United Kingdom Data Protection Registrar, *What Are Your Views? Monitoring and Assessment of the Data Protection Act 1984* (Wilmslow: Data Protection Registrar, 1988). Committee of Vice-Chancellors and Principals, *Data Protection Act 1984: Code of Practice for Universities* (London: The Committee, 1987).

<sup>73</sup> Even this definition is still considerably broader than that which is captured within the tort of the misuse of private information.

<sup>74</sup> The European Commission Article 29 Working Party was established under art. 29 of the Data Protection Directive and comprises data protection regulators from around the EU together with the EU Data Protection Supervisor.

<sup>75</sup> Specifically, the decision in *Tietosuojavaltuutettu* indicated that data already existing in the public domain could constitute personal data whilst in *Bavarian Lager* it was held that the names of individuals attending a meeting in their business capacity could also constitute the personal data of those individuals. This latter decision appears in direct contradiction to the Court of Appeal’s finding in *Durant* that data would not be personal if it merely recorded “the putative data subject’s involvement in a matter or an event that has no personal connotations, a life event in respect of which his privacy could not be said to be compromised” (See *Durant* at 28).

<sup>76</sup> DPA, sch. 1. Although articulated at a high degree of generality, many of these so-called principles include detailed rule-like stipulations which are usually set out in particular Schedules to the Act. The content of these provisions will be analyzed in detail below.

public importance” (DPA s.46).<sup>77</sup> Finally, so long as the material in question has not yet been published, the data controller also benefits from a **duty on the courts to stay legal proceedings** which may otherwise be brought against it under the Act.<sup>78</sup>

The most pressing issues which arise in relation to this inquiry are as follows:

1. The scope of ‘journalism, literature and art’ is subject to a great deal of confusion and may be significantly narrower than expression which is protected under Article 10 of the *European Convention on Human Rights*. However, if speech fails this hurdle then it may be subject to most if not all of the *DPA* provisions (e.g. in relation to ‘sensitive data’) which have clearly not been designed to appropriately balance freedom of expression concerns.
2. Section 32 does not exempt **even on a qualified basis** journalistic, literature and artistic processing from key elements of the *DPA* scheme. For example, in contrast to the situation in many European countries, there is no exemption from the duty (on criminal penalty) to register any automatic processing with the ICO (section 17, *DPA* 1998). Such provisions are not compatible with freedom of expression.
3. There is a ban in a *DPA* context on seeking injunctions in relation to material which has yet to be published. In the context of developing common law jurisprudence as well as a greatly changed technological environment, it needs to be considered whether this ban is still appropriate.
4. There are major issues regarding which European Economic Area (EEA) Member State’s data protection law may be applicable in different contexts, especially when activity takes place through the internet. Moreover these laws provide extremely different treatments for journalism, literature and art (ranging from no formal exemptions at all in countries such as Spain through to totally unqualified exclusion from the substantive provisions in many Scandinavian countries). This raises pressing issues as regards the third set of questions in this inquiry.

## **Section I: Injunctions and Super-Injunctions**

### **General comments and specific answer to question I.c**

General privacy jurisprudence has recently come to recognize the appropriateness of granting interim and even in some cases final injunctions in relation to the publication of material which is deemed highly injurious to privacy interests. I will leave it to others who have more day to day experience of the operation of this common law framework to comment on how this is working in detail. What is important from the *DPA* perspective is that, although injunctions are specifically provided for within the statutory scheme,<sup>79</sup> in relation to ‘journalism, literature and art’ the possibility of seeking such an injunction is specifically foreclosed by section 32 (4) of the *DPA*. Thus, under the *DPA* only post-

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<sup>77</sup> In slight contrast, post-publication it is possible for a data subject to obtain compensation for violation of the requirements of the *DPA* in relation to processing only for the special purposes which cause distress alone (thus waiving the need to show damage which applies in other cases) (*DPA* s.13). In addition, individuals seeking judicial remedy in relation to data processing for the special purposes may apply to the Information Commissioner for assistance in relation to these proceedings; the Commissioner may provide such assistance so long as they are satisfied that “the case involves a matter of substantial public importance” (*DPA* s.53).

<sup>78</sup> See *DPA* s. 32 (4). Officially these provisions expire twenty-four hours post-publication (*DPA* s.32(4)(b)).

<sup>79</sup> Specifically, section 10 of the *DPA* grants individuals with a right to prevent processing likely to cause damage or distress. Processing including not only publishing but even “holding” the data.

publication remedies<sup>80</sup> are currently available.<sup>81</sup> This limitation, however, is not a necessary element of the general scheme for JLA within the *DPA*. In fact, although Ireland provides almost exactly the same substantive balancing test for such material within its data protection law, its cognate of section 32 does not foreclose either the possibility of injunctions or regulatory enforcement action by the data protection regulator in this context.<sup>82</sup>

Given the development of the common law in this area as well a significantly more intrusive socio-technological environment, it would appear that there is no good argument for keeping the prohibition on seeking injunctions under the *DPA* in place. In allowing for the use of a ‘breach of statutory duty’ tort in this context, it could be that removal of this bar might help reduce the legal costs in pursuing an injunction thereby improving access to justice. More difficult is whether the data protection regulator (in the UK, the Information Commissioner’s Office) should be given more of a role in enforcing the *DPA*’s requirements both pre-publication and post-publication. The Irish regulator has certainly taken some action (at least post-publication) in this area.<sup>83</sup> On the other hand, granting a regulatory authority such wide-ranging powers would appear to raise very serious issues in a free society. Moreover, the possibility of regulatory action in the media context pre-publication does not appear very practicable. I would therefore recommend:

- Removing the bar on seeking Court injunctions under the *DPA* in relation to journalism literature and art. The test for the court could still be the substantive one set out in section 32,
- Maintaining the current limitations on regulatory enforcement action by the ICO pre-publication,
- Looking more closely into whether there is room for some expansion of the role of ICO in this area post-publication. Any such expansion would of course require appropriate resourcing.

## **Section 2: The balance between privacy and freedom of expression**

### **Question 2a – Have there been and are there currently any problems with the balance struck in law between freedom of expression and the right to privacy?**

From a freedom of expression perspective, I have major concerns as regards to how the *DPA* seeks to provide for an appropriate balance between privacy and public expression. The concerns relate to both the manner in which section 32 regulates the speech which falls within in (the **nature of section 32**) and secondly the lack of clarity and potential narrowness as regards to which speech can be benefit from this provision in favour of ‘journalism, literature and art’ (the **scope of section 32**).

Turning to the **nature of section 32** of the *DPA*,

- It does not provide an exemption from the duty on criminal penalty to notify automatic processing with the ICO,(s. 17, *DPA 1998*) and to have one’s details (including name and address) placed on the Data Protection Register. In 2008, a freelance photographer was

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<sup>80</sup> Notably damages but potentially also post-publication limitations on processing via section 10 *DPA 1998* as well.

<sup>81</sup> This fact may significantly explain the relatively limited use of the *DPA* in this context to date.

<sup>82</sup> See section 22A, *Data Protection Act s 1988 & 2003* (Ireland).

<sup>83</sup> For example, against *News of the World* and *Sunday World*. See [http://www.dataprotection.ie/docs/Case\\_Study\\_6\\_-\\_News\\_of\\_the\\_World:\\_Limits\\_of\\_the\\_Media\\_Exempt/463.htm](http://www.dataprotection.ie/docs/Case_Study_6_-_News_of_the_World:_Limits_of_the_Media_Exempt/463.htm).



successfully prosecuted for non-notification, a fact which led the National Union of Journalist's Freelance Industrial Council to express concern about the "privacy and safety" implications of this provision.<sup>84</sup> Meanwhile, in Jersey (which has cognate notification provisions) a politician, Stuart Syvret, was convicted *inter alia* for failing to register his blogging activity with the Data Protection Registrar.<sup>85</sup> These provisions clearly constitute a disproportionate and in practice arbitrary restriction on the exercise of freedom of expression. They should be removed.

- On the other hand, the potential overly-limiting nature of section 32 in relation to the seeking of injunctions has already been noted above. It may also be argued that the "public interest" test included in this section (which refers to the 'reasonable beliefs' of the data controller) should be brought more fully into line with that developing under the common law.

The problems in relation to the **scope of section 32** are much more serious. It bears emphasis that should speech fail the section 32 test then restrictions will generally become very onerous. For example, processing of any '**sensitive**' data generally requires that a legitimating condition under Schedule 3 of the *DPA* be satisfied. However, at least where such processing might cause more than minimal damage or distress, there is no condition which provides for the general legitimacy of processing such material in a free speech context (absent the "explicit consent" of the data subject). This is problematic since such data is defined broadly and categorically within the *DPA* scheme. It includes any data consisting of information as to data subjects' racial or ethnic origin, political opinion, religious (or similar) beliefs, trade union membership, physical or mental health and condition, commission or alleged commission of an offence and criminal proceedings.<sup>86</sup> Public expression will obviously often involved the processing of such data categories. Thus, as regards **scope of section 32**, it should be noted that:

- The ICO's implementation of these provisions has been overly narrow. For example, although it lists on its website approximately 150 "standard templates" for registering various types of data controller under section 17 of the Act, I have only been able to locate one (N900 – Journalist) which lists JLA as a purpose. There is a notable absence of the JLA purpose in the standard or model notifications for University (N887), Publisher (N841) and Networking Site (N963).<sup>87</sup>
- *Quinton v. Pierce* (2009) in the High Court proceeded on the basis that a politician's speech to the public through an electoral leaflet could not benefit from the JLA provisions. This was seemingly because it was not the exclusive purpose of the politician to produce a literary work to the public but, rather, this was intertwined with other purposes such as canvassing of support amongst the electorate. This line of argument is particularly problematic as socio-political speech not only often has this nature but is also rightly considered amongst the most important within a democratic society. A large number of other socio-political activities (e.g. the public filming of a protest by a activist group in order both to disseminate information to the public and also to have evidence of any malpractice by officials such as the police, the compiling of information on individuals by a body such as Amnesty International both for publication and for

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<sup>84</sup> See <http://media.gn.apc.org/fl/0809dpa.html>.

<sup>85</sup> <http://www.bbc.co.uk/news/world-europe-jersey-14444352> . Syvret was also successful prosecuted for a section 55 offence which is outside the scope of this point.

<sup>86</sup> Data Protection Act, 1998, § 2.

<sup>87</sup> Available through <https://www.ico.gov.uk/onlinenotification/?page=7.html>.

other purposes related to this body's work) would also appear to fail such an exclusivity test.

- In relation to social networking, the pan-European Working Party 29 group suggested that those who disseminate their profile to an indeterminate number of people may be able to avail themselves of the JLA exemption.<sup>88</sup> However, given the great range of purposes for which many of these people use social networking sites (social, political, business etc.), it seems likely that many of their activities would fail the exclusivity test. This poses growing problems in relation to the legal framework which should govern these sites.<sup>89</sup> Contrary to the Working Party, it has been suggested (including by ICO) that the domestic purposes provision may apply in this context.<sup>90</sup> This, however, is clearly incorrect. During the drawing up of the Directive, the Common Position of the Commission and the Council of Ministers confirmed that the domestic purposes provision could not be relied upon where data was disclosed to "an indeterminate number of people".<sup>91</sup> This understanding was confirmed by the ECJ in the *Lindqvist* case (2003) where it was found that the publishing of personal data on a private individual's non-commercial internet page would not be within its scope. Given the nature of the domestic purposes provision (it provides an exemption from all of the data protection requirements) and the explosion of online non-commercial activities which involve the severe misuse of personal data,<sup>92</sup> this limitation is understandable. However, this finding coupled with the explosion of private blogging and social networking etc. has the effect of making more urgent the task of ensuring that the other exemptions in the data protection scheme are appropriate.<sup>93</sup>
- The various decisions of Information and Privacy Commissioners across Europe in relation to Google Street View suggest that this work falls outside the JLA scope thereby necessitating such protections as face blurring and a right to remove images. The basis on which the non-availability of the JLA exemption has been ascertained remains unclear.
- Legal decisions elsewhere in Europe suggest that rating websites likely fall outside the JLA exemption. For example in the *Spichmich.de* case the German federal court held that "the mere automatic listing of editorial content does not yet constitute a journalistic or editorial design ... Only when the opinion-forming effect on the community is the dominant element of the design [can the exemption be claimed]" (unofficial translation).<sup>94</sup> As illustrated in the French *Note2be.com* case, this places the legality of many of these sites in great doubt.<sup>95</sup>
- Despite the fact that academic investigatory work into socio-political matters is almost always wholly orientated to the collating and dissemination of public knowledge through the production of literary works such as books and articles, it is generally argued that such activity does not benefit from the JLA exemptions but rather falls into the category

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<sup>88</sup> European Commission Article 29 Working Party on Data Protection. "Opinion 5/2009 on Online Social Networking." (Place Published: European Commission, 2009), [http://ec.europa.eu/justice/policies/privacy/docs/wpdocs/2009/wp163\\_en.pdf](http://ec.europa.eu/justice/policies/privacy/docs/wpdocs/2009/wp163_en.pdf).

<sup>89</sup> Brendan Van Alsenoy et al., "Social Networking and Web 2.0: Are Users Also Bound by Data Protection Regulations?," *Identify in the Information Society* 2, no. 1 (2009).

<sup>90</sup> Section 36, DPA 1998.

<sup>91</sup> James R. Maxeiner, "Freedom of Information and the Eu Data Protection Directive," *Federal Communications Law Journal* 48, no. 1 (1995): 100.

<sup>92</sup> Daniel J. Solove, *The Future of Reputation: Gossip, Rumor, and Privacy on the Internet* (New Haven; London: Yale University Press, 2007).

<sup>93</sup> Unfortunately, the serious problems in this area were not sufficiently emphasized by the ECJ in the *Lindqvist* (2003) case itself.

<sup>94</sup> BGH VI ZR 196/08/

<sup>95</sup> Case 08/51650.

of “research” (which is regulated separately according to the data protection scheme). As processing for “research” is subject to almost the full force of the *DPA*, this has resulted in the imposition of an inappropriately strict regulatory framework in this area. Thus, Rosemary Jay advised the Socio-Legal Studies Association back in 2004 that as a result of the *DPA* all covert and deceptive academic investigations were “almost certainly” illegal.<sup>96</sup> Even more restrictive conditions have been suggested as necessary for sensitive personal data processing. Although he did not stress the legal origins of some of these problems, Robert Dingwall cogently explicated the unprincipled nature of this outcome in the following comments:

[W]hat are the costs of regulating the same enterprise in different ways, particularly when the result is to handicap those elements that would generally be thought of as more disinterested, reflexive, unconstrained by partisan passions, etc.?...It is unsurprising that we increasingly question the fairness of restricting serious academic inquiry, while tolerating reality TV, hoax shows and ever-more intrusive security work.<sup>97</sup>

The effects of the data protection framework on academic research are symptomatic of the current incoherent and unprincipled state of the data protection framework in the UK and Europe generally.<sup>98</sup>

#### Question 2(c)

The emphasis within this submission has been that Parliament has already enacted a statutory privacy law in the form of the *Data Protection Act 1998*. Indeed it is notable that cognate instruments to the *DPA* in other jurisdictions (e.g. Australia and New Zealand) are explicitly styled *Privacy Acts*. Steps should be taken to ensure greater public understanding of the fact that the *DPA* is effectively a statutory privacy law. The core issue which requires attention here are the potential restrictions, potentially even as regards to material collected from or published primarily within the UK, on the applicability of the UK *DPA* vis-à-vis other European data protection laws. Given the highly divergent manner in which such laws seek to regulate journalism, literature and art this is an issue which requires urgent attention at both the national and international level. It is further addressed in section 3 of this submission.

#### Question 2(d)

In relation to the ‘privacy’ side of this equation, the *DPA* currently includes extensive presumptions (e.g. as regards the provision of fair information, non-excessiveness and special regulations regarding ‘sensitive’ data) that attempt to help fill out the public interest here. These provisions have clearly been a mixed blessing. They might, however, be used as a starting point for thinking about which privacy interests should be taken into account in this context. As a cognate to these provisions, there may be a role for both Parliament and the Courts laying down more explicit presumptions as regards the public interest in freedom of expression.

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<sup>96</sup> <http://www.kent.ac.uk/nlsa/images/slsdownloads/slsaexec/exec23-09-2004.doc>.

<sup>97</sup> Robert Dingwall, "Confronting the Anti-Democrats: The Unethical Nature of Ethical Regulation in Social Science," *Medical Sociology Online*, no. 1 (2006).

<sup>98</sup> See further David Erdos, "Freedom of Expression Turned on Its Head? Academic Inquiry, Journalism and the Data Protection Framework," (2010), ———, "Lost in the Labyrinth? Social Research and the Data Protection Framework," (2010).

### Question 2(f)

No. Explicitly bringing into the balance the commercial viability of the Press is not appropriate given the human rights context of the matters under consideration.

## **Section 3: Jurisdictional Issues**

### Question 3 (b):

The current practical inability or reluctance to enforce minimal privacy provisions in the online context coupled with the expectation that the traditional media will comply constitutes a clear violation of legal equality and the rule of law. It cannot be accepted as an appropriate *status quo*. In relation to the data protection context, a further problem presents itself in relation to which EEA Member States' data protection law will apply to the processing in question. According to section 5 (1) of the UK *DPA*, the Act only applies when:

- (1) The data controller is established in the United Kingdom and the data are processed in the context of that establishment, or
- (2) The data controller is established neither in the United Kingdom nor in any other EEA but uses equipment in the United Kingdom for processing the data otherwise than for the purpose of transit through the United Kingdom.

Despite a recent pan-EU Working Party opinion on this matter,<sup>99</sup> it is clear that there is no clear consensus within Europe as to what *nexus* between a processing operation and a Member State is required in order for a data controller to be deemed, as regards that processing, to be “established”. Certainly it is clear that the general activities of individuals and corporations based in the UK will be covered under (1).<sup>100</sup> However, it remains possible that a data controller may deliberately set itself up in another EEA country, collect and primarily publish material in the UK but then seek to rely on its “establishment” elsewhere in the EEA order to seek to evade even the reasonable statutory limits on freedom of expression set out in the *DPA*. This is clearly problematic as, although the UK *DPA* contains some of the weakest regulatory provisions in Europe vis-à-vis journalism, literature and art, a few EEA countries (potentially contrary to the Article 9 of the pan-EU *Data Protection Directive 95/46/EC*<sup>101</sup>) have completely and unconditionally exempted such activities from the substantive provisions of their law. This issue is clearly a very complex one, which requires debate and reform at both a national and international level. However, I tentatively suggest that at a minimum it should be made clear in Statute that, as regards the collection of JLA information within the UK and/or the primary publication within the UK, the balancing of interests put forward in this submission should apply irrespective of

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<sup>99</sup> European Commission Article 29 Working Party on Data Protection, *Opinion 8/2010 on Applicable Law* (European Commission, 2010).

<sup>100</sup> Indeed, section 5 (3) of the Act states that the following must be treated as “established in the United Kingdom”:

- An individual who is ordinarily resident in the United Kingdom,
- A body incorporated under the law of, or in any part of, the United Kingdom,
- A partnership or other incorporated association formed under the law of any part of the United Kingdom, and
- Any person who does not fall within the above but maintains in the United Kingdom (i) an office, branch or agency through which he carries on any activity, or (ii) a regular practice.

<sup>101</sup> This article clearly mandates a balancing between freedom of expression and privacy in this context. An absolute and unconditional exemption from all of the substance of data protection does not appear compatible with this framework. This is particularly clear in countries such as Sweden which otherwise lack of a general privacy law (either in statute or as developed by judges) which applies to private actors.

whether the data controller satisfies the requirement of “establishment” set out in section 5 (1) of the *DPA*. This would be a cognate to the unlawful obtaining of data contrary to section 55 of the *DPA* which also applies to any (natural or legal) person irrespective of whether they are so established.

6 October 2011

## **Terence Ewing—Written evidence**

### **PRESS COMPLAINTS COMMISSION**

#### **An appearance of lack of impartiality and independence**

#### **Funding and the position of the controlling company Press Bof**

1. The Press Commission is a private limited company set up as a charity in order to purportedly police discretions and breaches of the Press Complaints Commission Code by editors and journalists employed by newspapers.
2. As such, it hasn't been created by an Act of Parliament and therefore has no certainty of function other than a private company.
3. Full details of the Memorandum and Articles of Association of the Press Complaints Commission Company No. 02538908 may be obtained from Companies House.
4. In addition, full details of the Memorandum and Articles of Association of Press Bof (Press Standards Board of Finance Ltd.) Company No. 02554323 may also be obtained from Companies House.
5. It is contended that this is totally unacceptable, given the powerful and influential role played by Newspapers, their editors and journalists in forming public opinion and disseminating information to the general public regarding both individuals and issues of both local and national importance in respect of all spheres of activity.
6. The Commission is financed by a so called arms length separate company called Press Boff, which collects dues and fees from the newspaper industry itself and then passes this on to the Press Complaints Commission in order to fund it.
7. The Commission claims that this preserves its independence, but in reality, this is a ploy to give a false appearance of financial independence to the Commission. Press Boff can also appoint and remove the Chairman of the Commission.
8. In reality, the Commission is financed by the newspaper industry itself via a front company, and is therefore financed by the very organisations that it is supposed to be overseeing and regulating.

#### **Appointment of the Chair**

9. The Chairman of the Press Complaints Commission is appointed by the news industry itself, and I understand that Press Bof may also remove him or any other Committee member.
10. The Chairman is also chair of the appointments Commission for the Press Complaints Commission, which appoints the members of the Commission.

## Drafting of the Press Code of Conduct

11. The various editors of the newspapers itself draft the Press Code of Conduct again which the Commission is supposed to be overseeing and regulating.
12. The Committee of Editors is responsible for the Code and making any amendments to it and most of the leading editors of the national newspapers are on the Committee responsible for the Code.
13. In many cases therefore, editors of newspapers who sit on the committee to adjudicate cases will have been involved in the drafting of the Press Code of Conduct giving a further appearance of lack of independence.
14. The Committee's attention is further drawn to the fact that article 9(i) of the PPC Code of Conduct currently only prohibits mentioning details of relatives and friends of persons who are convicted or involved in criminal proceedings, if it is necessary for the story.
15. This provision should be extended to cover colleagues and acquaintances as well, as it can be highly damaging and distressing for colleagues and acquaintances to have their names mentioned in connection with someone convicted of offences, just as much as for relatives and friends.
16. There would also appear to me to be no justification for restricting this to solely relatives and friends.
17. Recent examples of this were in the case of Mr. Chris Langham, the actor convicted of child pornography offences, where the BBC showed footages of his appearances on television along with an actor who appeared jointly with him. There was no justification for this at all.
18. Another example was relating to Sir Paul McCartney's photograph and name being mentioned in connection with the conviction of Mr. Paul Caffell, a photographer to Sir Paul.
19. Copies of the relevant articles are enclosed, and it is submitted that there could have been no justification for publishing Sir Paul's name or photograph in this context.
20. There would also appear to have been a serious breach of article 9(i) of the PCC Code of Conduct in this context, as although it was stated that Sir Paul had been a personal friend of Mr. Caffell, Sir Paul wasn't involved with his case nor had he been called as a prosecution witness.
21. It would appear therefore that the press frequently breach article 9 of the PCC Code of Conduct in order to spice up their articles and make them more controversial.

### **Presence of editors on the adjudication panel**

22. The make up of the Commission consists of a number of editors of leading newspapers and a token element of lay members; the Commission claim gives an appearance of independence.
23. This is of course total nonsense, as it is clear that the editors themselves hold the sway when the Commission deliberates, and they clearly influence the lay members to go along with their way of thinking.
24. The editors may also well know the particular editor being complained against, and it is a situation of editors judging other editors.
25. This type of undesirable situation has been remedied in respect of police complaints with the setting up of the Independent Police Complaints Commission, to get rid of the previous complaints by the public that police officers were investigating and judging fellow police officers.
26. In addition, whilst it is accepted that the editor of a newspaper the subject of a complaint to the Press Complaints Commission would not sit on the panel considering that complaint, it must be the case that all of the editors who do sit on any adjudication will at some stage have been the subject of unrelated complaints against their own paper.
27. This creates a further appearance of lack of independence, by having editors sitting on adjudication panels, when they may have been subjects of similar although unrelated complaints to the Press Complaints Commission themselves.
28. The editors therefore sit on their own committee to judge complaints, when their fellow editors actions are under scrutiny, and when other editors have been responsible for drafting the Code of Conduct, and they may have had unrelated complaints made against themselves.

### **Qualifications of editors and lay members on the adjudication panel**

29. As an adjudicating body, neither the editors who sit on the adjudications or any of the lay members are legally qualified.
30. It isn't clear what legal assistance they have from the secretarial back up, although the Commission does have solicitors.
31. It is understood that the solicitors don't advise the members of the Commission in respect of adjudications, and unlike lay Justices in the Magistrates' Court the Commission are therefore not advised by someone with legal qualifications as with the case of Clerks to Justices.
32. It must follow that any adjudication say in respect of privacy issues, which as members of the current Parliamentary Committee will know, has given rise to a large amount of case law, including a decision in the House of Lords relating to the Naomi Campbell



case, will not have had recourse to professional legal assistance on the interpretation and application of the relevant case law.

33. As breaches of privacy is one of the main complaints to the Commission and there are provisions in its Code of Conduct concerning it, this must therefore raise issues as to the competence of the current Commission to seek to determine and adjudicate on such issues.

### **Conduct of hearings before the adjudication panel**

34. There is no right to any oral hearing for complainants before the Press Complaints Commission and complaints are determined on the papers.
35. Further, the Commission doesn't have any regulated code of procedure for conducting its proceedings whatsoever, and such procedures as it adopts in respect of its determinations are therefore made up on the hoof to suit the particular cases that it deals with.
36. All of its deliberations are held behind closed doors and members of the public are not entitled to attend any of them, as would be the case with tribunals or courts of law.
37. There is also no power for the Commission to obtain any documents from the newspapers concerned, and unless the editor of the newspaper in respect of which a complaint has been lodged decides to furnish the Commission with copies of any documents, the Commission's deliberations take place without full disclosure being made to it by the newspaper concerned.

### **Powers of the adjudication panel**

38. The Commission has no powers to levy fines on any newspaper found to be in breach of the Code, nor do they have any powers of disqualification in respect of rogue editors or journalists.
39. It has to be conceded that unlike police officers, doctors, accountants, lawyers and other professional bodies; there are currently no provisions for journalists to be registered with any professional body, or to have any form of practicing certificate that could be revoked by any disciplinary body that could be set up by Act of Parliament.
40. There may well be a good case for introducing Practicing Certificates, so that a body set up by Parliament if a breach of their Code of Practice was found to have taken place can disqualify holders.

### **Inadequate remedies against the Press Complaints Commission**

41. There is no proper review or appeals procedure in respect of challenging decisions of the PCC, and it is contended that complaints to the Independent Charter Commissioner are not an adequate remedy.
42. The Press Complaints Commission itself appoints the Independent Charter Commissioner, including the present one, Sir Brian Cubborn, and he has no powers to

overturn the Commission's decision, and may only investigate the manner in which the Commission conducted their investigation.

#### PRIOR NOTIFICATION OF PROPOSED ARTICLES BEFOREHAND BY NEWSPAPERS

43. It is suggested that journalists should also be required to contact the subject at least seven days and possibly fourteen days beforehand.
44. This would give time for the subject to be able to contact the editor by letter or through legal representatives, in order to put the newspaper concerned on full notice that the allegations are denied, and that any subsequent publication would be at the newspaper's risk of both defamation and breach of privacy proceedings ensuing.
45. This may also prove to be very important should the paper concerned wish to raise the issue of "qualified privilege" and "professional journalism" known as the "Reynolds" defence in any subsequent defamation proceedings, which might also have relevance if the issue of malice was also raised.
46. It would also relate to any "public interest" defence that the newspaper might wish to raise in defence to any misuse of private information claim.
47. In addition, this would also give the subject concerned, the opportunity of applying to the High Court for an injunction restraining publication until the paper had appeared before the court to justify publishing its story.
48. Clearly, wealthy individuals who have stand by legal teams that have access to contact High Court Judges over the telephone at weekends are at a distinct advantage over ordinary persons who don't have such immediate access to these select facilities.
49. An ordinary person who may be contacted by a Sunday newspaper journalist, say late on a Friday evening, when the courts are closed until the following Monday, will not be able to do anything to prevent a damaging publication.
50. However, someone with other financial means may well be able to instruct solicitors who can contact a Judge over the course of the following Saturday, and thus obtain an Injunction over the telephone preventing publication on the Sunday.
51. This would appear to be a very unequal playing field, and a total denial of "access to justice" for the ordinary person in the street.
52. If a sufficient time were available to such persons of say even seven days, they would be able to prepare an affidavit and summons and appear before a High Court Judge to explain the position, say at the earliest the following Monday.
53. An Injunction would then be obtained, and the newspaper invited to appear to justify their case for publication.

54. In these types of cases, it might also be desirable for evidence to be given on affidavit, so that either party would know that if they file any false evidence, they could be prosecuted for perjury.
55. This would then protect both the subject and the newspaper, as each side would be under a clear duty to give full and frank disclosure, and know that if it were to be proved that false evidence had been tendered, they would be liable to prosecution if it could be proved.
56. In addition, the newspaper's legal team would be professional barristers and solicitors who would be subject to their own professional code of conduct and be under a duty not to mislead the court.
57. This wouldn't prejudice the newspaper, because if they were able to justify on oath the reasons for such a publication, then the Injunction obtained by the subject would be discharged, as has been the case in a number of high profile cases recently.
58. It would also assist in promoting "professional journalism", because editors and journalists would then know that they might be required to justify before publication on oath the grounds on which publication was justified, thus clearly concentrating minds, with the beneficial result that deliberately false stories would then be far less common.
59. This is of course important in a case like that of Kate and Jerry McCann, where libelous statements which were misuse of private information were published in a number of newspapers in a totally reckless manner, with no care for the falsity or truth of what was being published, by both the journalists and editors alike.
60. This is an example of totally irresponsible journalism, and no doubt the newspaper editors concerned took the view that they wouldn't be called to account and could get away with it.
61. One reason why the actions may have been settled out of court, as otherwise, the journalists concerned would have had to have submitted Witness Statements and have given evidence on oath in court.
62. This might have led to them being investigated by the police for perverting the course of justice and perjury.
63. It would seem that they got cold feet therefore, and felt that the risks were too great to bluff it out, as it is amazing how minds are concentrated when there might be the threat of prison gates clanging behind them.
64. Likewise, the same might be said for some of the defendants who have recently featured in "See you in court".
65. Another such case was concerning Mr. Chris Jeffries where newspapers published numerous false statements about him and the Sun was later found to have been in Contempt of Court and Mr. Jeffries was also awarded damages against a number of media publications for misuse of private information and defamation.

66. Another case was also that of Mr. Barry George, which again appeared to be a case of reporters from News International on the Sun and the now defunct News of the World reporters again making up a fictitious story in order to attempt to blacken the character of Mr. George, notwithstanding some of his previous convictions.
67. The case of Mr. Moseley is again another example of the editor probably knowing full well that his source was lying and wasn't reliable and adopting a "publish and be damned" attitude to please his readers and promote circulation figures for Mr. Murdock.
68. This seems to be the attitude of many of the major tabloids and also broadsheets as well, as they all know that the Press Complaints Commission is a laughing stock, and that all it can do will be to give a slap on the wrist to its "buddy pals" in the press.
69. In the case of Mr. Moseley, this is well illustrated by the bad loser speeches given by the former editor of the now defunct News of the World on the steps of the Royal Courts of Justice after the case.
70. It is to be noted that so far as I am aware, the News of the World didn't appeal against Mr. Justice Eady's judgment, so if they were so concerned about it, the question has to be asked, why not? It seems an example of do as I say but not as I do.
71. Regarding the reliability of the source witness, it is to be recalled that the star witness suddenly had cold feet when at the doors of the court, and claimed that giving evidence would cause massive mental stress.
72. However, it is to be noted that she clearly wasn't suffering from such stress when she gave her material to the newspaper in the first place, and took the clandestine video recordings etc. No stress there, but cool and calculating breach of trust.
73. In addition, she seemed to have had a remarkable recovery a few days afterwards, as she had regained her composure sufficiently to be able to issue a public statement of apology to Mr. Moseley.
74. Perhaps the real reason why the News of the World didn't ever produce her in the court was because they knew all along that she was a total liar, and would have been torn to shreds in court.
75. Clearly, the editor was more concerned with a damage limitation exercise here, as the coverage of the case had already caused massive damage to the newspaper's reputation.
76. In such a case, if Mr. Moseley had had the opportunity of obtaining an Injunction beforehand, all of these issues could have been canvassed and if the Judge had thought that the witness was unreliable and was a total liar, then the Injunction would have been granted.

77. Mr. Moseley is correct in his contentions concerning the devastating damage that can be caused to an ordinary person by prior publication, perpetrated in a reckless manner by an unprofessional editor.
78. It is clear therefore from recent cases that the press is totally out of control, treat the Press Complaints Commission and any libel awards awarded against them by the courts with total contempt and consider themselves above the law.
79. Therefore, clear sanctions are now called for, and they have shown that they cannot be trusted to put their own house in order, and have no one to blame but themselves if Parliament now takes action.
80. A recent example of an organization being contacted before transmission of a television programme was the BBC in connection with its recent Panorama programme concerning Ryan Air, entered into considerable correspondence with that company prior to transmission.
81. This was obviously in the interests of professional journalism, as Ryan Air were given a full opportunity of commenting on and correcting any misunderstandings prior to the broadcast.
82. As can be seen from the enclosed attached correspondence downloaded from the Ryan Air web site at the time, there was considerable dispute concerning the facts of the case, which Ryan Air made plain both in the letters from Mr. O'Leary and his company representatives.
83. It is fair to say that the programme when eventually broadcast was a damp squib, as the original claims that were to have been adverse to Ryan Air were omitted for the most part, and the only concrete criticism leveled so far as I could see was concerning items on their web site. Ryan Air to their credit made a number of minor adjustments to their site prior to transmission.
84. This was due to Ryan Air being able to place the BBC on notice beforehand that some of their more contentious claims and allegations were hotly denied.
85. Clearly in those circumstances, the BBC wouldn't have had any defence of Qualified Privilege or even a "Reynolds" style defence, if they had then proceeded to broadcast some of the more controversial original allegations in the form that they had originally intended.
86. Mr. O'Leary declined to be interviewed on the programme unless he was given an assurance that it would be transmitted in its entirety in unedited form, something that the BBC may have unreasonably refused to do.
87. However, when Mr. O'Leary did appear on the programme when he emerged from a company meeting, he made his views very plain to BBC reporter Mr. Vivian White, and in my view came out with flying colours, making the BBC look stupid and biased against him and Ryan Air.

88. Ryan Air were contacted by Mr Vivian White and the BBC several weeks prior to transmission, and their original allegations were put to the company and Mr. O’Leary in the correspondence, so that they had adequate opportunities of fully refuting and responding to them.
89. As a result, Ryan Air also acted perfectly properly in publishing this correspondence on their web site for public viewing.
90. This may also be extremely relevant to Mr. Moseley’s proposition that subjects of proposed media articles should always be contacted prior to publication and be given a full opportunity of commenting on and refuting any disputed allegations.
91. This should be at least 14 or possibly seven days beforehand and in view of the Panorama programme, these should if necessary be in writing.
92. The opportunities given to Mr O’Leary and Ryan Air are rarely afforded to persons who are given adverse publicity by the media, and in particular by the News International Group, who as the Culture Media and Sport Select Committee heard in 2010, have been subject to the most adverse criticism at the recent hearings held before the “Press Standards, Privacy and Libel” enquiry.
93. It is therefore imperative that private individuals who are proposed to be the subject of adverse publicity be given full details of any allegations against them, and an opportunity of responding, in writing if necessary.
94. Clearly the BBC had reservations about broadcasting without giving Ryan Air the opportunity of fully responding in writing.
95. A phone call from a journalist from a Sunday newspaper on a Friday evening after the courts have closed and solicitors have gone home for the weekend is wholly insufficient.
96. Newspaper editors can under the present conditions, currently clearly adopt a “publish and be damned” policy, which they have done with veracity in recent cases as the Committee have heard.
97. The issue of concern therefore, is that this luxury is rarely if ever provided to ordinary members of the public, or even high profile public figures like Mr. Moseley.
98. Therefore, in all of the circumstances I would suggest that these suggestions are both proportionate and in compliance with both article 8(2) relating to the right to a reputation, and article 10 of the Human Rights Act 1998.
99. It is therefore imperative that private individuals who are proposed to be the subject of adverse publicity be given full details of any allegations against them, and an opportunity of responding, in writing if necessary.
100. Newspapers may well say that such proposals would be a “chilling effect” on their right of “freedom of expression” under article 10 of the Human Rights Act 1998 to publish stories they deem in the “public interest”.

101. However, as the recently decided cases, including that of Mr. Moseley have demonstrated, there has to be a balancing act between the article 10 rights of the newspaper and the article 8 rights of the subject.
102. Each case must be judged on its own merits, and in some cases, such as Lord Browne of Madingley, the balancing act was found to be in favour of publication, when it was discovered that he had allegedly misused his position as a director to promote his partner.
103. It must also be remembered that article 8 of the Human Rights Act 1998 is there to protect individuals from unwarranted invasions of privacy concerning their private lives and correspondence.
104. It is of course an open question as to whether such measures would be appropriate to large companies, or organizations or even politicians and persons in public life. Different considerations may apply here, but even so, article 8 may still give right to unwarranted invasions of privacy.
105. An example might be the recent revelations concerning MP's expenses, as several of the MP's concerned have stated that the details about them are inaccurate, with possibly actionable content.
106. On the whole however, I fully agree with Mr. Moseley concerning the devastating damage that can be caused to an ordinary person by prior publication, perpetrated in a reckless manner by an unprofessional editor.
107. It is clear therefore from recent cases that the press is totally out of control, treat the Press Complaints Commission and any misuse of private information and defamation awards awarded against them by the courts with total contempt and consider themselves above the law.
108. Therefore, clear sanctions are now called for, and they have shown that they cannot be trusted to put their own house in order, and have no one to blame but themselves if Parliament now takes action, as I would submit it has a public duty to do so.
109. Therefore, in all of the circumstances I would suggest that these proposals are both proportionate and in compliance with both article 8 and article 10 of the Human Rights Act 1998.

## **REMEDIES FOR PUBLICATION OF OFFENSIVE AND INTRUSIVE ARTICLES**

110. In cases where a newspaper publishes material that is offensive and intrusive, there doesn't appear to be any proper remedy at the moment so far as the criminal law is concerned.

111. Prosecutions under the Public Order Act 1986 would prove difficult, as would one using the Malicious Communications Act 1988, for the reason that the articles aren't communicated directly to any specified person.
112. I would suggest that a new statutory offence be created, that was easy to apply by prosecutors such as the CPS in situations that warranted a criminal prosecution of a newspaper, its editor and any journalists concerned.
113. The offence would be punishable by up to 5 and 10 years imprisonment respectively at the Crown Court and six months at the Magistrates' Court and triable either summarily or on Indictment at the election of the accused or in the same circumstances as other offences triable either way.
114. It is suggested that an offence along the following lines might be enacted:

### **Publication of false material or communications by newspapers and media publications**

- 1(1)—It shall be an offence for any person to publish in a newspaper or other media publication information knowing the contents to be false or untrue or misleading, with the intention of causing the subject of the publication alarm harassment or distress.
  - (2)—It shall be an offence for any person to publish in a newspaper or other media publication information knowing the contents to be false or untrue or misleading, likely to cause the subject of the publication alarm harassment or distress.
  - (3)—It shall be a defence for any person charged with such offences to prove that he published the information as a result of material and data wither oral or in writing which he had reasonable cause to believe and could have ascertained with reasonable diligence whether it was true or false.
  - (4)—For the avoidance of doubt "newspapers and media publication" includes newspapers registered under the Newspaper Libel and Registration Act 1881 and broadcasting organisations.
- "Person" shall include a body corporate, an editor, or journalist or author.
- "False or untrue or misleading" means publication of information as a statement of fact made directly or indirectly by suggestion or innuendo.
- (5)—An offence under section 1(1) shall be punishable on Indictment with imprisonment for 10 years and summarily with imprisonment for 6 months.
  - (6)—An offence under section 1(2) shall be punishable on Indictment with imprisonment for 5 years and summarily with imprisonment for 6 months.
115. The reason is that the civil sanction of being sued, doesn't seem to be a deterrent to editors and journalists who publish deliberately false and malicious articles, as has been witnessed in the current TV programe, "See you in court".



116. It is clear that both editors and journalists have a cavalier attitude to such publications, and adopt a publish and be damned policy.
117. It is also becoming clear that editors of national and local newspapers don't have a responsible attitude to publication of such articles, and fail to properly check their sources beforehand.
118. The Press Complaints Commission is of course no deterrent, as the organization isn't free and independent, and lacks any teeth at all, and cannot even impose financial penalties on media organizations that are members.
119. In addition, as can be seen by the number of libel actions, and for that matter, related privacy claims that have been issued against the media in recent years, the Press Complaints Commission has become a total joke and is ignored by the majority of claimants who chose to bring such claims.
120. Clearly, this is not without foundation, and was of course commented on in the Report on privacy by the Culture Media and Sport Select Committee "Press Standards, Privacy and Libel" enquiry.

## **RIGHT TO PRIVACY ALLEGEDLY STIFLING INVESTIGATIVE JOURNALISM**

121. Proper investigative journalism cannot be under any threat from the current judgments relating to privacy etc. and the application of article 8(1) ECHR as incorporated in the Human Rights Act 1981.
122. Firstly, as all of the judgments in Theakston v. MGN Ltd. [2002] E.M.L.R. 22; Campbell v. MGN Ltd. [2004] 2 A.C. 457; Douglas v. Hello! Ltd. (No 3) [2006] 1 Q.B. 125; HRH Prince of Wales v. Associated Newspapers Ltd. [2008] 1 Ch. 57; McKennitt v. Ash [2008] 1 Q.B. 73; Murray v. Express Newspapers plc [2009] 1 Ch. 481 and Moseley v. News Group Newspapers Ltd. [2008] E.M.L.R. 20, make very clear, any invasion of privacy has to be justified first and foremost by whether the subject has done anything wrong and whether publication is proportionate.
123. In the Naomi Campbell case, this was justified in part as she had denied taking drugs when attending a drug clinic, but there the issue was whether too many personal details had been given in the Daily Mirror article, and whether the publication of her photograph had been justified.
124. As the Committee will be aware, the House of Lords held that the intrusive details and the publishing of her photograph were held not to have been justified in the circumstances.
125. Equally, in Lord Browne of Madingley v. Associated Newspapers Ltd. [2008] 1 Q.B. 103, copy enclosed, as Lord Browne was held to have misused his company position in relation to his relationship with his male partner, this was held by the court to have justified the invasion of his privacy, and not the fact that it had been a same sex relationship.

126. Therefore, if an investigative journalist can show that he has exposed wrongdoing and that it is proportionate, the courts will sanction this, but not if the allegations prove to have been untrue, as occurred in the Max Moseley case.
127. Therefore, the suggestion that these various judgments are somehow stifling investigative journalism is unfounded.
128. In fact the courts have simply applied the principles applicable from the Strasbourg jurisprudence relating to article 8, such as Perry v. UK [2004] 39 E.H.R.R. 3; Von Hannover v. Germany [2005] 40 E.H.R.R. 1 and PG v. UK [2008] 46 E.H.R.R. 51.
129. Therefore, the courts cannot be condemned for applying the principles of article 8 of the Human Rights Act 1998 in respect of the cases that have come before them.

November 2011

## **Foot Anstey LLP—Written evidence**

There are approximately 85 regional daily and Sunday paid-for newspapers in England, Wales, and Northern Ireland, and 400+ paid-for and free weekly papers. Foot Anstey's Editorial and Regulatory Media Team represents approximately 60% of those newspapers, and has done so for the last 20 years or so.

Further, we represent a number of national magazine publishing groups.

Accordingly, we have the largest media law practice in England, Wales, and Northern Ireland outside London.

The Joint Committee's remit is primarily concerned with issues surrounding privacy and injunctions, in respect of which we make no submissions. Although the regional press is, of course, bound by the law of privacy, privacy is not an issue which affects the regional press in the same way as it affects national tabloid newspapers.

However, we note that the Joint Committee has taken evidence during the course of its enquiries on the subject of Conditional Fee Agreements, success fees and ATE insurance premiums. The regional press is most certainly affected by these issues, and so we belatedly make this submission.

Whatever their background, market, size, and history, all our clients have one thing in common: they consider Conditional Fee Agreements which provide for a success fee to have a serious chilling effect on their right to freedom of expression, both in terms of not publishing investigative articles which carry a risk of provoking litigation, and of settling claims which they would otherwise defend, due to the fear of excessive costs being incurred.

Our view that the current CFA regime creates a serious chilling effect on freedom of expression is unequivocal. We doubt that there are many, or even any, regional publishers which are willing to take the risk of exposing themselves to the enormous costs risk that accompanies the publication of investigative or contentious articles, or of defending a claim from a CFA funded Claimant, no matter how strong their defences might be.

Former Guardian Research Fellow at Nuffield College Oxford, Neil Fowler, has already given evidence to the Committee on the parlous financial state of the regional press. As he has explained in both oral evidence and in his thesis "The rise, the fall, and the future of regional and local newspapers", the regional press is on a financial knife edge.

We agree entirely with Mr. Fowler's analysis, save that we assert that in addition to the commercial issues he identifies, one must also consider the commercial consequences of CFAs.

When considering first, damages in the region of £10,000, £20,000 or £30,000 if the defence to a claim fails (and no matter how strong a defence may appear, the possibility of it failing must always be considered); and second, claimant costs of £300,00 or £400,000, it is no surprise that publishers invariably seek a settlement irrespective of the merits.

Claimant costs of £300,000 or £400,000 are not mere speculation; they are figures we have encountered in matters which did not even go to full trial. They are representative costs figures in claims we have encountered brought by the major solicitors' firms who act for clients on CFAs in libel matters.

This is the reality of the expression “the chilling effect on freedom of expression”.

This has been our view for some years, as will be seen from:

- the evidence of Tony Jaffa to the Culture Media and Sport Select Committee in February 2009 - see appendix 1, particularly the evidence marked \* on pages Ev13, Ev15, and Ev16, ;
- our submission to the Ministry of Justice dated 12<sup>th</sup> February 2010 – see appendix 2.

Accordingly, we:

- endorse the conclusions of Lord Justice Jackson, as contained in pages 319 to 329 of his final Report dated December 2009 - see appendix 3;
- welcome the reforms relating to the funding of reputation and privacy cases being proposed by the Government in the Legal Aid, Sentencing and Punishment of Offenders Bill;
- urge the Joint Committee to recognise the harm caused by the present CFA regime to the concept of freedom of expression in the United Kingdom, and to endorse the reforms contained in the relevant parts of the Legal Aid, Sentencing and Punishment of Offenders Bill.

2 February 2012

The appendices to this submission are available from the Parliamentary Archives (telephone 020 7219 5314)

Neil Fowler, Nuffield College, Oxford, Richard Walker, Editor, *Sunday Herald*, John McLellan, Editor, *The Scotsman*, Matt McKenzie, Editor, *The Sunday Sun*, and Alastair Machray, Editor, *Liverpool Echo*—Oral evidence (QQ 210–272)

**Neil Fowler, Nuffield College, Oxford, Richard Walker, Editor, *Sunday Herald*, John McLellan, Editor, *The Scotsman*, Matt McKenzie, Editor, *The Sunday Sun*, and Alastair Machray, Editor, *Liverpool Echo*—Oral evidence (QQ 210–272)**

[Transcript to be found under Richard Walker, Editor, \*Sunday Herald\*](#)

## **Professor Chris Frost—Written evidence**

I strongly support the Human Rights Act and its clauses on privacy and freedom of expression.

It is important to note that protection of privacy should refer to all intrusions: state as well as media, but I shall concentrate in this evidence on media intrusions as that is what the committee wishes to investigate.

All citizens are entitled to privacy of their family and home life. Provided what we do (as adults) in our homes and with our families does not break the law, we should be entitled to do it without fearing exposure by anyone else, whether the media, the state or other private persons.

However, there are a number of people who crave celebrity or fame and seek publicity in order to get it. The ability to trade private information (entirely different to secret information) for gain has long been understood. As part of our social interactions, we “buy” friendship and social networks by exchanging information that is private; information over which we have control and by ceding some level of that control to others we can draw them into our social circle.

Those who seek to manipulate the public for fame or money are aware that drawing the public in to a level of intimacy, which is admittedly entirely one way, they can set up a faux relationship that will make them popular.

There are also a number of people who wield power or authority who may not use publicity to get fame but certainly are able to use their power and authority to gain wealth or influence. These people owe their position to society and so should be answerable to society for its use or abuse.

Both these classes of people lose some element of their right to privacy because of the debt they owe society for their positions either of fame, bought on their selling of a carefully created depiction of their private life or through their use of power or authority.

The balance to those with power and influence or those who seek gain by presenting the public with a false image is freedom of expression. The right of anyone, including journalists and by extension the media, to publish their story whether a first-hand tale or a carefully researched piece of journalism.

The only way of measuring whether freedom of expression should allow a journalist to intrude into someone’s private life is public interest. This is necessarily a difficult tool to use although the courts have been trying to lay down some additional guidelines to those identified by Ofcom, the NUJ and the PCC. Whilst parliament may wish to add its own guidance, a full privacy law is unlikely to do anything other than add to the expense involved in deciding these matters and is likely to severely restrict freedom of expression in practice.

Privacy has been an issue of concern to parliament and the public for the past 70 years. News cycles have ensured that it becomes an issue of particular concern

every ten years or so but parliament has consistently decided that legislation is not the right way to go and I would support those decisions. However, reliance on the PCC or some other complaints-led regulatory body to deal with privacy would be foolish. The PCC deals with very few complaints about privacy, although they are notably its most important cases. Ofcom deals more steadily with such complaints. A research paper I produced last year examining privacy cases adjudicated by Ofcom and the PCC concluded: “Although the court cases looking at intrusions of privacy into the lives of celebrities by the print media have been attacked as meaning the end of press freedom (mainly in attacks by the press media itself, such as that of PCC code chair Paul Dacre), in fact hardly any of the landmark cases do anything more than firm up the law of confidence (Mosley, McKennett, Flitcroft). Although the PCC’s and Ofcom’s approaches are cautious (especially the PCC) there do seem to be significant moves on developing privacy rights around identity, health and children.

“To say that the PCC’s approach to identity is idiosyncratic would be an understatement as the two identity examples concerning e-mailed pictures show, but Ofcom is much clearer about the concept of identity in all its forms: pictures, names and identifiers such as address, phone number or e-mail. These are much more significant guides than any of the court cases all of which concern the clear breach of someone’s privacy with the only defence not being public interest, but the right of someone else to freedom of expression – the right to kiss and tell.

“This developments in privacy seem to be led by a clear expectation from the public of greater privacy rights and a freedom from media intrusion, paradoxical at a time when intrusion into privacy by the state has never been greater. People now seem to expect to be asked for their permission before any story or pictures identifying them are used, regardless of whether these were gathered in a public space or not. Journalists may now need to consider very seriously if their desire to get names and other identifiers into newspapers is now an outdated professional requirement.”

Frost, C (2010) *The Development of Privacy Adjudications by the UK Press Complaints Commission and Their effects on the Future of Journalism* Journalism Practice vol 4 No 3 London: Routledge

The paper showed that although there had been developments in thinking about privacy, these had been fairly limited. Statistics for a period of five years showed that Ofcom adjudicated on average 29 privacy complaints about news programmes, whilst the PCC adjudicated typically only 13 upholding only 22 percent of those.

**Table 2: Privacy adjudications**

Year	OFCOM				PCC			
	UH	Not UH	Total	%UH	UH	Not UH	Total	%UH
2004	4	21	25	16.0	1	17	18	5.6
2005	3	21	24	12.5	1	6	7	14.3
2006	5	27	32	15.6	4	10	13	30.8
2007	13	21	34	38.2	5	8	13	38.5
2008	7	23	30	23.3	3	11	14	21.4
		Avg:	29	21.1		Avg:	13.0	22.1

Ibid.

Very few complainants would consider using the PCC and risking new exposure when only a quarter of complaints are upheld, and the only punishment is a publication of the short adjudication in the newspaper concerned.

### ***The Press Complaints Commission***

The PCC was set up quickly by newspaper publishers at the end of the 1980s to avoid a statutory body suggested by the Calcutt committee and to limit the structure of the new body to mainly editors and a small number of independent commissioners describe by Paul Foot as “toffs and Profs”.

Its sole aim was to resolve complaints from the subject of stories. The body therefore deliberately and from the outset set out to involve as few people outside commercial decision making as possible and prevent as many complaints as possible, particularly complaints about media standards as opposed to mistreatment of an individual, by refusing to take complaints from third parties. The number of complaints it has processed over the years has increased to about 5,000 a year, but the number it adjudicates has dwindled and the number involving serious points of principle has virtually vanished. It proved itself to be completely incapable of investigating the phone hacking scandal, although even parliament struggled on that one, and it has consistently refused to take on any investigative or monitoring role regarding media standards or media freedom.

The PCC’s dominance by publishers (providing funding) and editors (code committee and commissioners) has been seriously damaging to newsroom culture. This hierarchical approach, not normally mirrored in countries whose journalistic ethics culture is more widely respected, has led to journalists seeing themselves entirely as employees and not responsible for their journalistic morals; just there to do a job as they are instructed. The weakening of trade unions through the eighties and nineties meant that journalists were less likely to take on such issues collectively through the NUJ and that the normative debates essential to any trade or profession that sees the involvement of the entire workforce as being significant (see health, education, the law etc) in providing a moral approach to their duties were denigrated by editors and publishers. For instance, although the Culture Media and Sport select committee identified in 2003 that journalists should be protected in the workplace if they refused to carry out an assignment they believed breached the code of practice, the Society of Editors opposed this saying editors should be solely responsible for workplace ethics. The PCC refused to get involved saying this was an employment issue.



The Committee needs to examine how the culture of journalism within newsrooms can be turned around to allow journalists to play a much stronger role in their working lives. This should involve strengthening journalists' rights in the workplace to be able to refuse unethical assignments, give assistance with training and continual professional development. Few journalists go into a trade that is no longer especially well paid in order to behave unethically, but where they fear for their jobs they can find themselves bending to a newsroom culture they find unacceptable and although there have been one or two examples of journalists quitting their posts because they could no longer stand doing what was expected of them most feel obliged to work with what they know is unacceptable.

Professor Chris Frost is Head of Journalism and director of the Centre for Responsible Journalism at Liverpool John Moores University in the UK and has been a journalist, editor and journalism educator for more than 40 years.

He is chair of the National Union of Journalist's Ethics Council and a National Council member of the Campaign for Press and Broadcasting Freedom. He also sits on the NUJ's Professional Training Committee. He is a former President of the National Union of Journalists, a former member of the Press Council and a former National Chair of the Association for Journalism Education.

He is now treasurer of the Association for Journalism Education, an executive board member of the Institute of Communication Ethics and sits on the editorial board of Ethical Space. He is a co-editor of *Journalism Education*.

He has written several books on Journalism: *Journalism Ethics and Regulation* (now in third edition); *Designing for Newspapers and Magazines* (shortly to enter production for a second edition); *Reporting for Journalists* (now in its second edition); and *Media Ethics and Self-Regulation* as well as several book chapters: Frost, C (in production) *Law as Regulation* in Petley J and Williams, G (eds) *Contemporary Media in Britain*; Frost, C (2006) *Local Ethics* in Franklin, R (ed) *Local Journalism and Local Media* London: Routledge; Frost, C (2006) *Press Complaints Commission: Ten years of self-regulation* in Keeble, R (ed) *Communication Ethics Today* London: Troubador; Frost, C (2005) *Design for Print Media* in Keeble, R (ed) *Print Journalism: A Critical Introduction* London: Routledge; Frost, C (2005) *The Press Complaints Commission* in Walters, E and Johnson, A (eds) (2005) *Decriminalising defamation: An IFJ campaign resource for defeating criminal defamation* Brussels: IFJ. He has published widely in academic journals and regularly writes magazine and newspaper articles on journalism ethics, the PCC, Ofcom, regulation and law.

5 October 2011

## **Global Witness—Written evidence**

Global Witness welcomes the opportunity to submit its written evidence to the Joint Committee.

Global Witness is a non-governmental organisation (NGO) that exposes the corrupt exploitation of natural resources, its links to wars and to international trade systems. We obtain evidence which we use to drive campaigns that end impunity, resource-linked conflict and human rights and environmental abuses. Global Witness was co-nominated for the 2003 Nobel Peace Prize for its work on conflict diamonds.

Our investigative and reporting work tackles important public interest issues such as funding of conflict, political and corporate corruption, and the functioning of organised crime. This work has been impeded by the threats that the current UK privacy law allows: powerful claimants, (often with no connection to the UK), threatening to initiate unfounded privacy actions against organisations such as ours who reveal the unflattering truth about them.

Furthermore, the UK legal system is characterised by disproportionately high costs which can be prohibitive for non profit organisations. The high cost of defending even a vexatious and unfounded legal action can have a potential self censoring effect. For such organisations, unlike for big newspapers, settling as a regular practice is simply not an option.

Global Witness is very pleased that a new Joint Committee has been appointed to consider privacy and injunctions. We consider that there is a tendency to characterise the privacy and injunction debate in the context of publications by the tabloid press. This characterisation fails to recognise the important work that Global Witness and other NGOs carry out on matters of vital and overwhelming public interest such as global corruption, state looting, armed conflict and human rights abuses. For a long time, only media organisations have been considered relevant in the debate as defenders of freedom of expression, and we believe that the important role of NGOs must be also be recognised.

We have elected to provide evidence in respect of two specific questions which are relevant to our own experience:

### **(2) A. Have there been and are there currently any problems with the balance struck in law between freedom of expression and the right to privacy?**

1. We believe that current privacy laws do not cater for the inequality of arms between non-media organisation publishers and often wealthy and powerful complainants. The law's failure to take this inequality into account operates, in practice, to place the balance too far in favour of the right to privacy of potentially corrupt individuals to the detriment of the public's right to know and freedom of expression.

2. Among the many threats that Global Witness faces, legal action is one of the more frequent - including breach of privacy. The corrupt politicians and businessmen whom we target in our investigations are often enormously rich, and can afford to use the law to

crush freedom of speech, despite the fact that what we publish is true and in the public interest.

3. Over the years, we have received legal threats attempting to silence us, and always deal with these robustly. For example, Global Witness has been the subject of an interim privacy injunction. In July 2007, the son of the President of the Republic of Congo, Denis Christel Sassou-Nguesso, attempted to use privacy laws to try and force us to remove documents from our website which indicated that he appeared to have been using state oil revenues to fund his lavish personal lifestyle. In order to expose this, Global Witness published bank and corporate documents showing that Denis Christel Sassou-Nguesso had spent hundreds of thousands of dollars on luxury goods and other items using a credit card that was paid out of funds which appeared to have come from sales of oil by the government. The documents Global Witness obtained had entered the public domain through a court in Hong Kong.

4. In 2006, Congo-Brazzaville had around \$3 billion in oil revenues, while 70% of the population lived on less than a dollar a day. As well as being son of the country's president, Denis Christel Sassou-Nguesso was also the Director of Cotrade, the marketing arm of the state oil company, and as such was the public official in charge of these oil sales.

5. After publication by Global Witness, Sassou-Nguesso and his company, Long Beach Limited, sought a High Court injunction to force Global Witness to remove his company records and credit card statements from its website. Judge Stanley Burnton dismissed this case and found that "once there is good reason to doubt the propriety of the financial affairs of a public official, there is a public interest in those affairs being open to public scrutiny." He said the documents "*unless explained, frankly suggest*" that Mr. Sassou-Nguesso and his company were "*unsavoury and corrupt*" and concluded that "*the profits of Cotrade's oil sales should go to the people of the Congo, not to those who rule it or their families.*"

6. Our refusal to bow to this pressure set a precedent in the English courts on public interest and the laws on privacy but was expensive – both in time and money for Global Witness. Although Global Witness was awarded £38,000 of its legal costs, we spent over two years trying to get the cost order enforced and ultimately had to seek enforcement abroad as Mr Sassou-Nguesso does not have any assets in the UK. The extra costs in terms of staff time, legal fees and the effect on our activities as a result of not having this money, have been significant, and only make it harder for organisations such as ours to defend ourselves.

7. We believe that the current privacy laws do not adequately protect freedom of expression in cases where overwhelming issues of public interest are at stake – such as when NGOs report on matters of undisputed public interest such as corruption and human rights abuses. The costs of defending a privacy injunction can be crippling. Spiralling legal costs of tens of thousands of pounds are commonly incurred in the course of defending an emergency injunction, often incurred over a 48 hour period. A publisher has little control over these costs which mount at a dramatic rate. Even if a publisher successfully defends an injunction it is unlikely that it will recover all of its legal costs. We consider that that the crippling costs of defending a privacy injunction can lead to a 'chilling effect' on freedom of expression as some publishers may conclude that the costs of defending an injunction are simply too great. Public interest reporting is likely to be stifled as a result.

8. There is also a concern that, as it is notoriously easier to obtain a privacy injunction than a defamation injunction, many privacy injunctions are sought merely as an alternate means of obtaining a defamation injunction by the back door. This effect is severely detrimental to freedom of expression and is not adequately guarded against in the present law. The injunction application brought against Global Witness, as described above, shows how powerful and wealthy individuals spare no effort to stop the publication of unfavourable information about them. This causes a significant imbalance in favour of the right to privacy. It is also likely that, the planned introduction of defamation reforms which it is hoped will make it harder to launch a frivolous defamation action, may lead to an increase in privacy actions, as an alternate means of suppressing freedom of expression.

9. This double burden swings the balance too far in favour of privacy rights and provides a serious threat to freedom of expression.

**(2) M. Should we introduce a prior notification requirement, requiring newspapers and other print media to notify an individual before information is published, thereby giving the individual time to seek an injunction if a court agrees the publication is more likely than not to be found a breach of privacy? If so, how would such a requirement function in terms of written content online eg blogs and other media?**

10. Global Witness opposes the introduction of a prior notification requirement in circumstances when publication is in the public interest. First and foremost, we are very concerned that a mandatory pre-publication notification would seriously stifle the right to freedom of expression. We also believe that a pre-notification requirement would also have a very considerable and deleterious impact on serious investigative journalism, as well as on the ability of NGO's to report on matters of public concern (say, corruption). If a pre-publication notification rule is established it would be very easy for those who wish to restrain publications to do so, either by obtaining injunctions – whether in London or elsewhere in Europe – or by simply tying publications and NGO's up in legal proceedings. As we have explained above, the very cost of fighting legal proceedings has become a serious chill on freedom of expression.

11. We also consider that introducing a prior notification requirement would represent too onerous a burden on a public interest publisher and would often be detrimental to the public interest issue being disclosed. Prior notification of publication of a public interest issue creates a very real risk that the issue being highlighted in the publication may be driven further underground and further entrenched as a result of the prior warning. There is also a risk that sources of the information are exposed and are vulnerable to steps taken to suppress the information. In some cases this may threaten the safety of the sources.

12. For example, Global Witness' investigations on Charles Taylor, former Liberian president, highlight the risks sources face pre publication. Taylor funded Sierra Leone's Revolutionary United Front, which was notorious for the mass amputation of limbs of the civilian population, with revenues from the diamond and timber industries. Working with Liberian counterparts who infiltrated the Liberian timber industry, Global Witness obtained critical information documenting this industry in detail, the resultant corruption, state looting and the timber for arms trade. This information was published in order to persuade the United Nations Security Council (UNSC) that they should impose sanctions on Liberian

timber, which they did in May 2003. If this information had not been made public, the UNSC timber sanctions may not have been imposed at all, or at least not as soon as they were, which would have prolonged the war with increased loss of life, forced displacement and general destruction. Had Global Witness been forced to contact individuals named in our reports prior to publication we would have jeopardised the lives of our sources and driven the corruption even further underground.

13. In a further example, we gathered information on the role of Cambodia's military in widespread illegal logging and extortion in a wildlife sanctuary where international donors (e.g. UN and EC) and international NGOs were spending large sums on ambitious conservation programmes. Through undercover investigations, open field research and aerial surveys, we assembled an extremely detailed picture of which units and which individual commanders were involved, their activities and how much money was changing hands. It was, at the time, the most in-depth investigation Global Witness had ever done on corruption in Cambodia's forest sector and arguably one of the most dangerous for the (Cambodian) Global Witness staff involved.

14. We published this as the 'Taking a Cut' report in November 2004. The same month, at the annual meeting between the Cambodian government and international donors, the latter insisted that the government accept key recommendations from our report (notably on information disclosure) as performance benchmarks for the following year. While the Cambodian government stalled on their implementation, these recommendations set the terms of the debate for natural resource management in Cambodia for the next two to three years.

15. At the time that we published the report, Global Witness had an office and five staff based in Phnom Penh. We felt that if we gave advance notice of our intentions to publish to those named in the report, they would attempt to stop the publication and threaten our staff. We believed that, once the report was published and those named came under public scrutiny, it would be more difficult for them to retaliate. As it was, the Cambodian government banned the report, seized copies and launched an investigation into Global Witness' activities in Cambodia. Eight months after we published the report they banned Global Witness expatriate staff from entering Cambodia and all of our local staff began receiving threats or warnings about their personal security. When the situation did not improve, we decided to close the office.

16. Global Witness believes that ill thought out application of the UK libel and privacy laws could have a seriously negative effect on civil society's ability to investigate and prosecute a large variety of crimes. We hope that the Joint Committee will carefully consider the implications on uncovering the truth and seeking accountability in pursuit of the public interest.

17. Consequently we consider that any "notification requirement" would gravely damage press freedom and the publication of the results of investigative work by NGOs.

16 December 2011

## Lord Grabiner QC and Dr Kirsty Hughes—Written evidence

the submissions represent our personal views as a practising barrister/parliamentarian and an academic lawyer

### INTRODUCTION

Some of the issues which are the subject of the Joint Committee's attention have been the source of frustration in certain sections of the press. In summary, our view is that this is unjustified, and that much of the commentary on matters relating to privacy law is inaccurate and superficial. In particular, there appears to be a developing notion that judges hearing cases concerning privacy law are on a frolic of their own. This is nonsense. The important point to keep firmly in mind is that in such cases, the judges are under instruction from Parliament in the Human Rights Act 1998 ("the HRA"), pursuant to which the European Convention on Human Rights ("the ECHR") was incorporated into domestic law, to balance an individual's right to respect for his or her private life against the more general right to freedom of expression. Parliament has thus carefully defined the task of the judiciary.

As a result of this legislation, the judge must first be satisfied on the evidence before him that the claimant has a reasonable expectation of privacy in relation to the information in question. If, and only if, that threshold is crossed must the judge then decide, again by close reference to the evidence before him, how best to strike the balance between Article 8 (privacy) and Article 10 (freedom of expression). This is a classic instance of the judicial process in action. As a result of their experience and training, judges are fully equipped to conduct this balancing exercise, and have rightly earned a reputation for discharging their duties in a just way, without fear or favour. If they err in their decisions, there is an excellent appeal process, overseen by judges of even greater skill and experience; and there is also the possibility of a further appeal thereafter to the Supreme Court, if the issue(s) in the case raises a point of public importance.

The broad thrust of this paper, therefore, is that the enactment of a statutory privacy law is unnecessary. We are firmly opposed to the idea of supplanting or obscuring the existing body of case law, which has developed around the rights protected by the HRA, with yet more legislation.

Further, we believe that many of the criticisms levelled at the existing privacy law are the result of the judges and their judgments being misunderstood and/or misrepresented. In this regard, and in order to contextualise the issues on which the Joint Committee has invited submissions, we suggest that it would be a useful exercise for Members of the Joint Committee who have not already done so to read a recent judgment, such as that of Mr Justice Tugendhat's in the case of *Goodwin v News Group Newspapers Ltd* [2011] EMLR 27. It will be seen that Tugendhat J's factual analysis is meticulous, and that his reasoning is logical and readily understood. No one can sensibly argue that he was on a frolic of his own.

## **PART I (TERM OF REFERENCE I) – HOW THE STATUTORY AND COMMON LAW ON PRIVACY AND THE USE OF ANONYMITY INJUNCTIONS AND SUPER-INJUNCTIONS HAS OPERATED IN PRACTICE**

### **The use of anonymised injunctions and super-injunctions**

Privacy cases involving newspaper stories are usually litigated under the law of misuse of private information, which may afford protection to a claimant where the defendant is seeking to publish, or has published, details of a private nature about the claimant. In such cases, the court may grant an injunction imposing restrictions on the publication of such details, or may award damages to the claimant in respect of private information which has already been publicised. It is important to appreciate that there are two principal types of injunctions: interim injunctions, which preserve the status quo *pro tem*, and permanent or final injunctions, which are granted after a trial on the merits. The Joint Committee is principally concerned with the former type of injunction, and in particular, with two sub-categories which have been the subject of recent controversy and confusion.

The first is a super-injunction, which can properly be defined as follows:

An interim injunction which restrains a person from: (i) publishing information which concerns the applicant and is said to be confidential or private; and, (ii) publicising or informing others of the existence of the order and the proceedings (the ‘super’ element of the order)<sup>102</sup>.

The second is an anonymised injunction, which is:

An interim injunction which restrains a person from publishing information which concerns the applicant and is said to be confidential or private where the names of either or both of the parties to the proceedings are not stated<sup>103</sup>.

In order to obtain interim injunctive relief in a privacy case, the applicant must not only establish that his or her right to respect for private life under Article 8 is engaged (by demonstrating a reasonable expectation of privacy in relation to the information which is sought to be publicised), but also that the requirement set out in section 12(3) of the HRA is satisfied<sup>104</sup>. Section 12(3) provides that an injunction to restrain publication before trial is not to be granted unless the court is satisfied that the applicant is likely to establish at trial that publication should not be permitted. As to the degree of likelihood, the House of Lords held in *Cream Holdings Ltd v Banerjee* [2005] 1 AC 253, at [22] – [23], that the courts should be exceedingly slow to make interim injunctions where the applicant has not satisfied the court that it is “more likely than not” that he or she will succeed at trial in showing that publication should be restrained. Thus, as a matter of law, it is not the case that super-injunctions and anonymised injunctions are automatically, or indeed readily, granted.

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<sup>102</sup> Report of the Committee of Super-Injunctions: *Super-Injunctions, Anonymised Injunctions and Open Justice* (“Report of the CMS”), May 2011, paragraph 2.14.

<sup>103</sup> Report of the CMS, paragraph 2.14.

<sup>104</sup> Strictly, it is for the respondent to raise a case for freedom of expression under Article 10, as Gross LJ noted in *Hutcheson v News Group Newspapers Ltd* [2011] EWCA Civ 808, at [31].

Nor, in practice, have such injunctions been used excessively or incorrectly. The tendency to confuse super-injunctions and anonymised injunctions has resulted in the misplaced impression that the former have become commonplace. But, whilst there appears to have been a rise in the number of cases in which interim injunctive relief is sought, and it is true that in many of the reported cases the courts have granted an interlocutory injunction, these have generally taken the form of anonymity orders or injunctions prohibiting the publication of specific details. They are not, as the *Report of the CMS* confirmed, super-injunctions<sup>105</sup>. Further, following clarification of the court's approach to granting super-injunctions in *Ntuli v Donald* [2011] 1 WLR 294, the circumstances in which that type of injunction can properly be made for anything other than a short period of time are extremely limited. The Court of Appeal has also recently clarified the correct approach to anonymisation<sup>106</sup>. These authorities provide useful guidance to judges, and ensure that the courts only accede to applications for interim injunctive relief in appropriate cases.

We consider that the significant burden imposed on claimants applying for super-injunctions and anonymised injunctions to satisfy the requirement in section 12(3) of the HRA, coupled with the guidance available to judges on when injunctive relief is appropriate, have safeguarded against the improper use of such injunctions. Applications for super-injunctions are becoming increasingly rare, and, when these applications are acceded to, it is only where strictly necessary. Any apparent increase in the number of anonymised injunctions is, in our view, reflective of the shift towards pre-emptive action by claimants to prevent private information being published in the first instance, rather than being indicative of the overuse or misuse of this type of injunction. Nevertheless, we would welcome closer monitoring of the number of privacy injunctions being granted; and we are therefore in support of the Master of the Rolls' pilot scheme, which requires the details of all applications for injunctive relief that engage section 12 of the HRA to be recorded for routine examination by the Ministry of Justice.

### **Time limitations and *contra mundum* injunctions**

There seems to be a common misconception that, once granted, super-injunctions and anonymised injunctions are cast in tablets of stone. By definition, such injunctions are of an interim, that is, temporary, nature, with their terms taking effect until a return date, when their propriety is considered afresh in the light of any new developments. Accordingly, we agree with the conclusion reached in the *Report of the CMS* that the requirement for draft orders to specify a return date means that super-injunctions and anonymised injunctions cannot, in practice, become permanent<sup>107</sup>. It should also be stressed that, at any time, either of the parties may apply for the injunction to be varied or discharged if changes in the relevant circumstances so require. Given these procedural safeguards, with which judges are very familiar, and the requirement for active case management in the Civil Procedure Rules, we do not believe that there has been a failure on the part of the courts to impose limitations on the duration of super-injunctions and anonymised injunctions.

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<sup>105</sup> *Report of the CMS*, page iv. The report dispelled the myth that the courts were issuing significant numbers of super-injunctions. It confirmed that only two known super-injunctions have been issued by the courts since the case of *Terry v Persons Unknown* [2010] EMLR 16. One of those injunctions was set aside on appeal (*Ntuli v Donald* [2011] 1 WLR 294), and the other was granted for a period of 7 days for anti-tipping-off reasons (*DFT v TFD* [2010] EWHC 2335).

<sup>106</sup> *JIH v News Group Newspapers Ltd* [2011] EWCA Civ 42.

<sup>107</sup> *Report of the CMS*, paragraph 2.35.



As to *contra mundum* injunctions, we would welcome appellate consideration of the circumstances in which they can be used in support of an individual's right to privacy under Article 8. This is particularly so in the light of the recent decision in *OPQ v BJM* [2011] EWHC 1059 (QB), where Eady J held that, in view of the *Buffham*<sup>108</sup> problem, a **final** *contra mundum* injunction was the only way in which the court could fulfil its obligations under the HRA to protect the claimant's Article 8 rights. The *Buffham* problem refers to the anomalous situation where a claimant is better protected by an interim injunction, which binds third parties who have notice of it under the *Spycatcher* doctrine, than by a permanent injunction granted after trial, which only operates *in personam* to bind the defendant(s). The Court of Appeal is due to reconsider the *Buffham* case this term. It would thus be premature to express any firm view. However, we consider that there may be grounds for arguing that properly granted final *contra mundum* injunctions represent a viable means of counteracting the *Buffham* problem, thereby removing the existing incentive to claimants to prolong the life of any interim injunction by seeking to delay the trial of the action.

### **The costs of obtaining a privacy injunction**

It is an old aphorism that 'the law, like the Ritz Hotel, is open to all'; and it probably rings truer today than ever before. Given the undeniably high costs involved in litigating privacy cases, it is unrealistic to imagine that a person without means could, or sensibly would, seek to obtain a super-injunction or an anonymised injunction. We are not aware of any means of overcoming this problem. In addition to the expense associated with taking legal advice, exploring the facts and documents in order to record the case history in chronological sequence is a time-consuming exercise, which benefits hugely from legal expertise. We do not believe that legal aid is available in privacy cases nor, in view of the planned cuts, is there likely to be. Moreover, in *MGN Ltd v United Kingdom* (2011) 53 EHRR 5, the European Court of Human Rights held unanimously that the liability imposed on the defendant (who had been unsuccessful before the domestic courts) to pay the success fees attached to the claimant's conditional fee agreement, pursuant to which the claimant had conducted both appeals to the House of Lords, was so disproportionate that it infringed the defendant's right to freedom of expression under Article 10. It is therefore questionable whether, and if so, in what circumstances, a conditional fee agreement which provides for a success fee of close to one hundred percent can properly be used by a claimant in a privacy case.

### **The speed with which privacy injunctions are being dealt**

As to whether litigants are being heard promptly and by a judge with suitable experience, we believe the courts provide a commendable service. In urgent cases, a judge is on call at all times including weekends, during the vacation, and outside of regular court hours. The judiciary rely on the good sense and experience of solicitors and counsel to be aware of this system for dealing with urgent matters, and to appreciate when it is appropriate to apply for emergency relief.

Similar procedures exist to enable a party dissatisfied with the decision of the judge at first instance to appeal to the Court of Appeal. However, an interesting and rather telling feature of the cases in which anonymised injunctions or super-injunctions are sought is that they are rarely appealed. The natural inference to which this gives rise is that the unsuccessful party recognises the correctness of the judge's decision at first instance and/or

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<sup>108</sup> *Jockey Club v Buffham* [2003] QB 462.

the fact that there is no serious prospect of success on appeal. Where such decisions are challenged, the Court of Appeal is clearly mindful of the need to proceed expeditiously so as not to prejudice either party. Thus, in *JIH v News Group Newspapers Ltd* [2011] 1 WLR 1645, at [16], the Master of the Rolls ordered that the claimant's applications for permission to appeal against two judgments should be heard by three members of the Court of Appeal, with any appeal to follow immediately if either application succeeded.

Our view, therefore, is that the courts have, and are making use of, the necessary procedural powers to deal with applications for injunctions and any subsequent appeals expeditiously and efficiently.

### **Penalising misbehaviour in litigation**

We are concerned by the recent trend of defendants declining to advance any public interest argument by way of defence, and simply adopting the stance of neither supporting nor opposing the claimant's application for an injunction. This tactic was commented on by Tugendhat J in *TSE v News Group Newspapers Ltd* [2011] EWHC 1308 (QB), at [35], where he said that:

The stance adopted by NGN in this case (neither resisting the injunction, nor consenting to it) had the consequence that The Sun's article about the case under the heading "New ace gags Sun..." was accurate, whereas it would have been less easy to print such a headline if NGN had offered undertakings or otherwise avoided the need for the court to issue an injunction...There is no reason why NGN should adopt this stance in this case, nor why NGN adopted it in the MJN case. NGN does not explain why it adopts it. It is the court's experience that in the past NGN has submitted to injunctions which it could not defend, or settled cases, as it did in *JIH*. If parties choose to exercise their right neither to oppose nor consent to injunctions, it has the further effect of taking up the time of the court that would be available to other litigants.

Fortunately, the courts have adequate powers to deal with such behaviour. In the first instance, and as in *TSE*, a judge may criticise the defendant in the judgment. The courts may also draw on their wide-ranging powers in relation to costs. These powers permit a judge who is satisfied that a party has behaved unreasonably to order indemnity rather than standard costs against that party. In a particularly serious case, such as where a legal representative's conduct has caused a party to incur unnecessary costs, the judge is even empowered to make a personal costs order (otherwise known as a wasted costs order) against the lawyers. The deployment of these powers is heavily dependent on the facts of each case. Having observed the parties' conduct throughout the course of proceedings, the court is well placed to evaluate the situation, and to make an order which is just in the circumstances.

## **PART 2 (TERM OF REFERENCE 2) – HOW BEST TO STRIKE THE BALANCE BETWEEN PRIVACY AND FREEDOM OF EXPRESSION**

### **Balancing the right to privacy and freedom of expression**

Once the claimant has demonstrated a reasonable expectation of privacy in respect of the material which the defendant intends to publish, or has already published, the court is then required to engage in a balancing exercise, weighing the claimant's right to privacy (Article 8) against the defendant's right to freedom of expression (Article 10). When doing so in the context of an application for interim injunctive relief, section 12(4) of the HRA requires the court to have particular regard to, *inter alia*, the importance of the Convention right to freedom of expression<sup>109</sup>, the extent to which it would be in the public interest to publish the material in question, and any relevant privacy code. Further guidance on how courts should strike the appropriate balance between these competing Convention rights has been furnished by both domestic and European case law.

At the European level, the leading case is *Von Hannover v Germany* (2005) 40 EHRR 1, which considered whether Germany had failed to protect Princess Caroline of Monaco's Article 8 rights sufficiently in relation to the publication by magazines of a number of photographs of the Princess in public places. The principal conclusion reached by the European Court of Human Rights (at [76]) was that "the decisive factor in balancing the protection of private life against freedom of expression should lie in the contribution that the published photos and articles make to a debate of general interest".

In the domestic context, Lord Steyn in *Re S* [2005] 1 AC 593, at [17], identified four propositions deriving from the judgment of their Lordships in *Campbell v MGN Ltd* [2004] 2 AC 457 regarding the interplay between Article 8 and Article 10:

First, neither article has *as such* precedence over the other. Secondly, where the values under the two articles are in conflict, an intense focus on the comparative importance of the specific rights being claimed in the individual case is necessary. Thirdly, the justifications for interfering with or restricting each right must be taken into account. Finally, the proportionality test must be applied to each.

As Eady J explained in *Mosley v News Group Newspapers Ltd* [2008] EMLR 20, the proportionality aspect of the balancing exercise requires a judge to question whether the intrusion or degree of intrusion is proportionate to the public interest supposedly being served by it. This necessarily involves an evaluation of the use to which the defendant has or intends to put his right to freedom of expression. In this regard, matters of political, societal and economic importance are (rightly in our view) accorded greater value than gossip or "vapid tittle tattle"<sup>110</sup>.

In view of these authorities, we agree with the opinion expressed by Eady J in *CTB v News Group Newspapers Ltd* [2011] EWHC 1326 (QB), at [17], that:

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<sup>109</sup> Council Resolution 1165 of 1998 does, however, affirm that Article 8 and Article 10 of the ECHR are neither absolute nor in any hierarchical order, since they are of equal value.

<sup>110</sup> *Jameel v Wall Street Journal Europe SPRL (No. 3)* [2006] UKHL 44, at [147], Baroness Hale. See also *ETK v News Group Newspapers Ltd* [2011] EWCA Civ 439, at [21] and [23], Ward LJ (with whom Laws and Moore-Bick LJ agreed).

...it is not right to say that the law of privacy is unclear or “confused”. As I illustrated in the earlier judgment, there are a significant number of appellate authorities which have explained it in great detail.

Moreover, the approach adopted in *Campbell v MGN* [2004] 2 AC 457, and later expounded by Lord Steyn in *Re S* [2005] 1 AC 593, has recently been endorsed by the European Court of Human Rights in *MGN v United Kingdom* (2011) 53 EHRR 5.

Not only do we consider that the law regarding the balance to be struck between Article 8 and Article 10 is clear, we are also of the view that this law has been applied by judges without difficulty. To illustrate this, we have produced a table (Appendix A) of the published or publicly known cases regarding privacy injunctions between January 2010 and August 2011<sup>111</sup>. This shows that almost all of the cases in the period under consideration related to the publication of information about the sexual activity of the individuals concerned, though some cases involved blackmail and the publication of intimate pictures. As the courts have frequently recognised, people’s sex lives are essentially their own business<sup>112</sup>. Provided the participants are consenting adults, there is no question of exploiting the young or vulnerable<sup>113</sup>, and the situation does not give rise to favouritism or advancement through corruption<sup>114</sup>, there is no legitimate public interest in the disclosure of the existence of a sexual relationship, less still salacious details or intimate photographs. However, in an attempt to strike a fair balance between Article 8 and Article 10, the courts have sometimes allowed one party to a sexual relationship who wishes to sell the story of the relationship to the press, to do so, provided the identity of the claimant is protected<sup>115</sup>. We therefore suggest that the cases in which the courts are imposing some form of restraint on publication are the cases in which the story sought to be published makes no obvious contribution to a debate of genuine public interest. This indicates that the courts are striking the appropriate balance between Article 8 and Article 10, and are reaching decisions which are consistent with the guidance on Article 10 offered by the European Court of Human Rights in *Mosley v United Kingdom* (2011) 161 NLJ 703, at [117]:

Finally, the Court has emphasised that while art 10 does not prohibit the imposition of prior restraints on publication, the dangers inherent in prior restraints are such that they call for the most careful scrutiny on the part of the Court. This is especially so as 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...The Court would, however, observe that prior restraints may be more readily justified in cases which demonstrate no

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<sup>111</sup> In compiling this table, we have drawn on the useful lists of privacy injunction cases published on the *Guardian* website, the *Inform* website, and the websites of 5 Raymond Buildings and One Brick Court Chambers.

<sup>112</sup> See, in this regard, Tugendhat J’s decision in *TSE v News Group Newspapers Ltd* [2011] EWHC 1308, at [24]: “For decades, both the English courts and the European Court of Human Rights have recognised a reasonable expectation of privacy in relation to sexual relationships, with sexual conduct being regarded as ‘an essentially private manifestation of the human personality’ (*Dudgeon v United Kingdom* (1981) 4 EHRR 149, at [52] and [60]). It is sometimes forgotten that, ten years before the HRA, the court in *Stephens v Avery* [1988] Ch 449 afforded protection to information concerning an adulterous lesbian relationship. Sir Nicolas Browne-Wilkinson said: ‘To most people the details of their sexual lives are high on their list of those matters which they regard as confidential’”.

<sup>113</sup> *Mosley v News Group Newspapers Ltd* [2008] EMLR 20, at [100].

<sup>114</sup> *Campbell v MGN* [2004] 2 AC 457, at 475, where Lord Hoffmann gave the example of a sexual relationship between a politician and someone she has appointed to public office.

<sup>115</sup> See, for instance, *NEL v Wood* [2011] EWHC 1972 and *MJN v News Group Newspapers Ltd* [2011] EWHC 1192.

pressing need for immediate publication and in which there is no obvious contribution to a debate of general public interest.

As a final point on this issue, we would also add that, regardless of the underlying legislation, determining where the balance lies between an individual's right to privacy and the general right to freedom of expression requires an intense focus on the specific facts of each case. This detailed analysis can only properly be carried out by the judiciary, not by Parliament.

### **A statutory privacy law**

Our position in response to calls from some quarters for a new Privacy Act is clear: legislation is neither necessary nor desirable. By introducing the HRA, Parliament placed privacy rights on a statutory footing, showing specific concern (given section 12 of the HRA) to maintain a balance between privacy and freedom of expression in relation to the enforcement of privacy rights by injunctive relief. Since the creation of such rights, it has been for the courts to interpret and apply the law on a case-by-case basis, as they have done for generations in relation to every Act of Parliament. The Government has explicitly mandated such judicial development of this area of law on two occasions since the enactment of the HRA.

The first followed the recommendation of the Select Committee on Culture, Media and Sport in 2003 that Parliament legislate to ensure protection for privacy. The Select Committee concluded:

On balance we firmly recommend that the Government reconsider its position and bring forward legislative proposals to clarify the protection that individuals can expect from unwarranted intrusion by anyone – not the press alone – into their private lives. This is necessary fully to satisfy the obligations upon the UK under the European Convention of Human Rights. There should be full and wide consultation but in the end Parliament should be allowed to undertake its proper legislative role. (*Fifth Report of Culture Media and Sport Select Committee: Privacy and Media Intrusion (2002-2003)*, paragraph 111)

However, the Government refused to legislate, and asserted that striking the balance between the competing Convention rights of privacy and freedom of expression was a task for judges:

...Section 12 of the HRA makes provision for substantial protection for the historic right to free speech, and there is a balance to be struck between freedom of expression and the right to privacy. We believe that that balance is not always to be found at the same point because, in effect, some people can be said to have invaded their own privacy by, for example, granting access to photographers, and thereby making public details of their private lives. The weighing of competing rights in individual cases is the quintessential task of the courts, not of Government, or Parliament. Parliament should only intervene if there are signs that the courts are systematically striking the wrong balance; we believe there are no such signs. (*Government's Response to Fifth Report of Culture Media and Sport Select Committee: Privacy and Media Intrusion (2002-2003)* ("Government's Response to Fifth Report"), paragraph 2.3)

...Because there are two conflicting rights involved, disputes require resolution on a case by case basis, and we believe that it is entirely appropriate for the courts to decide where the right balance lies, rather than setting out boundaries in legislation that attempt to cover all events. (*Government's Response to Fifth Report*, paragraph 2.4)

The second arose in 2007, when the Select Committee on Culture, Media and Sport revisited the issue whilst examining self-regulation of the press. On this occasion, the Select Committee found that legislation was undesirable:

While we accept that a complainant who brings an action to uphold their right to privacy under the Human Rights Act is entering very uncertain territory, and that a codification of what is private and what is in the public interest would be of value, we doubt that it could be achieved successfully and we agree with the Government in its reasons for opposing such a law. To draft a law defining a right to privacy which is both specific in its guidance but also flexible enough to apply fairly to each case which would be tested against it could be almost impossible. Many people would not want to seek redress through the law, for reasons of cost and risk. In any case, we are not persuaded that there is significant public support for a privacy law. (*Seventh Report of Culture, Media and Sport Select Committee: Self-regulation of the Press (2006-2007)*, paragraph 53)

More recently, neither the Select Committee on Culture, Media and Sport, nor the Government, considered that there were any signs that the courts were systematically striking the wrong balance between privacy and freedom of expression, such that Parliament should intervene. In its report, the Select Committee concluded:

The Human Rights Act has only been in force for nine years and inevitably the number of judgments involving freedom of expression and privacy is limited. We agree with the Lord Chancellor that law relating to privacy will become clearer as more cases are decided by the courts. On balance we recognise that this may take some considerable time. We note, however, that the media industry itself is not united on the desirability, or otherwise, of privacy legislation, or how it might be drafted. Given the infinitely different circumstances which can arise in different cases, and the obligations of the Human Rights Act, judges would inevitably still exercise wide discretion. We conclude, therefore, that for now matters relating to privacy should continue to be determined according to common law, and the flexibility that permits, rather than set down in statute. (*Second Report of Select Committee on Culture, Media and Sport: Press Standards, Privacy and Libel (2009-2010)*, Volume I, paragraph 67)

The Government agreed, affirming its belief that the courts were the most appropriate forum in which to resolve any tensions between privacy and freedom of expression:

The Government welcomes and shares the Select Committee's view that there is no need to put the law of privacy on a statutory basis. (*Government's Response to Second Report of Select Committee on Culture, Media and Sport: Press Standards, Privacy and Libel (2009-2010)* ("Government's Response to Second Report"), paragraph 2.14)

...The Government continues to believe that a decision by a court, based on the individual facts of the case is the best way to resolve potential tensions between privacy and freedom of expression. (*Government's Response to Second Report*, paragraph 2.6)

We consider that the recent views expressed by the Select Committee on Culture, Media and Sport and the Government are correct. The flexibility and discretion required to ensure that privacy laws work in practice cannot be achieved through yet more legislation. Moreover, with assistance from the growing body of domestic and European case law, the courts are consistently striking the balance between privacy and freedom of expression intended by Parliament in the HRA. There is consequently no need at present for the enactment of a statutory privacy law.

### **The definition of public interest**

In conducting the balancing exercise between Article 8 and Article 10, the court must ask itself whether there is sufficient general, public interest in publishing the information under consideration to justify any resulting curtailment of the claimant's right to respect for his or her private life. As the courts have emphasised on a number of occasions, this assessment is inherently case-sensitive<sup>116</sup>. Accordingly, we do not believe that it is possible to set out comprehensively when publication will be in the public interest. For this reason, we have serious doubts about whether a statutory definition of 'public interest' would serve any useful purpose.

In any event, we believe that the courts are dealing satisfactorily with the question whether there is a countervailing public interest in favour of publication, without the need for further guidance. The courts are deciding this question as an aspect of the proportionality test, having regard to increasingly well-recognised criteria, such as:

- (i) whether publication would contribute to a debate of general interest in the sense conveyed by the European Court of Human Rights in cases such as *Von Hannover v Germany* (2005) 40 EHRR 1;
- (ii) whether publication would achieve some legitimate social purpose, such as the prevention of a crime, or would be permissible under any of the other categories specified in Article 8(2) of the ECHR<sup>117</sup> as grounds for derogating from the right to privacy; and
- (iii) whether, echoing the terminology of the Editors' Code of Practice, publication would prevent the public from being seriously misled<sup>118</sup>.

Notwithstanding the focus of the Joint Committee's attention on the definition of the public interest, the reality is that, in most of the cases in which a privacy injunction is sought, no public interest argument is advanced by the defendant. This does not, however, relieve the court of its obligation to consider the matter: section 12(4) of the HRA requires the court

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<sup>116</sup> *Ntuli v Donald* [2011] 1 WLR 294, at [54], and *Re Guardian News and Media Ltd* [2010] 2 AC 697, at [50] to [52], where the court emphasised that the answer to whether there is a sufficient public interest to justify publication depends on the facts of the particular case.

<sup>117</sup> Article 8(2) of the ECHR states that: "There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others".

<sup>118</sup> *CTB v News Group Newspapers Ltd* [2011] EWHC 1232 (QB), at [25].

to have regard to whether publication is in the public interest, regardless of whether it is raised by the defendant or not. Nevertheless, this practice has been starkly highlighted by the *Guardian's* recent analysis of applications for privacy injunctions<sup>119</sup>, which has revealed that, between 2007 and 2011, a public interest argument was advanced in only seven cases; 21 out of the 38 cases identified in the *Guardian's* survey did not involve a public interest argument at all; and in the remaining cases, it is not clear whether a public interest argument was put forward.

It is instructive to identify, as we do below, public interest arguments which have been advanced by defendants, and their rate of success or failure.

### **Arguments which have succeeded**

- (i) There is a public interest in knowing about an allegation of professional wrongdoing. The Court of Appeal accepted that there was a public interest in the full story being publicised, particularly in view of the public argument that had already taken place in the media: *Hutcheson v News Group Newspapers Ltd* [2011] EWCA Civ 808.
- (ii) There is a public interest in knowing the job description of the colleague with whom the former CEO of one of the largest publicly quoted companies in the United Kingdom had an affair. The court accepted that there was a public interest in open discussion of the circumstances in which it is proper for a chief executive (or other person holding public office or exercising official functions) to carry on a sexual relationship with an employee in the same organisation. The court also considered that it was in the public interest that newspapers should be able to report cases which raise a question as to what should or should not be a standard in public life: *Goodwin v News Group Newspapers Ltd* [2011] EMLR 27.
- (iii) There is a public interest in publishing the names of suspected terrorists whose assets have been frozen. The Supreme Court accepted that it was in the public interest for the media to simulate debate concerning the use of freezing orders on those suspected of terrorist activities. This would suffer if a report of the proceedings did not reveal the identities of the individuals involved. The Supreme Court also recognised that a more open attitude would be consistent with the correct view that freezing orders are merely indicative of suspicion rather than guilt: *Re Guardian News and Media Ltd* [2010] 2 AC 697.

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<sup>119</sup> Available online at:  
<http://www.guardian.co.uk/law/datablog/2011/aug/05/superinjunctions-gagging-orders-injunctions-list#data>



### Arguments which have been rejected

- (i) There is a public interest in knowing that the BBC used public funds to prevent the revelation of details of a television star's private life. There was no evidence of this: *CDE v MGN* [2010] EWHC 3308 (QB).
- (ii) There is a public interest in knowing that the claimant and the defendant may have breached s.127 of the Communication Act 2003 by sending intimate images of themselves to one another. The court was doubtful as to whether this contravened the act, and even if it did, the court held that it was not sufficient to justify the infringement of privacy involved in newspaper exposure: *CDE v MGN* [2010] EWHC 3308 (QB).
- (iii) There is a public interest in knowing that the claimant had been exploiting a vulnerable woman for his own gratification. There was no evidence that this was the case, and even assuming that the woman was vulnerable, this could be an argument for restraining publication: *CDE v MGN* [2010] EWHC 3308 (QB).
- (iv) There is a public interest in the story that a celebrity left her position because she had an affair with a colleague: *ETK v News Group Newspapers Ltd* [2011] EWCA Civ 439.
- (v) There is a public interest in knowing that the former CEO of one of the largest publicly listed companies in the United Kingdom had an affair with a colleague who was involved in determining his severance package. There was no evidence that this was the case: *Goodwin v News Group Newspapers Ltd* [2011] EMLR 27.
- (vi) There is a public interest in knowing that the former CEO of one of the largest publicly listed companies in the United Kingdom was having an affair when his company made a disastrous acquisition, which led to the company being bailed out using public funds. The suggestion was that the affair may have distracted the claimant from his work. The court held that there was no evidence to support this: *Goodwin v News Group Newspapers* [2011] EMLR 27.
- (vii) There is a public interest in relationships between pop stars. The court distinguished this from a scenario in which a politician has a relationship with someone he or she has appointed to office: *Ntuli v Donald* [2011] 1 WLR 294.

In our view, the problem is not that the definition of what constitutes 'public interest' is unclear, or that the courts are taking a conservative view of what is in the public interest; rather, there simply is no public interest in the cases coming before the courts. This may offer an explanation as to why it is rare for a defendant to advance a public interest argument, and even rarer for a defendant to support such an argument with credible evidence.

### The commercial viability of the press

The Court of Appeal observed in *Hutcheson v News Group Newspapers Ltd* [2011] EWCA Civ 808, at [34], that:

...for sections of the media, developments in privacy law impinging on their ability to publish such matters [as sexual conduct, particularly if it includes salacious detail], may not only give rise to issues of principle as to freedom of expression in the individual case but also to real commercial concerns – which, at least to the extent of the general public interest in having a thriving and vigorous

newspaper industry, representing all legitimate opinions, may also be argued to give rise to a relevant factor for the court to take into account.

This observation highlights the issue, but it does not establish whether and, if so, how the commercial viability of the press is relevant to the court's determination of the public interest.

In *A v B plc* [2003] QB 195, at [11], Lord Woolf CJ controversially suggested that the courts must not ignore the fact that if newspapers do not publish information which the public are interested in, there will be fewer newspapers, which will not be in the public interest. However, the Court of Appeal has since held<sup>120</sup> that Lord Woolf's statements in *A v B plc* cannot be reconciled with the decision of the European Court of Human Rights in *Von Hannover v Germany* (2005) 40 EHRR 1, which cautioned against conflating what is interesting to the public (and therefore in a newspaper's commercial interest to publish) with what may be in the public interest to know (and thus for the media to publish in exercise of their right to freedom of expression).

Subsequent high-level authorities<sup>121</sup> have further clarified the relevance of the commercial viability of the press, and the current state of the law can be summarised as follows. The public interest in an economically viable press does not justify the publication of private information about an individual which otherwise makes no contribution to a debate of general importance to society. However, if the information relates to a matter of genuine public interest, such as court proceedings<sup>122</sup> or law reform<sup>123</sup>, the commercial viability of the press may be a relevant factor (among others) bearing on the extent to which private information can be included in an article.

We consider that this position strikes a fair and proper balance between the commercial concerns of the press on the one hand, and an individual's right to privacy on the other; and we would not support any greater prominence of the former in the courts' assessment of the public interest.

### **The adequacy of damages**

Whereas previously claimants sought damages after private information about them had been published, claimants are increasingly seeking anticipatory injunctive relief to prevent publication. This trend reflects the growing realisation that, once published, no amount of damages will restore a claimant's right to privacy, or adequately compensate the claimant for the unlawful interference with his or her private life: the damage is done, and the embarrassment is only augmented by proceeding with further court action.

In this respect, instructive comparisons and contrasts can be drawn with actions for libel. Like privacy, reputation, once besmirched, may be difficult to restore through an award of damages. But, whereas the corollary of success in defamation proceedings is often a public apology from the offending newspaper for making defamatory and/or false remarks, which may negate or at least ameliorate the effect of the libellous statement(s), in privacy cases, no

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<sup>120</sup> See *McKennitt v Ash* [2008] QB 73, at [62], Buxton LJ.

<sup>121</sup> For instance, *Re British Broadcasting Corporation* [2010] 1 AC 145 and *Re Guardian News and Media Ltd* [2010] 2 AC 697.

<sup>122</sup> *Independent News and Media Ltd v A* [2010] 1 WLR 2262.

<sup>123</sup> *Re Attorney General's Reference (No. 3 of 1999)* [2010] 1 AC 145.

comparable vindication is secured by the claimant establishing at trial that the information published by the defendant was private.

Nevertheless, where damages fall to be awarded to the claimant, the court must strive to ensure, so far as possible, that he or she is adequately compensated. In doing so, useful guidance as to the appropriate level of damages has been provided in *Mosley v News Group Newspapers Ltd* [2008] EMLR 20, and we support the approach of Eady J in that decision for the most part. However, Eady J considered that exemplary damages were not available in a claim for infringement of privacy, since there was no existing authority to justify such an extension, and because exemplary damages would fail the tests of necessity and proportionality. There may be scope for the law to be developed to allow for exemplary damages in appropriate circumstances; for instance, where it can be shown that the defendant set out unlawfully to invade an individual's privacy in the hope of making a profit. Any such development is best left to the judges.

### **Prior notification requirement**

We acknowledge that the European Court of Human Rights recently held that Article 8 does not impose a legal duty on newspapers to notify individuals of their intention to publish a story concerning them<sup>124</sup>. However, the ability of an individual to seek injunctive relief is premised on that individual having prior knowledge of the imminent or threatened publication of potentially private information about him or her.

Whilst pre-notification, in the form of giving individuals an opportunity to comment, is the norm across the industry, there is no express guidance on this in the Editors' Code of Practice published by the Press Complaints Commission. We therefore support the Government's recent recommendation that:

...the PCC should amend the Code to include a requirement that journalists should normally notify the subject of their articles prior to publication, subject to a "public interest" test, and should provide guidance for journalists and editors on pre-notifying in the Editors' Codebook. (*Government's Response to the Culture, Media and Sport Select Committee on Press Standards, Privacy and Libel* (2010), paragraph 2.16)

This pre-notification requirement would better enable individuals to safeguard their threatened privacy rights at an interlocutory stage, thereby preventing worthy claimants being confined to seeking damages after publication. Given the importance of this requirement to claimants, and given that the press is fully aware of the existing privacy laws, an unreasonable failure to pre-notify should, in our view, and as recommended by the Select Committee on Culture, Media and Sport<sup>125</sup>, be an aggravating factor in the assessment of damages for breach of Article 8.

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<sup>124</sup> *Mosley v United Kingdom* (2011) 161 NLJ 703.

<sup>125</sup> *Second Report of Select Committee on Culture, Media and Sport: Press Standards, Privacy and Libel* (2009-2010), Volume I, paragraph 11.

### **Defamation and breach of privacy**

Needless to say, defamation and the misuse of private information are two distinct causes of action, differing not only substantively and procedurally, but also in terms of their respective underlying purposes, with defamation ensuring fair and accurate reporting, and privacy law preventing the violation of an individual's right to respect for his or her private life. We thus see no inconsistency in placing the test for defamation on a statutory footing, but not the test for breach of privacy.

### **PART 3 (TERM OF REFERENCE 3) – ISSUES RELATING TO THE ENFORCEMENT OF ANONYMITY INJUNCTIONS AND SUPER-INJUNCTIONS**

#### **Enforcement in the age of ‘new media’**

We appreciate that the internet poses significant challenges to the enforcement of privacy injunctions by seemingly allowing limitless individuals to post messages or to write blogs naming claimants involved in privacy cases. But inflated claims about the power of social media, such as Twitter and Facebook, should not be used as an excuse for overriding an individual’s legitimate right to privacy. In this regard, we share the sentiments expressed by the Lord Chief Justice at a press conference held on 20 May 2011, where he said:

We have to find ways, do we not, to prevent the misuse of modern technology? We found ways to stop the circulation of pornographic pictures involving children...Are we really going to say that somebody who has a true claim for privacy, perfectly well made, which the newspapers and media cannot report, has to be at the mercy of somebody using modern technology?

Enforcing privacy injunctions on social networking sites (and their future equivalents) should not be dismissed as technologically impossible. It may, for instance, be feasible for internet service providers to censor tweets and blogs. No doubt they do something similar already to prevent or monitor the publication of illicit material. Moreover, the desirability, albeit not the practicality, of prosecuting (perhaps fining) each and every individual who flouts a privacy injunction using the internet is clear: to ensure that such individuals are not immune merely because they disclose information which is protected by a court order through a virtual medium.

In the meantime, however, it is important that the courts should not allow the challenges presented by the internet to undermine the rule of law. This issue arose for consideration in *CTB v Thomas* [2011] EWHC 1326 following exposure of the claimant’s name on the internet. We fully support the reasoning advanced by Eady J for refusing to vary the injunction to permit the identification of the claimant. Whilst Eady J noted that a stage may be reached when the information in question has become so widely available that there is nothing left for the law to protect, he considered (at [24]) that varying the order would subject the claimant to ‘a cruel and destructive media frenzy’, which would amount to a further invasion of the claimant’s privacy:

It is fairly obvious that wall-to-wall excoriation in national newspapers, whether tabloid or “broadsheet”, is likely to be significantly more intrusive and distressing for those concerned than the availability of information on the Internet or in foreign journals to those, however many, who take the trouble to look it up. Moreover, with each exposure of personal information or allegations, whether by way of visual images or verbally, there is a new intrusion and occasion for distress or embarrassment. Mr Tomlinson argues accordingly that “the dam has not burst”. For so long as the court is in a position to prevent some of that intrusion and distress, depending upon the individual circumstances, it may be appropriate to maintain that degree of protection...

As Eady J's judgment highlights, the internet and the press target different readerships on different scales. Thus, the publication of a story in a national newspaper is often regarded as a far greater invasion of an individual's privacy than its publication in a blog. There is also an important distinction between the weight attached to an article in a reputable newspaper, and the weight attached to an online revelation by an anonymous individual. Accordingly, provided the court's attempt to protect the privacy of the claimant has not been rendered futile, and depending on the circumstances, there will be cases where it may be practicable and desirable to restrain media publication, notwithstanding the online disclosure of information which is the subject of the proposed injunction.

### **'jigsaw identification'**<sup>126</sup>

This aspect of the debate is about innuendo or the drip-feeding of information, which is designed to reveal the identity of the claimant in a privacy case. Eady J addressed this in *CTB v News Group Newspapers Ltd* [2011] EWHC 1326 (QB), at [8]:

What Mr Tomlinson did rely on, however, were the terms of a broadcast by Mr Kelvin MacKenzie on BBC Radio on the morning of 30 April, when he claimed that he regularly passed on the identities of claimants who had been granted injunctions to anyone who asked him. He obviously does not approve of the current law of privacy and makes it his business to undermine court orders accordingly. He also likes to drop hints in his articles to give interested readers a steer as to who might be covered by an order. Mr Tomlinson described this as "playing games".

This is known as 'jigsaw identification'<sup>127</sup>. The speculation that it engenders can not only cause the claimant distress and embarrassment, but can also have the concomitant effect of putting other individuals who fit the clues and/or description given in the article under suspicion, thereby exposing them to the risk of harassment and humiliation.

As Sharp J observed in *DFT v TFD* [2010] EWHC 2335 (QB), at [29], such speculation risks breaches of the injunction taking place on internet forums, and creates a temptation for those who become aware of the identity of the claimant/applicant to release the identity anonymously. Accordingly, if the published snippets of information go beyond the publication allowed for in the injunction, and thus amount to a breach of the court order, the court should, if appropriate, exercise its powers to commit or fine the offender for contempt of court. This may be instigated by the court of its own initiative, or on the application of the claimant. In circumstances falling short of contempt, the court has wide-ranging powers, which have been discussed elsewhere, including the ability to condemn such behaviour in its judgment, and to make a suitable costs order against the wrongdoer.

### **Parliamentary privilege**

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<sup>126</sup> The phrase 'jigsaw identification' was usefully defined by Sharp J in *MNB v News Group Newspapers* [2011] EWHC 528 (QB), at [33]: "By its nature, jigsaw identification involves the separate publication by different entities of different items of information which do not identify the claimant when looked at separately, but do so or risk doing so, when they are put together. Such information therefore does not have to actually identify a claimant. Nor need it be private. The conjunction of publicly available information with the report of proceedings may well lead to 'two and two' being put together".

<sup>127</sup> See *NEJ v Wood* [2011] All ER (D) 218, at [11] and *AMM v HXW* [2010] EWHC 2457 (QB).

In recent months there have been regrettable instances of parliamentarians abusing the privilege granted to them in that capacity under Article 9 of the Bill of Rights 1689. On 14 May 2011 (HL Deb 14 May 2011, vol 727, col 1490), Lord Stoneham named Sir Fred Goodwin as having been granted a ‘super-injunction’ to hide an alleged relationship with a senior colleague at the Royal Bank of Scotland. It was, of course, an anonymised injunction, not a super-injunction. Mr Hemmings MP followed suit when he named Ryan Giggs (HC Deb 23 May 2011, vol 528, col 638). Messrs Stoneham and Hemmings were well aware that if their remarks had been uttered outside Parliament they would have been in contempt of court, and liable to be punished by way of imprisonment or a fine. But they preferred to seek refuge under the cloak of parliamentary privilege which, for historical and constitutional reasons, is exclusively regulated by Parliament.

In both cases, these gentlemen decided that, although they had not seen the evidence or heard the argument before the courts, and although the normal appeal process was available to the litigants as well as the media – but was not pursued in either case – it was appropriate to publicise information in flagrant disregard of the privacy injunctions in place. This behaviour shows a concerning lack of respect for our well-established and highly-regarded legal system, and the deliberate abuse of parliamentary privilege to undermine the orders of experienced judges. It also reveals an open disregard for the law by individuals who, ironically, are in the special position of being able to participate directly in the law-making process. In our view, this problem needs to be addressed urgently. It is not, fortunately, an everyday occurrence that a parliamentarian becomes a self-made judge, but mechanisms should be in place which are effective to deter such behaviour and, where necessary, to punish it.

Given the legacy and constitutional importance of parliamentary privilege, we do not believe that it would be appropriate to legislate, for instance, by reforming the Parliamentary Papers Act 1840, or by depriving the members of both Houses of the privilege they currently enjoy: Parliament is and should remain supreme. We would, however, recommend that both Houses implement a standard procedure, which first decides whether the conduct complained of constitutes an abuse of the member’s privilege, and if it does, then refers the case to the courts for consideration and, where necessary, punishment. The introduction of such a procedure would, we believe, be an effective deterrent to the abuse of parliamentary privilege.

## **PART 4 (TERM OF REFERENCE 4) – ISSUES RELATING TO MEDIA REGULATION**

### **The Press Complaints Commission (“the PCC”)**

Broadly speaking, we think that the guidelines in section 3 of the Editors’ Code of Practice fairly address the balance between an individual’s right to privacy and the press’ right to freedom of expression. That said, we do not take the view that the PCC has been effective in the context of preventing or dealing with bad behaviour from the press in relation to injunctions and breaches of privacy. In part, this may be due to the fact that the PCC is seen to be powerless, with the ability only to cajole and encourage being inadequate or simply not fit for purpose. Whilst there may be scope for strengthening the powers of the PCC, we take the view that it is essential for the courts to retain exclusive jurisdiction in determining the appropriate balance between the right to privacy and freedom of expression. As noted elsewhere in these submissions, that balancing exercise requires intensive examination of the facts of each case, which the courts are ideally suited to perform; the PCC, on the other hand, is not.

Nevertheless, it seems to us that there is scope for the press/media to improve its own standards through formalised education and a voluntary compliance system. Most professions these days have strict requirements for continuing education and development, with the Bar and the Law Society being prime examples. Practitioners are required to collect a minimum number of points over the course of the calendar year, with an unreasonable failure to achieve the requisite points leading to the possible withdrawal of a practitioner’s practising certificate. The analogy is, no doubt, imperfect, but we think that there is much to be said for requiring editors and reporters to attend training and education courses on those areas of the law which may impact on their professional lives, including: the HRA, the ECHR, UK court processes, the function of the Strasbourg Court, and the developing jurisprudence on the meaning of public interest. Such courses should be thoughtful and well planned, and participation in this educational process should be made obligatory through the insertion of provisions to that effect in employment contracts. The maintenance of this educational system, and its continuous improvement, could be achieved through the appointment of compliance officers by employers.

We consider that it would be easier to improve and thereafter maintain standards by pursuing this proposed route, rather than some of the suggested alternatives. We would not, therefore, support the introduction of primary legislation, or an increase in the powers of the PCC. Such developments would run the risk of undermining the effectiveness of the HRA, which we believe operates satisfactorily in this context, and of trespassing on the role of the courts.



**APPENDIX A**

<b>CASE</b>	<b>DETAILS</b>	<b>DATE OF JUDGMENT</b>	<b>JUDGE / COURT</b>	<b>JUDGMENT</b>	<b>INJUNCTION GRANTED?</b>
KGM v News Group Newspapers Ltd	Interim injunction sought to restrain disclosure of claimant’s extra-marital affair and second family.	January 2009	Sir Charles Gray	Not available.	Interim injunction granted restraining publication of certain categories of information.
		01/12/2010	Eady J	[2010] EWHC 3145 (QB)	Application for fresh injunction refused.
		19/07/2011	CA	[2011] EWCA Civ 808	Appeal dismissed, decision of Eady J upheld.
MNB v News Group Newspapers Ltd	Interim injunction sought to prevent disclosure of extra-marital affair.	01/03/2011	Henriques J	Not available.	Interim injunction granted prohibiting publication of certain information until return date. Claimant anonymised.
		09/03/2011	Sharp J	[2011] EWHC 528 (QB)	Interim injunction granted preventing further publication of information tending to identify claimant and woman named in confidential schedule.
Goodwin (formerly MNB) v News Group Newspapers Ltd	Interim injunction sought to prevent disclosure of extra-marital affair.	23/05/2011	Tugendhat J	[2011] EWHC 1309 (QB)	Application to discharge injunction refused, but injunction varied to remove prohibition on identification of claimant.

CASE	DETAILS	DATE OF JUDGMENT	JUDGE / COURT	JUDGMENT	INJUNCTION GRANTED?
		09/06/2010	Tugendhat J	[2011] EWHC 1437 (QB)	Application to vary injunction granted in part in order to permit publication of woman's job description.
TSE v News Group Newspapers Ltd	Interim injunction sought to prevent publication of claimants' extra-marital affair.	13/05/2011	Sharp J	Not available.	Emergency injunction granted.
		23/05/2011	Tugendhat J	[2011] EWHC 1308 (QB)	Interim injunction granted prohibiting publication of information tending to identify claimants as having had a sexual relationship and/or an affair.
CTB v News Group Newspapers Ltd	Interim injunction sought to prevent publication of claimant's extra-marital affair with Ms Thomas.	14/04/2011	Eady J	Not available.	Interim injunction granted to restrain disclosure of claimant's alleged affair with Ms Thomas. Claimant anonymised.
		20/04/2011	Eady J	Not available.	Interim injunction continued.
		16/05/2011	Eady J	[2011] EWHC 1232 (QB)	Interim injunction continued.
		23/05/2011	Eady J	[2011] EWHC 1326 (QB)	Application to vary injunction to permit disclosure of claimant's name refused, notwithstanding revelation of claimant's identity on the internet.

CASE	DETAILS	DATE OF JUDGMENT	JUDGE / COURT	JUDGMENT	INJUNCTION GRANTED?
		23/05/2011	Tugendhat J	[2011] EWHC 1334 (QB)	Application for anonymity of claimant to be removed refused, notwithstanding revelation of identity in House of Commons.
MJN v News Group Newspapers Ltd	Interim injunction sought to prevent publication of claimant's extra-marital affair with 18 year-old lingerie model.	5/05/2011	Beatson J	Not available.	Interim injunction granted to prevent publication of claimant's identity, and sexual and/or salacious details of 'relationship'.
		11/05/2011	Sharp J	[2011] EWHC 1192 (QB)	Interim injunction continued until trial or further order.
OPQ v BJM	"Straightforward and blatant blackmail case" concerning sale of intimate photographs and other information obtained in circumstances that were clearly private.	29/01/2011	Cox J	Not available.	Ex parte interim injunction granted to restrain first and second defendant from publishing confidential material about claimant's private life.
		02/02/2011	Eady J	[2011] EWHC 160 (QB)	Injunction continued and varied. Parties anonymised to reduce risk of jigsaw identification.

CASE	DETAILS	DATE OF JUDGMENT	JUDGE / COURT	JUDGMENT	INJUNCTION GRANTED?
		20/04/2011	Eady J	[2011] EWHC 1059 (QB)	Case settled – defendants gave undertaking not to publish. <i>Contra mundum</i> injunction granted to prevent publication of confidential information and images by third parties.
ETK v News Group Newspapers Ltd	Interim injunction sought to prevent publication of claimant’s extra-marital affair with married colleague.	05/03/2011	Collins J	Not available.	Application for interim injunction restraining publication of facts of case and details of relationship refused. Temporary relief granted on claimant’s undertaking to apply expeditiously for permission to appeal.
		19/04/2011	CA	[2011] EWCA Civ 439	Appeal allowed. Interim injunctive relief granted.
NEJ v BDZ (Helen Wood)	Interim injunction sought to prevent publication of claimant’s extra-marital relationship with the defendant prostitute.	9/04/2011	Blake J	Not available.	Interim order granted preventing publication of sexual relationship between claimant and first defendant. Claimant and first defendant anonymised.

CASE	DETAILS	DATE OF JUDGMENT	JUDGE / COURT	JUDGMENT	INJUNCTION GRANTED?
		13/04/2011	King J	[2011] EWHC 1972 (QB)	Interim injunction continued, but varied to allow for publication of first respondent's identity and fact of extra-marital relationship with claimant.
Goldsmith v BCD	Interim injunction sought to prevent publication of information obtained by hacker from claimants' personal emails.	22/03/2011	Tugendhat J	[2011] EWHC 674 (QB)	Interim injunctions granted in 2008 discharged. Final order granted, notwithstanding claimants' breach of undertaking to serve claim forms following identification of hacker in 2009. Defendant anonymised.
RJA v AJR	Interim injunction sought to prevent publication of intimate photographs of claimant by defendant. Neither claimant nor defendant public figures.	25/02/2011	Sharp J	Not available.	Ex parte injunction granted. Claimant and defendant anonymised.
		18/03/2011	King J	Not available.	Anonymity order extended. Defendant gave undertakings until trial not to publish any photographs or harass claimant.
		22/03/2011	Sharp J	Ex tempore judgment.	Claimant granted delivery up, destruction and search orders. Anonymity order continued until trial.

CASE	DETAILS	DATE OF JUDGMENT	JUDGE / COURT	JUDGMENT	INJUNCTION GRANTED?
CBL v Person Unknown	Threat to reveal information of sexual nature and harassment.	29/03/2011	Sharp J	Not available.	Not known.
ZAM v CFW, TFW	Injunction sought to restrain further publication of defamatory words.	25/02/2011	Tugendhat J	Not available.	Interim injunction granted. Claimant and defendants anonymised.
		07/03/2011	Tugendhat J	[2011] EWHC 476 (QB)	Interim injunction continued until trial or further order.
Hirschfeld v McGrath	Interim injunction sought to prevent publication of marital confidences in autobiography.	04/02/2011	Teare J	Not available.	Interim injunction granted to restrain publication of confidential information. Anonymity order made.
		15/02/2011	Tugendhat J	[2011] EWHC 249 (QB)	Anonymity order lifted, but interim injunction continued restricting publication of information about the case.
YYZ v YVR	Injunction sought to restrain defendant from selling information contained in email sent by claimant to defendant by mistake.	28/01/2011	Supperstone J	Not available.	Not known.
		04/02/2011	Eady J	[2011] EWHC 274 (QB)	Not known.
JIH v News Group Newspapers Ltd	Interim injunction sought preventing publication of claimant's alleged sexual relationship with another person during period of	13/10/2010	Nicol J	Not available.	Application for interim injunction preventing publication of story granted. Claimant anonymised.

CASE	DETAILS	DATE OF JUDGMENT	JUDGE / COURT	JUDGMENT	INJUNCTION GRANTED?
	claimant’s relationship with a long-term partner.	5/11/2010	Tugendhat J	[2010] EWHC 2818 (QB)	Application to continue anonymity order refused. Interim injunction continued. Implementation of order stayed to allow claimant to appeal decision.
		18/11/2010	Tugendhat J	[2010] EWHC 2979 (QB)	Further application for anonymity refused.
		31/01/2011	CA	[2011] EWCA Civ 42	Appeal allowed. Claimant granted anonymity until trial or further order.
POI v Person known as ‘Lina’	Interim injunction sought to prevent publication of photographs and video. Allegations of blackmail.	13/01/2011	Tugendhat J	[2011] EWHC 25 (QB)	Interim injunction granted to restrain publication of private information. Claimant anonymised.
		26/01/2011	Supperstone J	[2011] EWHC 234 (QB)	Interim injunction continued until trial or further order.
CDE v MGN	Interim injunction sought to prevent disclosure of claimant’s extra-marital quasi-relationship conducted through email/text/telephone.	16/07/2010	Eady J	Not available.	Interim injunction granted. Claimant and defendant anonymised.
		16/12/2010	Eady J	[2010] EWHC 3308	Interim injunction continued preventing disclosure of relationship until trial or further order. Anonymity order upheld.

CASE	DETAILS	DATE OF JUDGMENT	JUDGE / COURT	JUDGMENT	INJUNCTION GRANTED?
XJA v News Group Newspapers Ltd	Interim injunction sought to restrain publication of information claimed to be false.	November 2010	Calvert-Smith J	Not available.	Interim injunction granted to restrain publication of certain information. Claimant anonymised.
		03/12/2010	Sharp J	[2010] EWHC 3174 (QB)	Consent order between parties continuing interim injunction until trial or further order. Anonymity of claimant maintained.
KJH v HGF	Interim injunction sought to prohibit publication of stolen confidential and private information. Allegations of blackmail.	24/11/2010	Sharp J	[2010] EWHC 3064 (QB)	Interim injunction (granted and/or upheld on three previous occasions) maintained until trial or further order. Claimant and defendant anonymised.
Donald v Ntuli	Application for interim injunction preventing publication of various categories of confidential information concerning claimant's relationship with defendant.	April 2010	Eady J	Not available.	Interim super-injunction granted restraining defendant from disclosing existence of proceedings and certain information. Parties anonymised.
		26/04/2010	Eady J	[2010] EWHC 3543 (QB)	Terms of injunction varied to allow defendant to disclose information already in the public domain.



CASE	DETAILS	DATE OF JUDGMENT	JUDGE / COURT	JUDGMENT	INJUNCTION GRANTED?
		16/11/2010	CA	[2010] EWCA Civ 1276	Appeal allowed in part. Substantive injunction upheld, but order for anonymisation and super-injunction both discharged.
Gray v UVW	Interim injunction sought to prevent publication of information disclosed in confidence. Anonymisation of both parties sought.	21/10/2010	Tugendhat J	[2010] EWHC 2367 (QB)	Claim stayed, with interim injunction in place. Identity of claimant revealed, but anonymity order upheld for defendant.
AMM v HXW	Interim injunction sought to prevent publication of claimant's extra-marital affair with defendant. Allegations of blackmail.	21/09/2010	Edwards-Stuart J	Not available.	Interim injunction granted. Claimant and defendant anonymised.
		07/10/2010	Tugendhat J	[2010] EWHC 2457 (QB)	Interim injunction granted preventing disclosure of information by claimant's ex-wife. Anonymity order continued.
DFT v TFD	Interim injunction sought to prevent disclosure of information by defendant about sexual relationship with claimant. Allegations of blackmail.	9/09/2010	Sharp J	Not available.	Without notice application for interim injunction allowed. Claimant and defendant anonymised.
		27/09/2010	Sharp J	[2010] EWHC 2335 (QB)	Injunction and anonymity order continued, but disclosure of existence of proceedings permitted.

Lord Grabiner QC and Dr Kirsty Hughes—Written evidence

CASE	DETAILS	DATE OF JUDGMENT	JUDGE / COURT	JUDGMENT	INJUNCTION GRANTED?
Terry (previously LNS) v Persons Unknown	Interim injunction sought to restrain publication of information concerning claimant footballer's extra-marital affair.	29/01/2010	Tugendhat J	[2010] EWHC 119 (QB)	Without notice application for super-injunction refused given essence of application to protect reputation.

27 September 2011

## **Hugh Grant—Written evidence**

- 1) Although I have never applied for an injunction under Article 8, I am a supporter of this common law.
- 2) It seems clear to me that it should be unacceptable and illegal to deprive a British citizen of their fundamental human right to privacy when the motive for appropriating that privacy is commercial profit rather than public interest.
- 3) I think it is equally critical to protect conditional fee arrangements which give people who do not have substantial means access to this law.
- 4) Earlier this year we saw a sustained campaign from sections of the press to abolish both this law and CFAs. Generally speaking, this campaign was orchestrated by the tabloid press. Their motive was simple. Privacy law, and general access to it, threatened the business model they have developed over the last twenty or thirty years.
- 5) I would like in this statement to point out some of the misconceptions behind that campaign.

### **Misconception 1 - That it is only celebrities and politicians whose privacy is invaded.**

- 6) To an extent, we already know how false this is. There are victims like the Dowlers, like the families of the little girls murdered at Soham, like the families of soldiers killed in Afghanistan, like the victims of the London bombings. They were all identified as capable of making a commercial profit for certain newspapers, and therefore had their privacy invaded.
- 7) Then there are the innocent people whose privacy has been stolen simply because they are related to, or work with subjects of commercial interest to some papers. In others words, collateral damage. The mothers and fathers and children of hacking victims who also had their phones hacked. Or who were doorstepped. Or the children who face humiliation in the playground because their father is a footballer whose privacy a paper has stolen, most often not in the public interest, but for profit.
- 8) And what about the innocent citizens caught up in the periphery of a newsworthy crime and shamelessly monstered by some British papers? What about Christopher Jefferies, the innocent landlord of the murdered Joanna Yeates? Or Robert Murat, to this day receiving death threats with regard to the abduction of Madeleine McCann, a crime of which he is entirely innocent? Or more recently Rebecca Leighton, effectively found guilty of the Stockton Hospital deaths in certain papers of mass murder before being judged by the police to be entirely innocent? The common factor in all these cases? Money. The stirring up of public outrage, at the expense of the individuals' rights, while potentially jeopardising real justice, simply sold newspapers.

- 9) And even though the papers admit guilt and are made to pay fines by the courts, as in all three types of these cases, they keep doing it because the business model still shows a profit

**Misconception 2 - That current privacy law under the Human Rights Act muzzles the press.**

- 10) If this were so, why has a civil case for breach of privacy never been taken against the Guardian?
- 11) Why do popular papers' lawyers so seldom even bother to turn up to argue a public interest defence in front of the judge when one of their stories is threatened with being injunctioned at the eleventh hour? Or indeed in the cold light of next day? Or when it comes to a full hearing? Is it because there IS no public interest defence?
- 12) And if that is so, why do their editorials rail so loudly against so called abuses of these injunctions? Misnaming them as "super-injunctions" when they are merely anonymised, as they have to be, in order to fulfil their purpose? Failing ever to mention that blackmail plays a frequent role. Calling them "undemocratic", "backdoor" or "muzzling"? Is it perhaps not about press freedom or public interest at all? Are these editorials merely about protecting a business model? A lucrative racket?
- 13) Who would we rather decide what was in the public interest and what was merely interesting to the public? Judges? Or the editor of the paper standing to profit from the article in question?

**Misconception 3 - That judges always find against the press**

- 14) Have the judges in the injunction cases relating to personal privacy thus far made many egregious errors? I would argue that they haven't. And that neither have they shown a natural bias one way or the other. The recent case of Rio Ferdinand showed that the judges in these cases will rule for the paper if they feel (rightly or wrongly) that there is a public interest defence.

**Misconception 4 – Privacy can only ever be a rich man's toy**

- 15) One of the objections most often (sometimes correctly) cited against privacy law is that it is expensive to take out an injunction, denying access to justice for people without substantial means. But then why do so many of the popular papers that complain about this also campaign so loudly for the effective abolition of Conditional Fee Arrangements? Is it that this privacy law is seriously threatening their business model? And that in fact the fewer people that have access to it the better? Particularly as those people who can afford access can then be dismissed as wealthy and privileged?
- 16) There may well be a problem with access to justice for those without means who wish to defend their privacy rights. The answer is surely to improve the access, not to abolish the justice. There is some urgency on this as proposals – noisily supported by papers like the Daily Mail - to debilitate CFA's are in front of Parliament at this

moment. I would urge politicians and the media to join the Dowler family, Christopher Jefferies, Robert Murat and others in opposing them.

**Misconception 5 - That most sex exposes carry a public interest defence.**

- 17) If a politician campaigns on issues like family values, and he is caught having an extra marital affair, then of course it is right for a newspaper to tell the public.
- 18) If the England football manager has deemed that the England football captain should be a person of traditional moral virtue, and that same footballer has claimed that he is a “changed person”, then you might argue (as the judge did recently, though I happen to disagree) that it is in the public interest to know about his affairs.
- 19) But it seems clear to me, as it does to most judges, that the vast majority of the public interest arguments from popular papers for their sex exposes are bogus. The judges recognise that the motive for printing the story was commercial profit, not public interest.
- 20) Those papers will argue that Ryan Giggs has traded on his reputation as a faithful family man. In fact, he hasn’t particularly. And even if he had it is absurd to think that people are buying Ryan Giggs football boots because of his moral probity. They are buying them because he’s a brilliant footballer.
- 21) I read recently that I had no right to object to intrusions into my privacy because I also traded on my good name. Do I? I didn’t even know I HAD a good name. And if I did I am quite sure it wouldn’t make anyone part with their money at the box office. People only care about being entertained. Tom Hanks is a great family man as well being generally regarded as an upright citizen and an all round nice person. But he can still have flops. On the whole, all that people care about when parting with their ticket money is whether the film appears to be entertaining or not, and if Pol Pot is the leading actor then so be it.
- 22) Some may disagree with me, but I would also question most sex exposes of politicians. Unless, as I say, the politician has been elected on the platform of traditional family values, or has publicly criticised or legislated against the private sexual conduct of other people, or is breaking the law, or harming anyone, I don’t believe that knowing the intimate details of his or her sex life is in the public interest. Some of history’s greatest leaders have had colourful sex lives.
- 23) All this, of course, is to leave aside the question of the right of some newspapers to be moral arbiters. How is their moral conscience? Was there anything more comical or grotesque, for instance, than the News of the World, thundering about people’s “sordid secrets”?

**Misconception 6 - That people like me want to be in the papers, and need them, and therefore our objections to privacy intrusions are hypocritical.**

- 24) First of all, for most people I know who are branded “celebrities”, the celebrity was not the end in itself. Those people do exist, but I would argue that they are in the minority. Most so-called “celebrities” are just people who happened to become

singers, or actors, or footballers, or whatever, and then also happened - through luck sometimes, but also sometimes hard work or talent – to become successful.

- 25) In my experience - and this important and not well known - they seldom seek to be, or want to be in the papers for the sake of it, to promote themselves. In many cases they hate having to be in them at all. The issue only arises when they have something - a film for example - to promote, when there is a certain pressure to bang the drum a bit in advance of the release. Occasionally this pressure is contractual, but much more often it is simply moral. Typically, the “project” will have involved many people working very hard over long periods of time. And often, large amounts of money have been staked. You would simply feel bad if you didn’t do a bit of PR. The apparently accepted wisdom, vigorously championed by sections of the press, is that it is fine for a UK citizen to become an actor, or a footballer or a singer. But if you have any success, or if you fulfil your moral obligations and bang the drum for your film, or album or whatever then you should automatically be stripped of one of your basic human rights. I dispute that.
- 26) Having said all this, it is also important to realise how insignificant, in relative terms, PR is to the success or failure of a project. To take films as an example, the most important factor by far is simply whether it works as an entertainment. That’s about 85% of it. The marketing and release strategy might be another 10%. PR is merely the cherry on the cake. The final 5%. There have been thousands of examples of films with enormous media attention, wall to wall tabloid coverage that have gone on to fail at the box office.
- 27) So if PR is the final cherry, how big a part of that cherry is print media? These days, it is considered far less important than TV and radio. Take a film I acted in - “Love Actually”. When it came time to organise a press campaign, the ensemble cast nearly all followed my lead in choosing not to give interviews to the UK tabloids. (Most seldom or never did anyway). The film went on to be a huge success, particularly in the UK. I point all this out merely to counter the arguments of certain papers that they make or break films, or actors, who therefore have no right to complain about any abuses.
- 28) I do have a publicist. But she is only hired when I have a film coming out, and her job is really closer being an anti publicist. The film studio’s publicity division will typically want the actors to accept every possible PR opportunity. This makes the publicity people look good to their bosses. My publicist’s job is to refuse most of those proposals, while choosing a few that are “classy” to fulfill my obligations to promote the film. This is useful when I’m dealing with countries in which the media outlets are foreign to me.
- 29) It is also very important to remember that when a person DOES do an interview with a paper or magazine they are doing it by consent. And that the paper or magazine is not doing any favours. It’s a barter. The paper gets what it hopes will be a boost in sales, and the person gets what he hopes will be some helpful noise about his forthcoming project. It is like bartering 12 eggs for a bale of hay. Or like me selling you a pint of milk for 50p. When the deal is done, it’s done. You wouldn’t then say, “You sold me your milk, you slut. I’m now entitled to help myself to your milk for ever afterwards”.

- 30) I should also like to say that I have never in my life “tipped off” the press in the hope of being photographed. I concede that this may happen with a certain type of person who enjoys media attention, or – as is now possible - whose principal source of income is celebrity itself rather than the job that gave rise to that celebrity in the first place. But the behaviour of one person or a group of people does not mean it should be open season on another group of people. And in my experience, the tipping off of the papers is exceptionally rare. I wondered if I was wrong or naive about this, and recently asked ex Daily Star reporter Richard Peppiatt what his experience had been. He confirmed that I was right.
- 31) In my experience the oft-repeated arguments from popular papers’ editors about the hypocrisy of celebrities who secretly court the media is largely specious. And, of course, convenient.
- 32) I also hear again and again that people like me rely on the press for any success we might have had. If that is so, why is it that? –
- Excluding recent ones about media reform, I believe I have given only two interviews to British newspapers in 17 years? (Others have appeared, but they have been bought in from abroad or, more commonly, patched together from old quotes.)
  - I have frequently asked my lawyer, when settling some libel action, to forgo all damages and even the apology if I can just have an undertaking that the paper never mention my name again? This has never been granted, but it is a fantasy I know is shared by **many** people in the public eye.
  - Some of my films have done well around the world? Did the Sun make “Four Weddings and a Funeral” a success in America? In Venezuela? In Japan?

**Misconception 7 - That privacy invasion comes with the job.**

- 33) Of course if you are acting in films there is going to be interest in your life. And of course your personal life is probably going to be a juicier read than what film you are doing next. And of course there will always be a mismatch between how much the press would like to know of your personal life and how much you want to give them (usually somewhere between none and a few light hearted anecdotes). I accept all that.
- 34) But this mismatch has always been there, and in the past has been handled with at least a degree of good humour and decency. It is still handled in that way in most countries of the world. What has grown up in the last 20 or 30 years in this country is something quite new, much more extreme and frequently criminal.

December 2011

David Allen Green, Paul Staines, Jamie East, and Richard Wilson—Oral evidence (QQ 326–403)

**David Allen Green, Paul Staines, Jamie East, and Richard Wilson—  
Oral evidence (QQ 326–403)**

[Transcript to be found under Paul Staines](#)



## **Jonathan Grun, Press Association—Written evidence**

Following my appearance before the committee this week Ben Bradshaw suggested that I provide additional detail on the assistance available for members of the public who become the focus of media attention.

I would like to thank the committee for inviting me to give evidence and I would also like to take this opportunity to add to my comments at the hearing about assisting members of the public who find themselves the focus of media attention.

The debate about privacy has so far centred largely on celebrities and footballers who expect to be in the public eye at least some of the time and profit from it.

But ordinary people sometimes find themselves in extraordinary situations and become the centre of wholly unexpected media attention. It can happen when they are grieving, vulnerable and bewildered by the turn of events that has upset the equilibrium of their lives. I want to stress to the committee the efforts that the media make to relieve the distress of such people – efforts that are often overlooked in the general clamour surrounding the privacy of high profile personalities.

Help is at hand for members of the public in these circumstances and can be provided by the Press Complaints Commission and the Press Association.

I am sure the Press Complaints Commission will be able to give you examples, but from our experience at PA the PCC effectively offers assistance to members of the public. It can send a private advisory note to editors, making clear an individual does not wish to comment publicly on their situation and this can help to prevent unwanted media approaches.

The PCC can also issue a private ‘desist notice’ which requests journalists and photographers cease their approaches with immediate effect.

Sometimes people involved in these stories wish to make a statement but do not wish to have journalists approaching them. In these circumstances the Press Association is often called upon to provide a pooled report, which all of the media can access and use.

This is a common occurrence – we are frequently contacted by representatives of families, police forces and others – and it spares many people the attentions of the media: once words and pictures are supplied on a pooled basis the requirements of the press are often satisfied.

Perhaps the most well known example of PA providing this service was following the Dunblane massacre. Some families did not wish to speak to the media and wished their child’s funeral to be private. Others did want to celebrate their child’s life but did not want a media “scrum” developing at the funeral. In these circumstances a PA reporter and photographer attended to represent the whole of the media.

Jonathan Grun, Press Association—Written evidence

I am sure that the committee will still hear accounts of people who believe their privacy has been infringed but I was keen for you to know of the efforts that the Press make every day at a national and a local level to ensure the privacy of members of the public is respected.

2 November 2011

## Guardian News and Media Limited (GNM)—Written evidence

This response is submitted to the Joint Committee on Privacy and Injunctions on behalf of Guardian News and Media Limited (GNM) the publishers of the Guardian, the Observer and the guardian.co.uk website.

### I. How the statutory and common law on privacy and the use of anonymity injunctions and super-injunctions has operated in practice?

Privacy injunctions have not, in general, yet inhibited GNM reporting, which tends to engage more with issues of confidentiality than privacy. However the inter-relationship between libel and privacy and the effect of prior restraint on publication is clearly acknowledged.

In addition, technological changes, such as the rapid growth of social media and the internet have challenged the application and effect of legislation in the realms of privacy and defamation, particularly in relation to the dissemination of information on the internet in the context of injunctions.

By their very nature and definition, it is difficult to quantify the number of “super-injunctions”<sup>128</sup> sought and granted by the Courts historically and whether previously such injunctions have been used too frequently and / or in appropriate circumstances. In addition, owing to the urgency of injunctions, initial applications are often heard by a duty Judge at short notice, which in the past has meant no public judgment being made available or details provided of the grounds on which orders were imposed.

GNM compiled and published a list of known injunctions, which would appear to suggest a reasonable number of injunctions are obtained by celebrities and wealthy individuals. [https://docs.google.com/a/guardian.co.uk/spreadsheet/ccc?key=0AonYZs4MzIZbdGZhXIhpdUpDZGhSWHV4MIBBQ2IPYIE&hl=en\\_US#gid=0](https://docs.google.com/a/guardian.co.uk/spreadsheet/ccc?key=0AonYZs4MzIZbdGZhXIhpdUpDZGhSWHV4MIBBQ2IPYIE&hl=en_US#gid=0); it is of note that since Ryan Giggs was named in Parliament at the centre of an injunction in May 2011, GNM has not been served with any media privacy injunctions. It may be that the tide has already changed.

GNM considers that in the light of the more recent public judgments, it appears that in many cases, public interest was not argued by those seeking to defend applications for injunctions, but there are cases where it (the public interest) has been accepted, even where the ‘private’ information relates to a sexual relationship (for example *Lord Browne v Associated Newspapers* and *Rio Ferdinand v MGN Limited*)<sup>129</sup>.

In the past, to the extent that super-injunctions were being obtained as a matter of routine without any proper procedural safeguards being employed, such procedural deficiencies appear to have been remedied by the guidance laid out in the recent Report on the Committee on Super-Injunctions. Where possible the Courts should provide open judgments in cases unless there is an overriding reason to derogate from the norm.

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<sup>128</sup>as defined in the Report of the Committee on Super-Injunctions, page 5, as an “interim injunction which restrains a person from: (i) publishing information which concerns the applicant and is said to be confidential or private; and, (ii) publicising or informing others of the existence of the order and the proceedings”

<sup>129</sup> [2007] EWCA Civ 295, [2011] EWHC 2454 (QB)

In relation to contra mundem injunctions, these are a draconian order which effectively seek to bind the world from publishing information covered by it. Historically, contra mundem orders have only been made in exceptional cases, in the context of Article 2 ECHR and the right to life, distinct from the balancing act between Articles 8 and 10 in privacy cases.

In April 2011, Mr. Justice Eady<sup>130</sup> observed he had jurisdiction to grant a "contra mundem" order<sup>131</sup> to protect an individual. There were no media defendants or interveners in this matter, and none had been invited to attend, yet the Judge still felt able to conclude that *"furthermore, in view of the clear risk of publication in the media there is unfortunately no other means open to the court of fulfilling its obligation under the Human Rights Act to protect those rights than to grant a contra mundum injunction"*.

GNM considers this appears to indicate a current willingness by the Courts to extend the protection of the right to respect for privacy and family life under Article 8 of the Convention, at the expense of the rights to freedom of expression under Article 10. GNM believes that contra mundum orders which clearly engage Article 10 rights should not be made without the media being given proper notice and the opportunity to oppose.

GNM does not consider that steps should be taken to penalise newspapers which refuse to give an undertaking not to publish private information who also make no attempt to defend an application for an injunction in respect of that information. This would simply add more additional expense to the exercise. Giving an undertaking is properly a matter of editorial discretion. A case may not be fought for any number of reasons. That does not mean that a newspaper is not justified in refusing to give an undertaking. Often, for example, it is hard to agree sensible terms. In any event the Courts already have powers to award costs, which are more than adequate to deal with these situations.

## **2. How best to strike the balance between privacy and freedom of expression, in particular how best to determine whether there is a public interest in material concerning people's private and family life?**

An extant and continuing concern is the relationship between Article 8 and Article 10 ECHR and how the UK Courts interpret this. The Strasbourg Court has made it clear that "the decisive factor in balancing the protection of private life against freedom of expression should lie in the contribution that the published photographs and articles make to a debate of general interest."<sup>132</sup> In principle GNM would not seek to demur from this as a general position. Once it was recognised that the two rights would come into conflict, it was inevitable that a balancing act would have to be conducted whenever the two rights are engaged.

There is concern that this balancing act is not being properly conducted, that the public interest is too narrowly defined, so that in effect Article 8 is now trumping Article 10. From GNM's perspective this has not caused problems. It appears that in a number of cases complained about, newspapers have failed to offer any public interest defence, which leaves judges in a difficult position in relation to section 12 and the PCC Code. GNM would obviously be concerned if the law were to develop in a way in which privacy could successfully be deployed against journalism which complies with the PCC's code.

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<sup>130</sup>OPQ v BJM and CJM [2011] EWHC 1059 (QB)

<sup>131</sup>defined as: an order against the whole world, banning anyone from publishing material

<sup>132</sup>Von Hannover v Germany, 2004

The Strasbourg Court<sup>133</sup> recently noted, about a ‘kiss and tell’ story:

“ ... there is a distinction to be drawn between facts – even if controversial – capable of contributing to a debate of general public interest in a democratic society, and making tawdry allegations about an individual’s private life ... In respect of the former, the pre-eminent role of the press in a democracy and its duty to act as a “public watchdog” are important considerations in favour of a narrow construction of any limitations on freedom of expression. However, different considerations apply to press reports concentrating on sensational and, at times, lurid news, intended to titillate and entertain, which are aimed at satisfying the curiosity of a particular readership regarding aspects of a person’s strictly private life ... Such reporting does not attract the robust protection of Article 10 afforded to the press. As a consequence, in such cases, freedom of expression requires a more narrow interpretation ... While confirming the Article 10 right of members of the public to have access to a wide range of publications covering a variety of fields, the court stresses that in assessing in the context of a particular publication whether there is a public interest which justifies an interference with the right to respect private life, the focus must be on whether the publication is in the interest of the public and not whether the public might be interested in reading it.”

Privacy injunctions are unsurprisingly fact specific and as case law in this area illustrates the law in England and Wales is very unsettled. There is an argument that the test that the Courts are applying when deciding whether to grant an interim injunction is too weighted in favour of the Claimant.

However, practically speaking it is easier to establish that a substantive Convention right is “engaged” rather than that it has been breached. The approach is not “Was there a breach?” but “Was Article 8 engaged?”. The effect of a Claimant passing the threshold stage appears to be that it is therefore assumed there is a breach of Article 8 which then has to be justified under the balancing exercise. With Article 8 as the threshold test, because the scope of Article 8 is so wide, it has led to an ease in obtaining interim injunctions.

Most recently, the decision of Mr. Justice Nicol in *Rio Ferdinand v MGN Limited*<sup>134</sup> illustrates that when a Court has to fully engage on the evidence of the facts its practice of that balancing exercise may come out differently. In this case the Judge concluded on the facts that there was a public interest in publication of the article and raised arguments relating to public image and hypocrisy. This illustrates perhaps one of the difficulties inherent in deciding cases at a preliminary stage (which is what often happens in practice – few of these cases go to a full trial) when evidence is only written and there is no cross-examination of witnesses.

The examples of *John Terry v Persons Unknown*<sup>135</sup> and *Tiger Woods* also raise questions in relation to the use of injunctions to protect an image. Tiger Woods obtained an injunction in December 2009 to prevent the publication of private information. Historically Tiger Woods had many endorsements and had arguably created an image of himself he sought to protect. The Tiger Woods injunction also highlights the inherent difficulties in trying to restrain publication by media in this jurisdiction in circumstances where there was no restraint on publication in the USA or on the internet which, arguably, would defeat the purpose of the injunction. Different approaches to privacy in different jurisdictions also raise further hurdles. For example, in recent reporting of allegations surrounding Dominique Strauss-Kahn

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<sup>133</sup> *Mosley v United Kingdom*, 10 May 2011, at paragraph 114

<sup>134</sup> [2011] EWHC 2454 (QB)

<sup>135</sup> [2010] EWHC 119 (QB)

it is recognised that France has strict privacy laws and as a result, very little is reported on politician's private lives. In addition, French law is also seen to protect "image rights".

GNM does not consider that enacting a statutory privacy law would necessarily be any more effective than the current system, which involves a balancing exercise between the rights relating to very specific facts. If, however, a law of privacy could be drafted that simultaneously ended the injunction system of prior restraint (by perhaps increasing punitive or allowing exemplary damages), clarified or set limits to the definition of public interest and resulted in a more accessible mode of justice that reduced costs for all parties, it would of course merit proper consideration.

GNM considers that individuals arguably waive some of their right to privacy when they become a celebrity but the degree to which that individual uses their image or private life for popularity, money and the extent to which they have created a self-image may be relevant (for example see above, *Tiger Woods*, *John Terry*, *Rio Ferdinand* and the PCC code).

In addition, notwithstanding the above, GNM generally considers public figures' private lives to be private unless it can show for example harm, hypocrisy, conflict, or an effect on public office. This is reflected in the Guardian's editorial code, in keeping with both the PCC Code and the Human Rights Act. Where we consider intruding on privacy we should ask for example whether there is sufficient cause, integrity of motive, proportionate methods, proper authority and a reasonable prospect of success<sup>136</sup>. On the evidence of what is published we consider this to be close to the position of other 'quality' newspapers.

Whilst we have anxieties about Europe, in general GNM supports the HRA. We do not consider it should be repealed or that we need our own bill of rights. Article 10 has been good for journalists.

### **3. Issues relating to the enforcement of anonymity injunctions and super-injunctions including the internet, cross boarder jurisdiction within the United Kingdom, parliamentary privilege and the rule of law**

As the case of *Giggs*, referred to above, also illustrates 'new media' can lead to the dissemination of information which is the subject of an injunction which, once available through the internet or published in different jurisdictions is difficult to control. GNM believes that it is not desirable to enforce these injunctions against the internet and Twitter even if this effectively creates a two-tier regime. Those parties who are served with or notified of injunctions are bound and if it is shown that they are the source of leaks to others then there are legal consequences for such breaches. Given the jurisdictional difficulties which are faced in relation to information accessible on the internet it is difficult to see how information can be successfully contained. Although recent case law highlights that individuals have been successfully sued in the context of defamation and 'new media' it is difficult to see how this can be achieved in a proportionate and effective way.

GNM signs up to a voluntary code of professional standards and ethics, and are happy to be bound by the PCC code, which we agree with, together with its definition of public interest. GNM sees advantages in belonging to this 'kite marked' arena, which sets us apart from the wider sea of social media, so would accept that different standards might apply.

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<sup>136</sup> <http://www.guardian.co.uk/info/guardian-editorial-code>

In addition, the higher sets of standards and obligations by the press is what arguably distinguishes the press from the noise of the web. The preservation of a higher standard is what allows us to continue to command a more trusted place in society than the more widely available information on the internet.

GNM considers Parliament should regulate its own procedures and if that is properly done, any problems created (for example Giggs / Goodwin / Trafigura) should not arise.

There is a level of uncertainty, as highlighted in the Committee Report on Injunctions, relating to the reporting of statements made in Parliament. While there is a statutory protection from defamation, there is no such clarity from contempt. The Committee Report noted, *“Where media reporting of Parliamentary proceedings does not simply reprint copies of Hansard or amount to summaries of Hansard or parliamentary proceedings they may well not attract qualified privilege. Where media reporting of Parliamentary proceedings does not attract qualified privilege, it is unclear whether it would be protected at common law from contempt proceedings if it breached a court order. There is such protection in defamation proceedings for honest, fair and accurate reporting of Parliamentary proceedings. There is no reported case which decides whether the common law protection from contempt applies. There is an argument that the common law should adopt the same position in respect of reports of Parliamentary proceedings as it does in respect of reports of court proceedings.”*<sup>137</sup>

GNM considers it would be helpful for this area to be clarified.

#### **4. Issues relating to media regulation in the context of parliamentary privilege, including the role of the PCC and OFCOM**

GNM would not intend to submit anything on this at this time as the Leveson Inquiry is looking at the whole role of the PCC and regulation.

October 2011

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<sup>137</sup>Report of the Committee on Injunctions, 20 May 2011, page 8.

Gillian Phillips, solicitor, Director of Editorial Legal Services, The Guardian, David Price QC, Gavin Millar QC, and Reynolds Porter Chamberlain—Oral evidence (QQ 33–64)

**Gillian Phillips, solicitor, Director of Editorial Legal Services, *The Guardian*, David Price QC, Gavin Millar QC, and Reynolds Porter Chamberlain—Oral evidence (QQ 33–64)**

[Transcript to be found under David Price QC](#)



Alan Rusbridger, Editor, *The Guardian*, Ian Hislop, Editor, *Private Eye*, John Witherow, Editor, *The Sunday Times*, and Jonathan Grun, Editor of the Press Association—Oral evidence (QQ 162–209)

**Alan Rusbridger, Editor, *The Guardian*, Ian Hislop, Editor, *Private Eye*, John Witherow, Editor, *The Sunday Times*, and Jonathan Grun, Editor of the Press Association—Oral evidence (QQ 162–209)**

Evidence heard in Public

Questions 162–209

MONDAY 31 OCTOBER 2011

Members present:

Mr John Whittingdale (Chair)  
Lord Black of Brentwood  
Mr Ben Bradshaw  
Lord Boateng  
Baroness Bonham-Carter of Yarnbury  
Mr Robert Buckland  
The Lord Bishop of Chester  
Baroness Corston  
Philip Davies  
Lord Dobbs  
George Eustice  
Paul Farrelly  
Lord Harries of Pentregarth  
Lord Hollick  
Martin Horwood  
Lord Janvrin  
Eric Joyce  
Mr Elfyn Llwyd  
Lord Mawhinney  
Penny Mordaunt  
Yasmin Qureshi  
Lord Thomas of Gresford  
Nadhim Zahawi

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**Examination of Witnesses**

*Witnesses:* **Alan Rusbridger**, Editor, *The Guardian*, **Ian Hislop**, Editor, *Private Eye*, **John Witherow**, Editor, *The Sunday Times*, and **Jonathan Grun**, Editor of the Press Association.

**Q326 Chair:** Can I now move on to the second part of this afternoon's session and welcome Alan Rusbridger, the editor of *The Guardian*, Ian Hislop, the editor of *Private*

Alan Rusbridger, Editor, *The Guardian*, Ian Hislop, Editor, *Private Eye*, John Witherow, Editor, *The Sunday Times*, and Jonathan Grun, Editor of the Press Association—Oral evidence (QQ 162–209)

*Eye*, John Witherow, the editor of *The Sunday Times*, and Jonathan Grun, the editor of the Press Association. Perhaps I might begin by asking you to what extent you think the law as it currently stands is working well in striking a balance between freedom of expression and privacy. Also we have been told at our previous sessions that the rush of super-injunctions which occurred six months or so has now dried up, there are very few being granted and, therefore, this is no longer a problem. Do you agree with that?

**John Witherow:** I have slightly got observer status here because the last injunction we had was about 10 years ago, which we successfully fought off, but when I see what is happening to the rest of the media, there has been an extraordinary spate of injunctions this year. You have got to say that there was a sense they were being scattered around like confetti and then getting somewhat out of control, but that has really moderated in the last few months. I gather there have been some guidelines set by the Master of the Rolls that balance freedom of expression against the right to privacy. Whether there have been fewer cases brought forward in that time, the courts have just not had the opportunity to explore them, I do not know, but it seems to have eased and the mood seems to have slightly changed. I would have thought that, at the moment, the balance is, as much as we can judge, not too bad.

**Ian Hislop:** I gather there have been none since June—so I was told by one of my learned colleagues—and this is because there was a judgment against John Terry, there was a report by Lord Neuberger, which again made it fairly clear what he thought should happen, and then a couple of spectacular own goals by public figures, which tends to concentrate the minds of everyone else thinking about having a super-injunction. I do not think it is anything the law's done; it is partly to do with the massive hoo-hah kicked up by various sections of the media—including many of us sitting here—and partly to do with the feeling that there has been some correction in the way the law is being applied. It was deeply worrying—the last time I gave evidence, I actually brought along a threat from a Mr Granger via his lawyer, Keith Schilling, saying, “We are going to slap one of these on if you start asking questions about what I have been up to”—and there was a chilling effect, and I think what we have seen is an outbreak of sanity, which is very encouraging.

**Q327 Chair:** Do you see it as a temporary outbreak or a permanent shift?

**Ian Hislop:** Who knows?

**Alan Rusbridger:** I agree. At the moment, there is a period of calm. Ian and I—it must have been two years ago—gave evidence, and Ian brought this letter along and I said, at that point, *The Guardian* had never been affected by privacy law. That remains the case and we have not been served any letters or cases trying to gag us under privacy. We have, more recently than John, had injunctions—I dare say we will move on to that—but I suppose the only other point in opening is that it seems to me we are at a very early stage of feeling our way on privacy and it is obviously going to be some time before a proper jurisprudence develops. Quite a lot of the cases so far have not been very good cases. The law moves slowly and it is going to take some time before we get a real sense of where it is going to settle down.

**Jonathan Grun:** If John has observer status, then I think I probably have super-observer status, because I do not believe the Press Association has ever been the subject of an injunction, but if you want my opinion it would be that the balance has shifted towards

Alan Rusbridger, Editor, *The Guardian*, Ian Hislop, Editor, *Private Eye*, John Witherow, Editor, *The Sunday Times*, and Jonathan Grun, Editor of the Press Association—Oral evidence (QQ 162–209)

privacy and against freedom of expression of late. I would also like to add that the entire furor that we have had about injunctions, when coupled with the phone-hacking scandal, has tended to act as what you can describe as a distorting lens. When applied to the activities of the British media as a whole, I think that it misrepresents the day-to-day activities of hundreds of newsrooms across the country. You probably know from your own experience with your local media that, in newsrooms across the country, day by day, journalists take decisions beneath the radar. They are bound to be beneath the radar because we do not know that they are being taken, but those decisions tend to guard the privacy of what you would describe as ordinary people.

**Ian Hislop:** You say you are both observers, but a lot of these orders are contra mundum, which means nobody at all, including both of you, is allowed to say anything about anything, so you are included in all of them—all of the ones that have that status.

**Q328 Chair:** Regarding the fact that there are fewer now, you referred to a couple of spectacular own goals. Do you think that, therefore, people are going to be less inclined to seek an injunction, or are the press now behaving better and less intrusive?

**Ian Hislop:** I do not think so. My guess is that of the people who took the injunctions, one had a judgment that said, “You are doing this because of, at least partly, your commercial interest”, which was not what most litigants want to hear, and I am sure that concentrated the mind, and other people thought, “Why am I taking out an injunction when the resultant publicity will make me look much more of a fool than if I had just stuck to the phrase, ‘publish and be damned’?”—a phrase I keep repeating in front of these committees and which used to be how we did it.

**Q329 Chair:** How many stories are you currently prevented from writing as a result of our standard injunctions?

**Ian Hislop:** I would think there are about 10 of them still out there; footballers, actors—

**Chair:** Do not feel you need to list them all.

**Ian Hislop:** Those sorts of people.

**Q330 Chair:** There are about 10 which *Private Eye* would like to write, but that it currently cannot.

**Ian Hislop:** I am not even saying we would cover them. A lot of those stories, we would probably never have done. My point has always been the principle of being told you can’t; by who and why?

**Q331 Chair:** How old are these injunctions now?

**Ian Hislop:** My most senior colleague says part of the problem is no one really knows because you are not allowed to know anything. I am sure you are but we are not.

Alan Rusbridger, Editor, *The Guardian*, Ian Hislop, Editor, *Private Eye*, John Witherow, Editor, *The Sunday Times*, and Jonathan Grun, Editor of the Press Association—Oral evidence (QQ 162–209)

**Q332 Yasmin Qureshi:** Do you think that press standards have changed in the last few years with regard to the publication of kiss-and-tell stories, or do you think this is something unique to England?

**Ian Hislop:** The *National Enquirer* seems to fill its pages. No, I don't think it is unique to England. Have journalistic standards fallen, compared with the eighties? No.

**Alan Rusbridger:** We had a debate recently with Carl Bernstein and the editor of *Le Monde*. The editor of *Le Monde* was rather puzzled by the whole discussion because she said, "We do not have tabloids in France", and Carl Bernstein from America was rather puzzled by the whole discussion because they have such an attachment to the First Amendment that they could not understand any concept of regulation. In America, you have supermarket tabloids and then you have the rest of the press. The *New York Post* is really quite a middling, middle-market tabloid by British standards, so they do not have quite the same mixture of news and gossip and celebrity and entertainment in the same package that we do. I think that is what makes Britain a slightly more difficult case than some continental countries or America.

**John Witherow:** There are plenty of examples on the continent where sensational stories that have been published, whether it is in Italy or Scandinavia, frequently emerge. We think about France often, which seems to self-regulate itself into oblivion when they don't discover what is happening to DS-K or Mitterrand, and seem content with that until the whole thing blows up and then they wonder, "Why didn't we know?"

To go back on one of those earlier points about why are there fewer injunctions, one of our columnists, Jeremy Clarkson, rather publicly and famously last week outed himself on an injunction. I think, when he says, "I spent"—whatever it is—"£250,000 fighting this and it has been all over Twitter and everybody knows; it is a total waste of money", that is a deterrent to other people, making them say, "What is the point? If that is going to happen to someone like Clarkson, should I go after one myself?"

**Q333 Lord Thomas of Gresford:** Has it been lawyer-led—in other words, the firms who see this as an easy way of making money—or do the clients look for the injunction? Have you any impressions?

**Ian Hislop:** Are you suggesting that lawyers are chasing business? That is appalling.

**Q334 Lord Thomas of Gresford:** No, they are creating business. Do you think they create business?

**Ian Hislop:** Yes, I do. I think the libel business rather dried up and privacy became the next avenue.

**Alan Rusbridger:** It is not simply the matter of celebrity coverage, Chairman. If you wanted to write a textbook on how to end up with disastrous publicity for your client, Trafigura was a company that was relatively unknown and became spectacularly well known globally for what it had done in the Côte d'Ivoire and for the attempt it made to litigate over that. I think lots of companies must be looking at this as a mad way of doing business.

**Ian Hislop:** You could not have had any worries about a public interest defence over Trafigura, a case in which, only when someone said it in Parliament and then it was reported by us and others, did the truth actually come out. What problem would there be in

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disclosing whether there has been toxic dumping from a multinational company in a third-world country? Do you need a statutory defence of public interest? Not really; you just need common sense.

**Q335 Lord Hollick:** Could you tell us, within your own publications, the steps you take to ensure that there is a correct balance between privacy and freedom of expression? Can you also give us any examples of where you spiked a story or where you held off on a story or aimed off on a story, which you believed to be in the public interest, because privacy concerns were paramount?

**John Witherow:** I suppose the process one goes through, when we balance privacy against the public interest, is that we have an internal debate involving our lawyers, journalists and senior editors, and we bat it back and forward: where is the public interest in this? In most cases, with the sort of stories we do, it is pretty clear-cut, so it does not have to be hugely complicated and very prolonged. We kind of know whether it is in the public interest because we use as our guideline the PCC code, which spells it out in various ways and often involves pretty blatant wrongdoing or criminality.

We did a story using subterfuge at the weekend about an insurance scam involving cars being smashed up and then false claims being made. It was so clearly in the public interest the debate probably lasted 10 seconds. When we did FIFA, again using subterfuge, obviously if there is corruption in a body like that, it is clearly in the public interest. In the case of *The Sunday Times*, we do not have many complex arguments like that, because the sorts of stories when injunctions are issued are not the areas we tend to go.

**Alan Rusbridger:** I agree with most of what John said. I think you have to have some kind of codification and, at *The Guardian*, we have the PCC code and we have our own code, which goes slightly beyond that. I think you have to have a culture where people, from top to bottom in the organisation, understand roughly where you draw the line, because editors cannot be there to take every decision at every minute of the day. People have to understand generally. Recently, we have added something which we have taken from guidelines that Sir David Omand, former Head of GCHQ, suggested that the intelligence services might use, which is essentially five questions that you ask yourself before you introduce it to the public.

The first is the question of harm: what harm are you doing by publishing this story? The second is: what public good is being served? The third is the question of proportionality: are you using the minimum possible means of intrusion? The fourth is that you have proper authority: that there is a kind of process and that the people in authority are noting and approving it. The fifth is that there should not be any fishing expeditions. I think Sir David Omand proposed those in relation to the intelligence services; I think they are pretty adaptable and they work pretty well in terms of journalism, so we added that to the code. I hope that anybody on *The Guardian* knows those are the questions they should be asking and that they should consult somebody in authority before, so there is an audit trail of the discussions that have been had.

**Ian Hislop:** We do not have anything so strictly codified. It tends to be more common sense, but the one where we lost the most money or potentially came the biggest cropper was over the president of the Law Society, who was reprimanded by his own society and decided this was a confidential matter—it was private between himself and the Law Society in some way. I had no hesitation about putting that story in, nor did I have any

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hesitation in fighting it through the lower courts and the upper courts, where we finally won, but at a risk of £350,000 and six months after I wanted to run the story. I cannot imagine any of you have a problem with that. If you are reprimanded by your own disciplinary body, that is a matter of public interest, but no, he was awarded a privacy injunction.

**Alan Rusbridger:** A confidence injunction.

**Ian Hislop:** Confidence, yes, but it comes under the same sort of four-month delay. Thank you, Alan—thank goodness for *The Guardian*, a stickler for accuracy. That is what happened. Yes, without being pompous, it is usually pretty obvious, and certainly the ones where we have ended up in the courts, it has been obvious.

**Q336 Lord Dobbs:** You say this is all common sense, and Mr Rusbridger has just given us a very worthy set of criteria by which to judge these things, but I did not hear what I think was perhaps the Paul Dacre defence in there: what sells newspapers? “Will this story help us sell more newspapers?” Does that ever come into consideration? You are obviously rather more up-market than some of the other newspapers; does it ever come into your considerations: “We will take a risk because we know that this story will sell newspapers”?

**Alan Rusbridger:** We all like to sell newspapers; no one is being high-minded about that. I think, if you are using commercial justification as a sort of trump card over the other balancing acts, that is a slippery slope.

**Q337 Lord Dobbs:** Many people are arguing that the newspapers ought to have a much lighter regulatory regime—not a regulatory regime but a self-regulatory regime—than other industries, because their long-term future is at financial risk and, therefore, they should be allowed to take a few flyers and make sure that their front pages are appealing.

**Alan Rusbridger:** Personally, I do not think that is in the best interests of the press. If you want an example of that, you can look at the kind of stuff *The Guardian* has been writing about for the last two years. As I said, it is a slippery slope, and if you are going to lessen standards or become laxer or take chances because you think that is a route to greater sales or to survival, I think, in the end, that is in danger of becoming very unstuck.

**Q338 Lord Dobbs:** I commend to you the diaries of Piers Morgan on that issue, although, of course, he used to edit a newspaper for perhaps a different market from that of *The Guardian*.

**Ian Hislop:** This is a parliamentary first: someone commending Piers.

**Q339 Lord Dobbs:** While we have got Mr Hislop there, I seem to remember, in the past, *Private Eye* arguing that, “Yes, okay, we did publish this story but it does not matter so much and we should not be treated harshly because we are only *Private Eye* and everybody takes *Private Eye* with a bit of a pinch of salt”.

**Ian Hislop:** I wouldn’t have argued that.

Alan Rusbridger, Editor, *The Guardian*, Ian Hislop, Editor, *Private Eye*, John Witherow, Editor, *The Sunday Times*, and Jonathan Grun, Editor of the Press Association—Oral evidence (QQ 162–209)

**Q340 Lord Dobbs:** The reason I am interested in that is because, of course, we have to deal with new media—the social media—who essentially argue the same sort of thing: that stories in newspapers are different from stories on the internet.

**Ian Hislop:** I think print—all of it—has an authority that is difficult to get on Twitter now, which is why we publish and then we get penalised. I am not against that at all. I do not accept that defence, by the way, that it does not matter because it is in the *Eye* and no one takes it seriously. The reason you do not sell newspapers is that no one believes you, and I think that is the death of papers if you buy it and you think, “This is not true”. The reason all newspapers had a huge circulation spike during the expenses affair is because the public thought, “My God, this is actually true”, and they rushed and they bought print newspapers to find out the details. So, no, I think printing the truth is a way to sell newspapers.

**Q341 Chair:** Mr Witherow, you referred to your insurance story this Sunday. As I recall, that story was written by Mazher Mahmood. He was, of course, the fake sheikh, the star investigative reporter of the *News of the World*, and some people have occasionally in the past questioned the tactics he used when he was employed by the *News of the World*. Were you happy to take him to *The Sunday Times*? Were you happy about his record in his previous newspaper?

**John Witherow:** Clearly, we checked him out very carefully and needed reassurances that he was not involved in any way with the phone hacking, which he assured us he wasn't, and independently we were assured he wasn't. As far as I am aware, the police have no interest in him, so that was very important before we took him on. He has an exemplary record on these sorts of stories. He has instigated, I think, about 250 prosecutions of people, for exposing criminality. Yes, we were concerned but I think he is a remarkable operator in that form of journalism.

**Q342 Chair:** If you have read Peter Burden's book on the *News of the World*, that makes a number of suggestions about the tactics used, which I don't think he has ever done anything about. Are you aware of those suggestions?

**John Witherow:** I am aware of some of the allegations, yes.

**Q343 Chair:** But they are not sufficient for you to have paused before taking him on.

**John Witherow:** Yes. Because of the checks we do, we were comfortable that what he had done in the past was fine.

**Q344 Mr Llwyd:** Can I take Mr Rusbridger back to what he said about his five criteria? I presume that accuracy falls within the audit and authority part. The reason why I raise that is I had occasion to do a case on behalf of a client some years ago against a Sunday newspaper. I had not chased anyone for the work, by the way, but I was astonished, because there were two witness statements containing utterly nonsensical evidence that could not possibly be true, but because both of them had been sworn, the Sunday newspaper carried on with the story and we had to injunct them in the end. We fortunately did, but we had to

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go all the way along. They were happy because they had sworn statements; albeit the statements were nonsense, but they were happy to go ahead on that basis. I take it, gentleman, that you all are a bit more particular about accuracy than that.

**John Witherow:** I agree. The point of the sort of journalism we do is to get it right and, if we do not, it is pointless. We take that very seriously. If we get it wrong, we want to correct it and apologise for it. I think the PCC has played a very valuable role in raising standards. I think the idea you are going to be adjudicated against over accuracy is something we fight, if there is a complaint against us, very strongly—almost as much as a libel case. Newspapers do take PCC adjudications very seriously, and I am not sure that it is always understood by the public, because it seems like still a toothless body, but it is treated by the press seriously. Accuracy is the first and the most paramount thing we ask for.

**Jonathan Grun:** I echo that. Accuracy underpins everything that we do at the Press Association, but I would not present the Press Association as being a paragon of journalistic virtue. I would say that you can go to most newsrooms—every newsroom—around the country and everyone wants to be first to the story, but first they want to make sure that the story is right, because the consequences of getting it wrong are so awful for the organisation and for the journalist concerned.

Can I pick up on one point about the stories that may not have been published because of the chilling effect? I think the answer to that is that we do not know, because not every media organisation has deep pockets and, at the community level around the country, the newspapers that serve towns and cities simply cannot afford to contest the sort of legal threats that are put to them when they start to investigate stories. As a result of that, we may never know how many stories have not been covered and, as a result of that, we may never know how many people who have been up to no good will sleep a little easier tonight because of that.

**Q345 Baroness Corston:** If I may paraphrase something that Ian Hislop said just now, he seemed to be saying that, if the story is true, then publication can follow. One of the people who has given us written evidence has said, “The private bedroom activities of public figures are no business of ours, whatever the personal views of some self-opinionated newspaper editors or columnists”. Do you agree with that assertion?

**Ian Hislop:** They might be. Sex is not irrelevant to every story that happens. *Private Eye* and I have been criticised for not running enough of it.

**Q346 Baroness Corston:** Who criticised you for that?

**Ian Hislop:** Some of our older readers in particular are very keen on that sort of material, but I am afraid I, on the whole, try and run those stories if they relate to promotion or other forms of corruption. If you take the French model, if you want draconian privacy laws, you end up where you, the public, are not allowed to know that the President has a mistress who he has put up in a flat at your expense and employed all the children. You are not allowed to know that an arms deal has been done so that the Defence Minister’s mistress could benefit from it. That is none of your business, because the secrets of the bedroom should be kept private. Well, not always: there are occasions when they should not be kept private and, on those occasions, again, it is pretty obvious where the public interest lies, so whoever said that—was it Mr Mosley?



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**Baroness Corston:** No.

**Ian Hislop:** Someone more distinguished.

**Baroness Corston:** Much more.

**Ian Hislop:** Oh, really? Who was it?

**Baroness Corston:** A professor.

**Ian Hislop:** A professor—good grief! I obviously defer.

**Q347 Baroness Corston:** If somebody promotes themselves as being a family man—say he is a footballer—devoted to his wife and children, and would never stray, and then it turns out that he has, then of course, I do not think anybody would argue.

**Ian Hislop:** That is what this judgment was about.

**Q348 Baroness Corston:** I understand it was in one of those cases, but not in another. If a similar person never makes an assertion of that nature and is discovered to be having an extramarital affair, is that then a matter of public interest?

**Ian Hislop:** I do not know the circumstances. You are coming out with a hypothetical story.

**Q349 Baroness Corston:** Somebody who has never said, “I am a devoted family man” on an election address or on television or in any other publication or statement; if they have never made any statement about their private lives that would give you the notion that they were entirely faithful husbands or wives and it turns out that—

**Ian Hislop:** So there was absolutely no element of hypocrisy in that.

**Q350 Baroness Corston:** No element of hypocrisy at all.

**Ian Hislop:** That is not the only thing. It might affect what else they did. I would not run this story anyway. My interest in football is almost nil. If you want to come up with a hypothetical story, refer to both my colleagues: there would be cases where they would say, “That story is of no interest. Why would I run that?” There are plenty of stories you don’t run all the time.

**John Witherow:** I think Alan and I tend to veer towards that direction: that, unless you can prove that the sexual or private life of someone is relevant and affects their public life—they are public figures—we would tend to steer clear, but not all newspapers would. If you take the case of Fred Goodwin, which we did not have anything to do with, if it was presented to me that Fred Goodwin was having an affair with somebody on his staff, I would probably say, “Why is that relevant, unless you can prove this affected the way he worked and how he ran the bank?” That might be very hard to prove, in which case we probably would not go near it.

**Ian Hislop:** We would, because if an employee in his firm had done that, they would have been sacked.

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**John Witherow:** Fair point. But subsequently, I think, a judge ruled that it was in the public interest—in the general public interest, not in the specific—so, rather alarmingly, we are being more self-censorious than a judge.

**Q351 Baroness Bonham-Carter of Yarnbury:** To what degree do you feel that the journalism you practise is being affected, or has been affected, by the creeping privacy law that seems to be emerging. We have had slightly contradictory evidence from other people and from lawyers last week. Defendant lawyers were suggesting that they felt this was going on, much more than we, the public, realised, whereas Professor Barnett—I do not know if you heard him—earlier on said he has no evidence that stories are being suppressed. I know, Ian, you mentioned 10 that you could not run, but is there a general concern and greater resistance to investigating stories as a result of what is going on?

**Alan Rusbridger:** I think there is a great danger. I interviewed the Canon Chancellor of St. Paul's last week, Giles Fraser, on the day that he resigned. I defer to the bishops here, but his view was that the debate over the Church of England had been completely skewed over the last 10 years by the debate about sex, whereas, if you read the Bible, there is much more about money than sex. The truth is that 99% of British journalists, including the papers Jonathan was talking about earlier—regional papers, provincial papers and weekly papers—do not write about sex. This debate is skewed by the 1%; not the 99%—this almost echoes the occupiers of the land outside St. Paul's at the moment.

The debate, I think, has been skewed, so I do not feel inhibited by. I have never had an injunction on privacy. I have on confidence, which is why I slightly drew the distinction. I think confidence is quite a dangerous area and that gets into the areas of whether you approach people before publication, because I am sure John would live with this fear too: people go for you on the grounds of confidence. We published a story about Barclays Bank's tax affairs, which we had to take off our website at one o'clock in the morning on ground of confidence. I think confidence can hit you.

**Q352 Baroness Bonham-Carter of Yarnbury:** That has been getting worse, has it?

**Alan Rusbridger:** Yes, that is an ever-present threat. As I say, you can have lawyers who are awake round the clock getting judges up in their pyjamas to take stuff off websites. I am much more worried about confidence and I would have thought, for 99% of journalists in this country, privacy is not something that hits them. Confidence and defamation is much more important in their lives.

**Ian Hislop:** They are actually counting now, for the first time, so that you can know and we can all know how many injunctions are out there and how many there have been. I would say the injunctions that have hit us have been about money and about business, and about largely public money and public figures, so it is not all pathetic sexual stories that do not matter to anyone.

The privacy one that *Private Eye* did waste a lot of money on was Andrew Marr, who is the second journalist and broadcaster, now Jeremy Clarkson has lifted his injunction, who has admitted, "I should not have done this. This is a terrible idea. I was wrong to do so." Marr did it after we had spent rather a lot of money challenging it, but I think that particular privacy order, again, was extremely clear. A man who is asking the Prime Minister what

Alan Rusbridger, Editor, The Guardian, Ian Hislop, Editor, Private Eye, John Witherow, Editor, The Sunday Times, and Jonathan Grun, Editor of the Press Association—Oral evidence (QQ 162–209)

pharmaceuticals he takes and a man who is interviewing David Blunkett about his private life should not have a gagging order about his own.

**Q353 Chair:** Mr Marr, as you may know, has presented evidence to us, which is now on our website.

**Ian Hislop:** I have read it.

**Q354 Chair:** You have?

**Ian Hislop:** Yes. Do you know, I did not agree with all of it?

**Chair:** I didn't think you would.

**Q355 Mr Bradshaw:** Jonathan, you said something very interesting about what you thought was the chilling effect on local and regional newspapers, but that it was very difficult to know because we would never know about it; that is a question we can ask the Society of Editors, I suppose, who might have a clearer idea. If a local newspaper has what it considers to be a great story but does not have the pockets to defend an injunction, there are ways that it could get that story to a newspaper—perhaps a member of the same newspaper family—that did have those deep pockets, and that story would still get to the public domain.

**Jonathan Grun:** Maybe, although very often those stories only resonate locally, so it would not necessarily translate to the national news agenda. Can I just add, at the risk of making a flippant point, that we don't cover kiss-and-tell stories at the Press Association, but it is probably true to say that, because of the spate of injunctions there have been this year, our coverage is actually at an historic high. That is largely as a result of the celebrities making failed attempts to keep stories about themselves secret, which I am sure was an unintended consequence when they embarked on the action.

**Q356 Lord Mawhinney:** Can I take you back to Mr Witherow's evidence about Jeremy Clarkson and his £250,000? The point to me is not that it was a waste of money, but that it was £250,000, which is a lot of money to most of us. Presumably, he thought it was worth it and presumably he had access to the money. To borrow a phrase from others, the general perception is that privacy and injunctions have now become for the few rather than the many, so at least two of you will not be surprised at my question, which is: what do you think ought to be done to reduce the overall cost of privacy and injunctions to bring them more into the reach of ordinary people, rather than having them as a celebrity operation?

**Alan Rusbridger:** You may not want to get on to this territory yet, but I think the answer is in the future shape of regulation. I think there is a quite profound challenge for the press, because I think most members of the press would say they would rather—and they often say this—people went to the PCC than to the law. I think it is a challenge in crafting a new form of regulation to see whether that is indeed what we want. Do we want to get away from the law, push the law back from interfering in our affairs, and say, 'You do not have to do that because we are going to offer you a free and fast alternative'? I think, instinctively, that is a good starting place, but if you are going to do that you have to look at

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how closely you want the jurisdiction of this new, let's call it PCC-plus, to mirror that of the courts.

If it is wildly different, there is no incentive to people. Your Keith Schillings and Carter-Rucks of this world are going to go to the courts. They will say, as they do of the PCC at the moment, "It is useless. You will get nothing from that. We are going to go straight to the courts." It is going to be quite a narrow line to craft. If you want people to have a free and quick way of dealing with privacy as well as everything else, then you have to craft that into your new regulator, and the new regulator has to take it seriously.

**John Witherow:** The great problem I see with that is you would ask, in cases like that, for the PCC to restrain publication, which is going far beyond anything it has done in the past. The newspapers might not agree with that, and then you would still resort to the law, because the law would be the ultimate arbiter in this. I think it is quite dangerous for the PCC to be there to stop publication because it disagrees with something.

**Alan Rusbridger:** Except that one of the stories that the PCC tells, if you hear Baroness Buscombe and Stephen Abell talking about it, is, "We often do give free publication advice, and editors quite often ring us." I have never rung them, but they say, "We are happy to give advice and that is one of the services we offer."

**Q357 Lord Mawhinney:** Would I be wrong then, Mr Witherow, in deducing from your answer that it really does not bother at least the national media that much that privacy and injunctions is a very expensive business, and that, if one was being ever so slightly cynical, that might work to your advantage because it cuts down the number of people who you would have to deal with?

**Ian Hislop:** Also, they are the people who take out the injunctions. Ordinary members of the public, on the whole, do not resort to the law to keep something secret.

**Q358 Mr Bradshaw:** Because they can't afford to.

**Ian Hislop:** But they are not going to be written about in newspapers, are they? On the whole, the two things equate.

**Mr Bradshaw:** There are quite a lot of examples of ordinary people who feel they have had their privacy invaded, who would not know about the law, would not have the money to seek an injunction, and have no recourse at all, which is where this question is coming from, of how to reduce the costs, and how you give a new Press Complaints Commission-plus some teeth that would help ordinary people who feel their privacy has been invaded and have no chance of getting an injunction.

**Q359 Lord Thomas of Gresford:** Could you give us a ball-park figure for what it would cost to resist one of these applications for privacy? That is my first question. The second—and it has to be directed to Ian Hislop: do you ever threaten to publish and then, in the face of an injunction, simply not oppose it—just let it go through and let it stay there and let it rest? In other words, we have heard from lawyers that one of the problems is that newspapers will threaten to publish and then, when an injunction is taken out, they do not contest it; they just sit back and do not appear. Does that happen with you?

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**Ian Hislop:** No, not at all.

**Q360 Lord Thomas of Gresford:** What is the ball-park figure for resisting?

**Ian Hislop:** £350,000 was the Napier case, which is pretty expensive, and five months wasted of everyone's time. I would think we spent about—how much on Marr? About £75,000 and I am advised by the man who charged me, so add on a little. It is incredibly expensive to resist these things. Obviously, it is very expensive to take them, but it is very expensive.

**Q361 Lord Thomas of Gresford:** It would be a comparable expense to bring if it costs that much to resist.

**Ian Hislop:** I would imagine so, yes.

**Q362 Lord Thomas of Gresford:** So that puts it out of the park for anybody, really.

**Ian Hislop:** I am told the £350,000 was the cost to both sides.

**Lord Thomas of Gresford:** I see.

**Q363 Lord Harries of Pentregarth:** If there is a growing feeling that we need what Mr Rusbridger called a PCC-plus or some strengthened regulatory body, I wonder whether you have any particular regulatory body in mind which at least might be a starting model to think about—the Bar Council or the equivalent body for solicitors, or the Human Fertilisation and Embryology Authority—or, if you have no particular model in mind, whether you have very clear steps as to the ways in which that body could be strengthened compared with the PCC at the moment.

**Alan Rusbridger:** I think the PCC is a good starting point. I have been a big critic of the PCC over the years but I think it does valuable work, has a good code and is a good mediator. I think one should begin with the PCC as a good building block. I think it has not been very good on privacy and I think it is going to need to address this concern of how you give cheap justice to people who want to go down the privacy route because, otherwise, they are just going to go to the courts. I think the thing where the PCC fell down was on the investigatory and sanctions bit, and there, I think, Paul Dacre has made an interesting suggestion, which is about the ombudsman.

The model I would refer to is the former Independent Television Commission and how they handled something that *The Guardian* wrote, about 10 years ago, which is a case where we accused Carlton TV of having faked scenes in a programme. That was exactly the Paul Dacre “polluter pays” principle, so what they did was to call in a distinguished QC, Michael Beloff, who went into Carlton TV with a couple of assessors and, essentially, found that they had faked these scenes. Carlton paid the bill for that and then they were fined £2 million. That seems to be an interesting model that you could bolt on to the PCC, so if you reached a case, as with phone hacking, where there was prima facie evidence of something gone badly wrong in a newsroom—and I think this would have worried the *News of the World* greatly—if you had sent in Michael Beloff with a team of assessors and forensic

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whatsits who could look at the accounts and speak to reporters, I think the threat of that would be enough to make newspapers think very seriously about what they were doing.

**Chair:** I think we will come back to the PCC in due course.

**Q364 Lord Janvrin:** I want to come back to the public interest, and the definition of the public interest. Do you see it simply as a matter of feel and common sense, or do you see any value whatsoever in having it more closely defined by Parliament?

**John Witherow:** As I say, we use the PCC code. The advantage to us is that it is drafted by journalists, and this has been a cause of some criticism: should there be lay representation on this code committee, which would seem to me perfectly reasonable for that? It is also very flexible. It is constantly updated and, if the mood changes in the country or there are case studies, the code reflects that and can be adapted quite quickly. If you had legislation on this, you would set it out in a code that would be fixed and very hard to change in a reasonable period of time, so there is merit in the flexibility of the PCC code and the fact the press signs up to it and that they should adhere to it. I see that as an attractive option.

**Alan Rusbridger:** I agree. I think the code is pretty good. I have heard criticisms of it earlier today but I think, until this summer, no one really criticised the code. There were lots of criticisms of the PCC, and the way it operated and its failings, but I think the code is a fairly good basis and it is not dissimilar from the BBC and the ITC codes. They all cover essentially the same obvious ground.

**Q365 Martin Horwood:** One of the defences that is likely to be used by some of your tabloid cousins is not so much the hypocrisy one but one that, if someone has chosen to put their own personal life into the public domain, whether that is through reality TV or by using them in their political campaigning, that makes them and their private life fair game. Do you agree with that?

**Ian Hislop:** Someone said that celebrity is an exchange of privacy for money. It is not a bad definition of modern celebrity, in which you willingly exchange your privacy in certain situations and in accounts of yourself in tabloid papers. It is not an argument entirely without merit.

I am sorry: I did not get to answer the public interest question. Again, I am perfectly happy with the courts doing this, providing they have a definition, which could easily be the code or could be covered by Parliament, but the best suggestion I have seen is where there is a range within which the judge can say not whether it is in the public interest or not, but that it is perfectly reasonable for an editor to think that this is in the public interest. Judges differ: it depends who you go in front of, particularly at the moment. It is very confused on whose idea of what is in the public interest in terms of privacy; even on the recent cases; you get split decisions in the appeal courts. It is not that easy, so if there was a definition which was essentially, “It is reasonable to have printed that story, you could argue it”, that would be great for editors.

**Alan Rusbridger:** That takes you into what I call the Omand principles, which is, if you have got your audit trail, you can say, “Look, here is the audit trail. We discussed this. We considered the harm, we considered the good, we considered the proportionality and we had the proper line of authority”. That is very similar to the doctrine in Reynolds in libel:

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if you can show the workings of the newsroom and that this was a responsible piece of journalism that had a proper discussion in advance; I think that dovetails with what Ian has just said about being able to show why you considered it was in the public interest.

**Q366 Lord Thomas of Gresford:** You would be happy for a judge to determine what is reasonable for an editor to print, would you?

**Ian Hislop:** That is what they do at the moment, and they are just weighing up Article 8 and Article 10. I think they need, as in libel and defamation before, some advice on the fact they were getting this balance wrong.

**Q367 Chair:** Order. Could I interrupt you for a second? There is a division in the House of Lords. Us Commoners will press on in their Lordships' absence.

**Alan Rusbridger:** Just completing that, it is essentially what happens in Reynolds. Under the civil Reynolds doctrine, a newspaper editor doing a big piece of investigation will put the things to the subject of the article and will keep a complete document trail of every email and phone call that has been sent in order to establish that the steps have been gone through. If you are going to do that in libel—and quite often that is to the advantage of the newspaper—then I cannot really see why it should not work in privacy as well.

**Chair:** We are about to lose our quorum from the House of Lords, so I fear we are going to have to pause until some of them return. We will have a brief break.

*Sitting suspended for a Division in the House of Lords.*

*On resuming—*

**Chair:** We were discussing the public interest when we stopped. Yasmin Qureshi wanted to come in on that.

**Q368 Yasmin Qureshi:** I think we understand the kinds of issues or situations where the public interest that you talk about is easier to determine: toxic waste or a politician doing something wrong. I think everybody can understand that there the public interest would be to publish the information. Where I wanted to find out your views was—and I know your newspapers probably do not do this sort of stuff; in we know they don't do this sort of stuff—for example, on Sienna Miller, mentioned earlier on: an actress who is not a public figure in the sense of trying to hold a position of responsibility; discussion of her private, personal life was in the newspapers, running over three or four pages. Would you think that in those cases the public interest justifies publishing her private personal details, because she is a public figure?

**Ian Hislop:** I have no idea; it depends on the circumstances, what was revealed and what she'd said previously in terms of attempting to publicise whatever she was doing or not

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doing. It may be that there is no public interest at all; it may be that there is. I don't know. But that is what I would like to see in what they call this range, which says, more or less, "It would be reasonable to do that", and it also does not interfere in the way you do it. It can be that they do not say that you should not put this picture in, or that headline, or whatever, but say, "That story shouldn't be there". Again, on the whole I am for as much publication as possible, so I would have a much broader defence of as much free speech as we can possibly muster.

**John Witherow:** I do not know about the Sienna Millar case, but picking up on the point of a famous person and whether they lose some right to privacy: they try and control the agenda when they want their news out there, and they do it using agents or whatever means to get the sort of publicity they want that forwards their career and makes them more money. And then when a story emerges that is not in their interests they try to use any methods to stop that. You have to think, "Is that right, if they are benefiting from all that publicity, but when there is something negative they then close it down?" It does not seem really fair.

**Jonathan Grun:** I think that just because you are in the public eye does not mean that you are fair game. I think it is when the image that you present of yourself in public is at odds with the way that you behave in private. That, I think, is when it is legitimate for stories to be written about those people. It is a fact that you can be a celebrity in this country and behave so badly but so openly that you almost inoculate yourself against coverage, simply because you clearly have nothing to hide and therefore you are not much of a story.

**John Witherow:** The tabloid press would say about us that we are all very high-minded and we hold our noses above this sort of things, but as soon as they publish one of these stories, our newspapers are only too happy to pick it up and run with it.

**Ian Hislop:** That's true.

**Q369 Paul Farrelly:** This Committee is called the Joint Committee on Privacy and Injunctions, but when it comes to injunctions I feel it is wholly artificial not to talk about confidence, which has been mentioned before. Ian, you referred to Napier and Pressdram; that was the first part of my two-parter that involved Trafigura as a parliamentary question. I would have thought that, to coin a phrase, a one-eyed Albanian, in both those cases, as a judge, would have been able to see from a sheet of A4 that the public interest was served by both of those stories being published, particularly if you had proper opportunity to present your side of A4. The question I have is in two parts as well: do you think in those cases the judges apply any test of public interest at all before granting an interim injunction; and do you feel they give you the opportunity to put your case before you're getting involved and spending hundreds of thousands of pounds?

**Ian Hislop:** My experience was that they were too quick to grant and seemed to be less favourably inclined towards the press's arguments in those cases. Because these privacy and confidence things came over from family law and cases where it really matters—I am not saying these cases do not matter, I am being flippant, but cases where it is really obvious to see there is harm and distress and whatever—they moved that agenda over, so that they were again too ready to grant injunctions, in the case of confidence and privacy. I think what has happened is they have stood back a little and thought that the freedom of the press is worth a little more consideration against Article 8, or against the confidence.



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**Alan Rusbridger:** I think the answer is quite often there is short notice, if not ex parte injunctions. You are suddenly in court or, as I said before, it could be a telephone call at one o'clock in the morning and a judge, who is really just the duty judge, has been presented with an expensive lawyer. In the Barclays Bank case that was a case that revealed internal Barclays Bank documents, revealing the strategy of the company to hoodwink the taxman. I think we can all agree that is very high public interest. But at one o'clock in the morning, the judge is in a difficult position, and that judge decided we should take that document down, pending mature discussion of it. In the *Trafigura* case, there was the dumping of hundreds of tonnes of toxic waste and a claim from 30,000 people that this had led to injury and death, so again, who needs the public interest there? The judge, again at short notice and before we had any chance to assemble a response, granted not only an injunction, but a super-injunction. The grounds for granting anonymity to the company included the priceless sentence that said, "There seems to me to be substance in the point that if *The Guardian* publish that named claimants have applied for an injunction against them, it is something that could be seen by some members of the public as indicating an attempt by the claimants improperly to muzzle the press." That was grounds for granting a multinational, global corporation anonymity. It is totally bizarre.

**Q370 Paul Farrelly:** I want to come on to those grounds in a moment, but John and Jonathan, as observers, do you think in these sorts of cases the courts are operating as they should do: following their own rules of procedure and necessarily balancing what is in the public interest?

**John Witherow:** Not in that case, which was clearly not in the public interest. Generally yes, I think there is propensity to come down harder on the media than they should, so I think the balance is slightly off-key.

**Ian Hislop:** I have been asked to make one thing clear: in the *Napier* case the judge initially refused the injunction, but not on the grounds of public interest; so he granted it on another case. Then he granted the injunction pending the appeal, so we had to go to the appeal, and finally the Court of Appeal overturned it. So the public interest point was not taken up, so your one-eyed Albanian holds. I just did not want to do an injustice to the first judge.

**Jonathan Grun:** I would just say that it became clear that that was the case in the *Trafigura* case. Of course, we simply do not know, in many other cases whether the action taken was appropriate or not.

**Q371 Paul Farrelly:** Confidence and privacy would overlap if lawyers made arguments that corporations had Article 8 rights, and judges made rulings that that was the case. Are you aware of any companies and lawyers who may have used that sort of argument, or arguments that tended that way?

**Ian Hislop:** They have not come my way, but I gather that confidence is used in a lot of whistleblowing cases as a threat, at various stages: "If you tell this story you are breaching confidence, and you can say it is in the public interest, but that won't help you". So anecdotally I gather there is a chilling effect there. I have had nothing.

**Alan Rusbridger:** This touches on the point about whether there should be a legal requirement, a Mosley clause, that you should always put things to your subjects before writing them. That sounds right, and of course that is good journalistic practice. But let us

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say you are going to expose X as a tax evader, and you have documents that prove this. If you go to X, he/she would probably get an injunction saying, “You should not have those documents, those are confidential documents, and we want them”. That might reveal a source, so you are engaging source protection, and you are also engaging libel, because you may need those documents in the case of libel. For the source protection you would want to destroy the documents; for the confidence action you would want to destroy the documents; but if you are going to fight the libel action you will have to keep the documents. These are quite complex judgments that you are into in advance of publishing. It is why sometimes the obvious course—that you should go to the subject beforehand—is not always practical given the state of prior restraint there is in the company.

**John Witherow:** In fact, we had a very similar case; I cited the last injunction we had about 10 years ago, which was about tax, and then the person tried to get an injunction and failed, and when before we published the story, by taking a they then took civil action against us under breach of confidence. and failed, because The judge said it was solidly in the public interest to know about this public person’s tax affairs.

**Q372 Paul Farrelly:** Can I just ask a final question? When the press—or certain parts of the press—berates judges and calls for Parliament to act, of course what they want Parliament to pass is a no privacy law rather than a privacy law. Do you think that because of the creepers you described from the family courts in terms of confidence that legislation might be quite useful in defining limits to that creep?

**Ian Hislop:** For me, that would be useful, and I think it is just like with the changes to the defamation law, which were very helpful in terms of pointing out to judges that they have to balance the bits of this not always in favour of one defendant, and I quite like the idea of a definition of a range of public interests. Is this your last question?

**Q373 Paul Farrelly:** It is.

**Ian Hislop:** Sorry, it was just I do not want to bore on. There are two things I wanted to say—forget it then.

**Chair:** I think that is a Division in the House of Commons.

**Ian Hislop:** I can be very quick.

**Chair:** We have two minutes.

**Ian Hislop:** I think it was Ben Bradshaw’s question earlier, I felt I was rather thick, I didn’t get it. Obviously no one is going to give further legal aid so that hundreds of people can come out. That is not going to happen; there are cuts in legal aid anyway. What you have to do is make the courts cheaper, have an early resolution, get everything solved quicker, and then ordinary people will not have to spend that sort of money. The other thing was blackmail: we are always accused of only being on one side, but all these judges keep saying there is an element of blackmail here, or there could be blackmail. If people are saying, “I am going to go to the press unless you pay me money”, they should be prosecuted.

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**Chair:** We are going to have to adjourn briefly. I have to go and meet the Ukrainian Foreign Minister, but if Lord Hollick is able to take the Chair on return and enough members come back, then we can perhaps spend a little more time on discussions.

## **Guardian News and Media Limited—Supplementary Written Evidence**

We refer to Carter-Ruck's letter of 22 November 2011, in relation to the written evidence submitted by Guardian News and Media.

In relation to the matter of *OPQ v BJM*, we write to clarify that GNM was not initially served with the application seeking the *contra mundum* order. Subsequently, GNM contacted Carter-Ruck to seek some background information about the case. At GNM's request, Carter-Ruck provided some documents. Reynolds Porter Chamberlain LLP were instructed on behalf of several newspaper groups, including GNM, to consider whether to apply to intervene in the case. In the event, before the application was heard by Mr Justice Eady on 6 April, GNM decided, given the particular facts of the case, not to proceed with any intervention.

Whilst we consider that *contra mundum* orders are *draconian* and should not be made without proper notice, we accept this was not an appropriate example to identify in support of that proposition and apologise for any confusion that may have been caused by the GNM submission to the committee.

25 November 2011

## **Alex Hall—Written Evidence**

### ***(1) How the statutory and common law on privacy and the use of anonymity injunctions and super-injunctions has operated in practice***

I believe that injunctions are used too frequently, and quite often in the wrong circumstances. There is a tension between freedom of speech and the need to respect an individual's privacy, but I feel that injunctions should not be granted against innocent individuals where the claimant is seeking to protect themselves and cover up their misdeeds. The draconian demands of an injunction are intimidating, and such orders should not be based on hearing only the claimant's side of the story.

In my case, I received an injunction late at night, which was based on facts that I believe to be fundamentally untrue. Its existence and the terms of it were reported in the press, and my reputation by association was damaged irrevocably. There was no consideration for the damage it did to my children and my family became victims of a malicious smear campaign, with the claimant trying to use his network of contacts and the media to rally support - all because I had the decency to inform him, a man with whom I had a relationship spanning 28 years, that I was considering writing a book, and I was looking for his support.

Essentially, I underwent "trial by media", and was assumed to be guilty because a judge had granted protection to the claimant without regard for the other party. I had to demonstrate my innocence.

It transpired that the claimant had no intention when he sought to get an injunction to take the case to trial, and I believe that he was hoping to use this injunction to silence me forever. He cavalierly withdrew the injunction as my legal team were forcing the claims to trial. There was no consideration given to my children and it was again reported in the press, causing further damage to my reputation. I felt like a ragdoll in a dog's jaw, tossed about at its mercy, and that my opinions or story didn't count; I wasn't given the opportunity to prove my innocence in court. I firmly believe that individuals should not be able to use their financial power and the law to cover up their misdeeds - if you don't want misdeeds reported, then don't cross the line of indiscretion.

The existence of the injunction rendered me incapable of earning a livelihood, since I was severely psychologically traumatised and had to spend months gathering evidence to prove my innocence. I had to borrow money to abide by the terms of the injunction, responding through a lawyer within a very limited time (5 days). The injunction also made me extremely concerned about taking legal advice for fear of being in breach of its terms, which is punishable with a jail sentence.

### ***(2) How best to strike the balance between privacy and freedom of expression, in particular how best to determine whether there is a public interest in material concerning people's private and family life***

There is always a public interest concerning people's private and family life. If an individual has decided early on in their career to put their and their family's private life into the public eye, their private life is no longer private. There are clear guidelines set out by the PCC Code of Conduct, the media's own codes, and public morality as to whether the material is

in the public interest or not. However, if a person wishes only to protect his or her own interests, and their reputation may be at stake through their own misdeeds, they should accept responsibility rather than using money, power and the law to try and cover them up.

In terms of striking a balance between privacy and freedom of expression, there are clearly problems with the status quo. In my case, I had had an 8 year relationship with the person who injunctioned me, had been married to him, and revisited the relationship for another 10 years post-divorce, and wished to write a book from my perspective and about my life (some of which involved him). It is my life, and the fact that he did not want the public to have any knowledge of an association with me should not have been grounds for an injunction to be granted.

A better system would be to require notice of a dispute to be given prior to an injunction being granted, with the dispute placed in abeyance for a period of 4 weeks. During that time, the matter should be mediated, and a judge should make an impartial determination as to whether an injunction is appropriate after hearing submissions from both sides. The two parties may be able to reach a compromise, thus negating the need for an injunction anyway.

Further, I believe that prior notification is essential.

When deciding which factors should be relevant in striking the balance between privacy and freedom of expression, I believe that the commercial viability of the press should not be considered. A person has a right to privacy unless they have forgone that right by misdeeds; if they do not have that right to privacy, a commercial deal could be done between them and the press. Celebrities and politicians should generally be taken as having waived their rights to privacy through choice, although the extent to which this has been waived should be assessed on a case by case basis dependent upon how far the individual has used their image or private life for popularity. This should be so regardless of whether the use of the image is directly relevant to the story, so there should not be a "hypocrisy" argument to justify publication. In the context of sexual conduct, salacious details should never be reported on, but the fact that a sexual relationship occurred can be.

### *(3) Issues relating to the enforcement of anonymity injunctions and super-injunctions*

In the information age, "new media" is virtually unstoppable. This means that ordinary anonymous injunctions cannot be enforced, which renders them futile. Super-injunctions, where the knowledge of their existence and those to whom they relate is secret, are the only way to ensure that injunctions work. It is neither practical nor desirable to prosecute "tweeters" or bloggers, since they are merely enjoying their freedom of expression. Further, the lack of regulation of new media means that there is no point in trying to restrict the press intrusion when such barriers can be circumvented relatively easily.

31 January 2012

## David Howarth<sup>138</sup>—Written evidence

I have seen the memorandum submitted by Prof. Bradley and would respectfully adopt his analysis. I write only to highlight one point where I would draw conclusions slightly different from his.

The Clerk of the House of Commons has proposed that the Committee might consider preparing a resolution for adoption by both Houses, which could be based on that proposed by the Commons Procedure Committee in 1995–96, viz.:

*That, subject always to the discretion of the Chair and to the right of the House to legislate on any matter, no reference should be made in any motion, in debate or in a question or supplementary question to a Minister to any matter (a) the publication of which is subject to restraint by order of a court of law in the United Kingdom, or (b) is of a class of information the publication of which is expressly prohibited by the criminal law.*

Such a resolution would reinforce Parliament's respect for the rule of law while avoiding excessive inflexibility. I would nevertheless question the proposed resolution's scope, the means it adopts, and its practicality.

### Scope

I have two concerns about the scope of the proposed resolution: should it apply beyond privacy cases; and should it apply to permanent orders of the court as opposed solely to interim orders?

### Beyond privacy

The proposed resolution goes a long way beyond merely forbidding the revelation of private information protected by a court order in a privacy case.

First, it forbids not merely the revelation of the contested information itself but also any reference to that information, which rules out even asking whether the matter could in principle be mentioned. It is a sort of super-injunction in itself.

Secondly, and more substantively, the proposed resolution covers the publication of any matter subject to a court order of any kind, not just an order in a case about misuse of private information. It could cover, for example, information subject to a confidentiality clause in a compromise agreement between an employer and a former employee. Concern about such gagging clauses was recently expressed at the Health Committee (7 December 2011) and the ability of Parliament to ignore them was of great significance in Treasury Committee's investigation of the banking crisis (particularly the evidence of Paul Moore, the ex-head of regulatory risk at HBOS<sup>139</sup>). Gagging clauses in compromise agreements have also been significant in the phone hacking affair, particularly in the early cases settled out of court by News International. If a court order restraining breach of such clauses already exists, the proposed resolution would operate to prevent parliamentary debate of the issues.

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<sup>138</sup> University of Cambridge. Member of Parliament for Cambridge 2005-10.

<sup>139</sup> <http://www.publications.parliament.uk/pa/cm200809/cmselect/cmtreasy/144/144w243.htm> Feb 2009 para 3.20

One can also easily imagine circumstances in which an ex-employer gets wind of an ex-employee's intention to pass information to an MP and moves to enjoin the ex-employee from breaching the confidentiality clause. At present, as the *Trafigura* affair illustrates, judges tend to back down in the face of possible conflict with Parliament. The existence of a resolution in the terms proposed, however, might encourage judges to believe that there was nothing improper in granting such an order. From the court's point of view the House would have contemplated orders of this kind and would have indicated its willingness to cooperate in preventing their circumvention. The Master of the Rolls' committee report asserts that no order of a court could restrict or prohibit parliamentary debate or proceedings, and that no order could remove the protection provided to non-MPs who communicate with members for the purpose of "business before the House or its committees". That is, however, of little comfort. The order would not be directed at the House but rather at the individual constituent, and the scope of protection recognised by *Erskine May* for communications from constituents is narrow – one might say, given the scale and type of work that MPs now undertake for constituents, bizarrely narrow. It only applies to information given in connection with "parliamentary proceedings" and not to information given "voluntarily and in their personal capacity".<sup>140</sup> If the court knows that the information is to be passed on in contemplation of a debate or a committee hearing, it should refuse the order, but just as Parliament has difficulty in discovering what orders have been made by the courts, judges will not easily discover, especially in the course of interim hearings, what proceedings are contemplated in Parliament. The potential for conflict between the courts and Parliament is evident.

The proposal to include all matters covered by the criminal law brings its own dangers. Banning any reference to information the publication of which would be forbidden by the criminal law threatens any discussion in the House, no matter how veiled, of national security matters, even if the House is sitting in private. The House managed to discuss such matters throughout the world wars, and it is not clear why suddenly it should not be trusted to do so.

### **Interim or permanent?**

The proposed resolution goes beyond the scope of the sub judice rule in a very important respect. The sub judice rule can be justified as respecting the process by which the courts come to their decisions. But that is different from respecting the final contents of those decisions. The whole point of the constitutional struggle that took place in the late 1830s and in 1840 around the decisions of the Court of Queen's Bench in the *Stockdale v Hansard* series of cases was that the House did not consider itself bound by substantive decisions of the court about matters the House considered to be within its exclusive jurisdiction. The House even ordered the imprisonment of those charged with enforcing the court's orders.

As *Erskine May* says, that struggle has not been finally resolved. Sometimes, the courts have recognised limits to their authority, as for example in the *Bradlaugh* case<sup>141</sup>, where the judges conceded that even the interpretation and enforcement of statutes could fall within the House's exclusive jurisdiction, but at other times, notably, and opportunistically, in

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<sup>140</sup> As the Master of the Rolls' committee report hints, the restrictive view of the protection of constituents seems to be based on a questionable reading of *Rivlin v Bilainkin* [1953] 1 QB 485, which might be better interpreted as standing only for the proposition that merely sending a document to an MP does not clothe it with parliamentary privilege.

<sup>141</sup> *Bradlaugh v Gossett* (1884) 12 QBD 271



*Chaytor*<sup>142</sup>, some judges have asserted an unlimited authority to determine the House's jurisdiction, an authority not confined to cases involving the interests of people outside Parliament.

In my view, it would be unwise of Parliament to do anything the courts might interpret as capitulation in the longstanding conflict about who has ultimate authority to determine the extent of exclusive jurisdiction. Indeed, it is important for the balance between democracy and the rule of law that the question is never finally resolved.

A different option would be to develop the current sub judice rule so that it covers interim orders of the court about the identity of the parties, but only while there is a process to be protected. Currently the rule says "Civil proceedings are active when arrangements for the hearing, such as setting down a case for trial, have been made, until the proceedings are ended by judgment or discontinuance", but it also says "Any application made in or for the purposes of any civil proceedings shall be treated as a distinct proceeding." That means that where an interim order has been made but no further proceedings about it have been arranged, the rule does not apply. It should be possible to add a clause to the effect that, in addition, interim orders concerning the anonymity of parties to the proceedings shall count as active even if no further proceedings on the interim order are contemplated, until all the proceedings in the case are ended by judgment or discontinuance.

### **Means**

The proposed resolution in effect transfers individual members' discretion about whether to breach court orders to the Speaker. That is not an unusual move in a Commons standing order, and putting decision-making power into the hands of the Speaker alone has the advantage that, at least with the right Speaker, it can protect the interests of minorities in the House. But it should also be recognised that it has a number of drawbacks. The Speaker of the House of Commons gives no reasons for his or her decisions, there is no right for individual members to put their case and no right of appeal. It seems odd to respond to concerns about due process by creating a process that violates almost every procedural norm. It is also questionable for the House to put the determination of its rights and privileges into the hands of a single member, albeit one of high status elected by the House as a whole.

If, contrary to my recommendation, the House continues down the path of a general bar on referring to matters covered by court orders, rather than marginally expanding the coverage of the sub judice rule, it might look for broader based procedures for determining whether the House might want to hear contested information following an initial determination by the Speaker that there might be a problem. The existence of the Backbench Business Committee provides a number of new routes that might be taken.

### **Practicality**

The Master of the Rolls has suggested various means whereby Parliament might be informed more effectively of the existence and scope of the small number of privacy cases that have resulted in anonymity orders.<sup>143</sup> If, however, the resolution were to cover all court orders about publication, the number of cases might well become unmanageable. It would also have

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<sup>142</sup> *R v Chaytor* [2010] UKSC 52, [2011] AC 684

<sup>143</sup> Report of the Committee on Super-injunctions 5.12-5.22

to cover an unknown number of libel, intellectual property, family and contractual confidentiality actions.

More significantly, one might question whether the proposed rule, or indeed any rule, would work effectively in practice. In sub judice matters, the Speaker can usually intervene before any harm is done. In particular, the greatest danger comes from remarks by ministers in reply to questions or interventions, which the Speaker can usually cut off before they start. The situation in privacy matters is different. It only takes a moment for a member to use a question or an intervention to blurt out a name. There is a high probability that the Chair will not be able to intervene in time. Subsequent disciplinary proceedings against the member cannot undo what has been done, and some members might even welcome the opportunity for a little gentle martyrdom. Before going ahead with a new standing order, more thought needs to be given to how it might be enforced effectively.

### **Conclusion**

If it is thought worthwhile to establish a new standing order to deal with the problem of members breaching anonymity orders, which might be questioned, it would be better to draw the rule as narrowly as possible. One such narrow approach that I would recommend would be to provide that interim anonymity orders count as active proceedings for the purposes of the sub judice rule until the final conclusion of the case.

13 December 2011

**Dr Kirsty Hughes and Lord Grabiner QC—Written evidence**

Submission to be founder under Lord Grabiner QC

## **ITN—Written evidence**

I am writing in response to your invitation to give written evidence as part of the Joint Committee's inquiry on Privacy and Injunctions.

ITN welcomes the opportunity to provide a response on these important issues and supports the Committee's detailed consideration of this area of public policy.

As the UK's leading commercial broadcast news provider, ITN firmly supports the fundamental principle of freedom of expression as the lifeblood of our society. The right to inform the public provides the foundation for a vibrant media sector in this country - particularly in news provision - and is essential for the future health of democracy and debate.

The role of the news media is to act as a check and balance on public life, holding those in power to account on matters of public importance. While we recognise the need to balance the right to privacy, we urge that this significant public purpose should not be curtailed unless there is clear evidence warranting a change, given the potentially chilling effect on news reporting across all platforms.

In an increasingly fragmented market, PSB news continues to play a special role as a highly-influential, trustworthy source of information and is well placed to deliver on this civic objective in the digital age. We recognise that today's fast-moving media ecology presents a number of challenges for legislators, with publication now taking many forms over a number of platforms and crossing many international jurisdictions.

We believe that any future regulatory framework in this area will need to ensure a level playing field between international entrants - who currently face different or no regulation - and domestic businesses so as not to unduly limit growth within the UK creative sector.

It should also be noted that any new privacy legislation may lead to greater financial expenditure by news organisations when fighting legal challenges on issues of legitimate public interest. There is already a real concern that the present cost of litigation is unduly high. With the traditional business models of the commercial PSBs under pressure, it is vital that the threat of increased financial liability does not put freedom of expression at stake - with decisions made on financial considerations rather than legal merit.

ITN has wide-ranging views on the broad issues raised by the Joint Committee and in the section below I have focused on addressing those areas which are of most direct relevance to us.

## **BACKGROUND**

ITN is the UK's biggest independent producer of public service broadcast news. The news services we produce for our main customers - ITV and Channel 4 - reach nearly 10 million people every day. From early 2012, ITN will also take over news provision for Channel 5, thereby supplying all three main commercial PSB broadcasters. We therefore play a crucial role as the BBC's main competitor in the provision of high quality, impartial news, reaching a diverse cross-section of the British population.

ITN's award-winning journalism is also watched by millions more viewers worldwide, through global partnerships with outlets such as Reuters, CNN and NBC, and platforms including Livestation, YouTube and MSN.

As well as providing high-quality, trusted broadcast news output, ITN operates three other divisions: footage sales arm ITN Source; video creation business ITN Productions; and advisory services from ITN Consulting.

ITN has four shareholders: ITV plc (40%), Daily Mail and General Trust (20%), Reuters (20%) and United Business Media (20%).

ITN takes its compliance responsibilities very seriously, with robust internal protocols and training in place to underpin our reporting and newsgathering. More than 55 years of good practice has fostered an editorial culture within ITN which values independence, impartiality, accuracy and fairness. We are proud of our impressive track record of compliance scrutiny. In addition to strict adherence to the Ofcom Broadcasting Code, ITN has a Compliance Manual which sets out clear guidance on the industry regulations affecting journalism such as privacy and freedom of information so our staff are aware of and able to act ethically and within the law.

**1. Do you think that broadly the right balance is struck between privacy and freedom of expression in the context of broadcasting?**

In broad terms, ITN believes that a practical balance is currently struck between freedom of expression and privacy in the context of broadcasting. The rules concerning privacy are clearly set out in Section 8 of the Ofcom Broadcasting Code.

The Code outlines a broad principle to ensure that broadcasters avoid any unwarranted infringement of privacy in programming and associated newsgathering. It contains a number of practices to be followed in relation to reporting and obtaining material on matters which engage the issue of privacy. For example, the Code covers protection for minors, states that the location of an individual's home should not be revealed and stipulates that consents are required when filming in institutions. Secret filming is only justifiable where strict guidelines have been met, including prima facie evidence of a story in the public interest, reasonable grounds to suspect that further material evidence could be obtained and whether it is necessary to the credibility and authenticity of the programme.

It is fair to say ITN's news reporting is usually on matters with a strong public interest - such as allegations of wrongdoing, issues concerning political matters or the actions of public bodies or public organisations. Although ITN will report on issues concerning celebrities such as the issue of super injunctions, it is rare that our reporting raises significant private issues concerning celebrities.

**2. Has privacy regulation ever restricted your ability to report on particular issues which you would otherwise have reported?**

The experience at ITN is that the privacy regulations have not unduly restricted our ability to report issues. We have not been subject to applications for an injunction on the basis of breach of Article 8.

The only occasion where ITN was subject to an application for an injunction, where an injunction was initially granted, concerned a case where the individual was contending that issues of his personal safety were raised under Article 2 of the ECHR. ITN contested the application. During the course of the contested application, the claimant withdrew the application and the injunction was withdrawn.

**3. Are you happy with the Ofcom rules and practices in this area? Should any of them be revised or redrafted? How does Ofcom interpret and apply its privacy code? If you are happy with the Ofcom Code, why do you supplement it with your own editorial guidelines on privacy?**

At ITN we do not have any objection to the Ofcom rules and practices. We do not believe they should be revised or redrafted.

It is notable that the Ofcom Broadcasting Code focuses not only on the broadcasting of material but also regulates the obtaining of material. For example, Section 8.1 states that:

“Any infringement of privacy in programmes, or in connection with obtaining material included in programmes must be warranted”

Section 8.5 states:

“Any infringement of privacy in the making of a programme should be with person’s and/or organisation’s consent or be otherwise warranted”.

ITN has its own Compliance Manual which has recently been updated. It sets out the laws that affect journalism and the Ofcom regulations and our internal practices. The Compliance Manual acts as a working guide for the basics that our journalists need to know about the law and regulations. It is not a substitute for the Ofcom Broadcasting Code. We have our own guidelines because the journalists need to know not only the Ofcom Broadcasting Code but other areas such as the general laws affecting reporting and ITN’s own practices and procedures.

**4. There are examples of what constitutes the “public interest” in the Ofcom Broadcasting Code, the BBC guidelines, the Independent Producers handbook etc., but there is no statutory definition. Should there be?**

We do not believe that there needs to be a statutory definition of the public interest. It is difficult to define what the public interest is and what is in the public interest can change over time. The definitions of the public interest within the Ofcom Broadcasting Code (see 8.1 of the Code) provide a good yard stick for what falls within this category of in the public interest.

**5. (To Channel 4) Can you tell us more about your concern about potential unintentional breaches of privacy? Do individuals have a reasonable expectation**

**of privacy that they are not filmed, for example, whilst out shopping or relaxing in a park?**

This is a question specifically for Channel 4.

**6. Are commissioning editors able to act against the advice of internal compliance teams? Are there repercussions if there is then a complaint?**

The compliance team's role is to advise on the law and industry regulations.

At ITN, the compliance team and the editorial team work together to ensure that the laws and industry regulations are respected. The compliance and editorial team will discuss compliance/legal issues and use legal and editorial judgement to reach an appropriate line to be taken in an editorial report to ensure compliance with the industry regulations and law.

**7. Would it be beneficial for commissioning editors to have an external body from which they could seek pre-transmission advice on privacy issues?**

ITN does not believe it will be beneficial for commissioning editors to seek advice on privacy issues. We are not aware of evidence in television news that warrants the setting up of such a body. The present system works well.

We also would in principle be against such an external body. It is important that news organisations make their own editorial decisions and are responsible for them. In addition, the setting up of such a body would be against the traditions within news that support the independence of news organisations from state/public organisations on pre-publication issues.

Ofcom has traditionally not played a role in pre-publication advice on editorial content. We believe the system works well. It would set an undesirable precedent if Ofcom or a regulatory body were to be given this pre-publication advisory role and our experience in the broadcast media is that there is not evidence to warrant it.

News reporting plays an important role as a check and balance on issues on public and political life and the editorial control and the independence of news organisations needs to be protected.

It should also be emphasised that, historically, our jurisdiction has also not allowed prior restraint of the media except in limited circumstances and public bodies have not been tasked to play a role in advising on or making quasi-editorial decisions prior to publication.

**8. Should there be a higher threshold for holding that Article 8 privacy is engaged? Is it a problem for the BBC and other broadcasters that the courts have sometimes protected anodyne information?**

ITN has not encountered problems regarding Article 8 and the protection of anodyne information. As stated above, ITN's reporting is not focused on celebrities or the lives of public figures unless there is a genuine public interest. In terms of the threshold to be applied, we believe the terms set out in the Ofcom Code are fair and reasonable.

### **9. Should Ofcom consider harassment as a specific issue within the Broadcasting Code?**

The Ofcom Code already regulates the obtaining of material and it can be a breach of fairness or privacy if editorial teams act in a way that amounts to harassment. In other words, the regulations are already in place and there is no need to supplement the present position.

In addition, the law provides significant remedies under the Protection from Harassment Act 1997.

ITN also receives notices sent out by the PCC to news organisations where concerns are raised about issues such as the number of photographers or cameramen situated at a place.

### **10. Should the same privacy rules apply in principle equally to all media—print, broadcasting and online? If so, which body should have authority to apply these rules? (Ofcom, ATVOD, a new media tribunal?)**

The laws on privacy should apply to all media. In terms of the industry regulations in media, ITN believes that the Ofcom Broadcasting Code provides a fair and reasonable code for the broadcast industry.

ITN does not take a position on whether the same regulation should apply to all media.

It is important that any rules that are imposed do not stifle investigative journalism and reporting on matters of public interest. There is a danger that increased regulation will simply lead to a reduction in legitimate reporting on matters of news interest and will have a chilling effect on investigative journalism.

It is fair to say that the amount and extent of regulation of the media has increased significantly in recent years and before any new regulations are introduced, there needs to be a strong case for making a change including tangible evidence. In addition, consideration must also be given to whether the regulations and laws that already exist already cover the matter in issue. For example, the Data Protection Act and many other pieces of legislation that impact privacy should be examined to determine whether a change in the law is actually necessary.

### **11. What impact would a statutory tort of privacy - essentially along the lines of the existing privacy law which is being implemented by judges in individual cases - have upon broadcasters?**

We do not believe there is a strong case to warrant the introduction of a statutory tort of privacy. The case law in this area of privacy has developed and the law itself is reasonably clear. Each case now is primarily dependent on the individual facts in issue and is determined by an intense focus on the specific facts. We do not believe that the law needs to be clarified or for a statutory tort to be made. Creating legislation in this area would simply lead to greater litigation on the meaning of the legislation. We believe that the privacy law should not be subject to a new statute.



**12. Do you fear that the process of negotiating and drafting a statutory tort might upset the balance which currently seems to exist in the broadcasting media between respect for privacy and freedom of expression?**

As stated in the answer to the question above, we do not believe a statutory tort is justified. As well as the present system in the broadcast media working well, a statutory tort of privacy would create problems to do with definitions of words such as “what is privacy?” and “what is public interest?”. In addition, social mores change over time and a statute may prevent the development of the law through case law to meet changing social circumstances. We believe the present situation – where the law is developed by case law on a case by case basis – provides the best basis for the law to adapt to changing circumstances.

6 December 2011

## ITV—Written evidence

### Introduction

This is not a full statement of ITV's position on the areas covered by the committee's inquiry. It is a summary response to the specific questions put to Channel 4 and the BBC during their recent oral evidence to the Joint Committee on 7 November 2011.

ITV is the biggest UK commercial television network, and an international programme producer, and makes a major contribution to the UK's culture and media landscape. As well as holding the Channel 3 licences making up ITV1 in England and Wales, it broadcasts a family of digital channels - ITV2, ITV3, ITV4, CITV, as well as HD and time shifted channels.

### **Do you think that broadly the right balance is struck between privacy and freedom of expression in the context of broadcasting?**

Broadly, yes.

Like all broadcasters, ITV is subject not only to the constantly developing law of privacy, but to the provisions of Section 8 of the Ofcom Broadcasting Code ("the Code"). This provides a clear framework with one overriding Principle, namely to avoid unwarranted infringements of privacy in programmes and in the obtaining of material included in programmes, and one simple Rule, namely that any infringements of privacy must be warranted. It then sets out practices to be followed, although failure to follow these practices will only constitute a breach of the Code where it results in an unwarranted infringement. In addition Ofcom publish non-binding Guidance to assist broadcasters in interpreting and applying the Code. Where the Code has been breached, Ofcom will normally publish a detailed adjudication, and these decisions form a further useful body of precedent for broadcasters to follow. Commercial broadcasters are obliged under their licence to ensure compliance with the Code. Where a broadcaster breaches the Code deliberately, seriously, recklessly or repeatedly, Ofcom may impose statutory sanctions against the broadcaster, including substantial fines. Ofcom can, ultimately, remove a broadcaster's licence for sufficiently serious breaches of their licence obligations.

There are therefore strong incentives for broadcasters to avoid unwarranted infringements of privacy. But ITV takes its responsibilities under the Code very seriously not only because of this sanctions regime but because it seeks to make and produce programmes to a high ethical standard.

We consider the Code, which expressly recognises the competing rights of privacy and freedom of expression, has largely been successful in balancing these rights and broadcast regulation has provided individuals with an effective method of redress as an alternative to court proceedings when bringing privacy complaints. It is important to note that the majority of Ofcom adjudications on privacy complaints are not upheld against the broadcaster, suggesting that the television industry acts responsibly in this area.

**Has privacy regulation ever restricted your ability to report on particular issues which you would otherwise have reported?**

Not significantly. The regulatory framework within which we operate has not prevented us from reporting on any issue of public interest. It goes without saying that there are daily difficult and challenging judgement calls to be made in the area of privacy, but we see this as a natural consequence of the responsibilities we have as a public service broadcaster with a licence to broadcast into living rooms throughout the country.

In recent years ITV has carried out many successful investigative programmes, sometimes involving some degree of infringement of privacy, for example with covert filming, which has been warranted given the public interest in the subject matter. We have very rarely been subject to applications for pre-broadcast injunctions, despite the fact that, unlike newspapers, we are obliged by the Code to give programme subjects timely notice of allegations being made about them.

**Are you happy with the Ofcom rules and practices in this area? Should any of them be revised or redrafted? How does Ofcom interpret and apply its privacy code?**

Broadly, yes. The Code rehearses examples of public interest, which set a high bar for the justification of infringements of privacy, but we do not feel that the right of freedom of expression is unreasonably fettered in this regard. Inevitably we may not always agree with the regulator when it makes findings on privacy, but largely we believe this is an area where Ofcom has shown a proper regard for the need to balance Article 8 and 10 rights. In any privacy case, much will turn on the specific facts and circumstances, and public interest cannot usefully be reduced to an exhaustive list. However, Ofcom's Code is sufficiently clear and consistent enough for broadcasters to understand their obligations and to ensure they broadcast compliant news, current affairs and factual programmes.

Furthermore, Ofcom consults regularly on updating the Code to reflect developments in the law and public attitudes.

Ofcom's procedures for the handling of complaints and consideration of sanctions have recently been streamlined, and now offer broadcasters no formal appeal or review of decisions (other than judicial review). Notwithstanding this, we do not have serious concerns about the way Ofcom has handled privacy complaints or applies the Code in this area.

Historically ITV has not had its own equivalent to the BBC Editorial Guidelines or the Independent Producer's Handbook produced by Channels 4 and 5. It does however have a number of internal policy and guidance documents, but the bedrock of these documents remains the Code.

**There are examples of what constitutes the “public interest” in the Ofcom Broadcasting Code, the BBC guidelines, the Independent Producers handbook etc., but there is no statutory definition. Should there be?**

No, the current approach provides clear guidance on public interest but retains flexibility. The Code is better able to deal with changing circumstances than any statutory definition, which we believe will not provide more certainty but would inevitably be either too narrow or too wide. The current approach works well. Decisions rest on the facts of a particular case, and are informed by experience and previous adjudications as well as the law. Ofcom’s rules and practices in this area are fit for purpose.

**Are commissioning editors able to act against the advice of internal compliance teams? Are there repercussions if there is then a complaint?**

ITV’s Commissioning team has responsibility for editorial decisions, but compliance issues are closely bound up with and overlap with editorial decisions in the area of privacy. Like the BBC and Channel 4, ITV has clear lines of referral up, which ensure that difficult decisions are taken at the appropriate level.

Likewise, where there is any disagreement between producers or commissioners and compliance advisors which cannot be resolved, or where the desired editorial decision contradicts compliance advice, issues are then escalated to more senior levels of management within both the editorial and compliance/legal teams. In practice such referral up is relatively rare, not least because most producers and commissioners rely on compliance advice, especially in the difficult and ever-changing area of privacy. ITV compliance seeks to provide pragmatic and solution driven advice to help producers deliver the programme that ITV has commissioned in a compliant form.

Compliance is not simply the responsibility of the internal compliance team, but is a responsibility for everyone involved in making our programmes. ITV prides itself on having a strong compliance culture underpinned by a corporate governance structure that is proactive in encouraging ethical and responsible behaviour. Therefore, whether or not such action resulted in a complaint, any ITV producers who were found to have acted against explicit internal compliance advice without referral up would face severe disciplinary consequences. If the producer in question was an independent, future commissions would be jeopardised.

**Would it be beneficial for commissioning editors to have an external body from which they could seek pre-transmission advice on privacy issues?**

No. Where there is any doubt as to the application of the Code, it is open to commissioners to ask the compliance team to discuss issues with Ofcom before broadcast. Although the regulator will not “clear” any material before broadcast, it will on occasion give non-binding advice. As far as the law is concerned, it is for the broadcaster to take its own internal or external legal advice.

**Should there be a higher threshold for holding that Article 8 privacy is engaged? Is it a problem for the BBC and other broadcasters that the courts have sometimes protected anodyne information?**

The law already provides that in considering injunctive relief that affects the exercise of the right of freedom of expression, the court must have particular regard to the importance of that right, and to public interest considerations and any relevant privacy code (in the case of broadcast, the Ofcom Broadcasting Code). Provided the courts properly apply the Human Rights Act when considering applications for injunctions (which has not always been the case to date, particularly when granting injunctions *ex parte*), then the current law should provide an adequate framework for balancing rights of privacy and freedom of expression.

It has not been a particular problem for broadcasters that the courts have sometimes protected anodyne information. Much of the litigation around privacy injunctions has concerned the kind of celebrity stories which are not central to the editorial agenda of broadcast news.

**Should Ofcom consider harassment as a specific issue within the Broadcasting Code?**

No. The Code already has more than adequate provisions that regulate broadcasters in various activities which are sometimes cited as constituting harassment such as doorstepping. There has been concern in the past about “media scrums” gathering when some individuals become the focus of media attention, but broadcasters are generally keen to voluntarily comply when asked (for example) not to gather outside private residences. We believe the main concern in this area is not the activity of broadcast newsgathering, but that of paparazzi and tabloid journalists when pursuing individuals for pictures and information.

**Should the same privacy rules apply in principle equally to all media—print, broadcasting and online?**

**a. If so, which body should have authority to apply these rules? (Ofcom, ATVOD, a new media tribunal?)**

ITV does not consider that the same regulatory framework could or should apply to all media. It would be impractical to seek to extend the rigour of broadcast regulation to all online content.

**What impact would a statutory tort of privacy—essentially along the lines of the existing privacy law which is being implemented by judges in individual cases—have upon broadcasters?**

ITV does not consider a statutory tort of privacy to be desirable or necessary, given the current development of the enforcement of Article 8 rights. The courts would have to consider any statutory tort using the same basic framework of the Human Rights Act and the balance of rights as they do already. We do not consider such a tort would provide any additional protection for individuals.

ITV—Written evidence

Given the existing redress available, and the degree of responsible behaviour in the broadcast sector, we do not consider a statutory tort would have much impact on broadcasters.

**Do you fear that the process of negotiating and drafting a statutory tort might upset the balance which currently seems to exist in the broadcasting media between respect for privacy and freedom of expression?**

That is a risk, yes.

November 2011

John Kampfner, Sir Christopher Meyer, Martin Moore, and Julian Petley—Oral evidence (QQ 404–444)

**John Kampfner, Sir Christopher Meyer, Martin Moore, and Julian Petley—Oral evidence (QQ 404–444)**

[Transcript to be found under Sir Christopher Meyer](#)

## **Andreas Kolbe and Dr Edward Buckner—Written evidence**

### **Wikimedia and Wikipedia: Concerns**

#### **Executive summary**

Internet sites owned by the Wikimedia Foundation, including the online encyclopaedia Wikipedia, have become increasingly important. The Wikimedia Foundation has become a highly visible organisation with a \$20 million annual income from donations.

But however successful in many respects, the Wikimedia principle of “crowdsourcing” by anonymous contributors creates significant and ongoing problems in several areas, most notably:

- Biographies of living people
- Handling of Adult content

#### **Biographies of living people**

Wikimedia Foundation projects like Wikipedia and Wikimedia Commons have a number of policies and processes designed to regulate these content areas. However, these policies and processes work erratically at best. They are often ignored by contributors who feel safe in the knowledge that as anonymous editors, they have no real-life repercussions to fear (cf. journalist Johann Hari’s recent confessions about his adding anonymous smears to Wikipedia biographies of people he disliked).

Concerned biography subjects who try to correct misrepresentations in their own Wikipedia biography find themselves in an unfamiliar, disorienting environment where the playing field is stacked against them. They are often hazed, attacked and blocked from editing for violations of arcane rules unknown outside Wikipedia. In most cases, their edits are undone. This is true even where the material they removed contravened Wikipedia’s own policies.

As charities, Wikimedia Foundation and Wikimedia UK should be more accountable. Wikipedia biographies are frequently the top Google link for a person’s name. Inaccurate or slanted information added to such biographies by anonymous contributors can have a devastating effect on the individuals concerned.

#### **Adult content**

The handling of adult content suffers from similar problems. Hundreds of masturbation videos and penis images in Wikimedia Commons testify to a well-developed and unchecked culture of anonymous sexual exhibitionism. The most accessed pages are almost all sexual images. Sexual material hosted in Wikipedia and/or Wikimedia Commons includes –

- photographs of sexual acts including ejaculation, ordinary penetration, masturbation with vegetables, toothbrushes and children’s toys, and the drinking of urine,
- old, out-of-copyright pornographic films featuring penetration, fellatio and ejaculation,
- pornographic drawings with motifs ranging from bestiality to incestuous child abuse.

This material is available unfiltered, to minors and adults alike. Personality rights and privacy are treated in a cavalier way. The word of an anonymous uploader is taken as sufficient



assurance that the person depicted – possibly in the process of engaging in a sexual act in a non-public place – is aware of and has consented to the upload.

The absence of any kind of content rating or search filter, such as the one used in Google, means that sexual images may be and are included in search results for innocent search terms that no user would expect to return sexual media. For example, searching for a particular children's toy in Wikimedia Commons returns as its first search result an image where the toy in question is used by an adult for sexual gratification.

### **Problem causes**

Some of the root causes of problematic content in Wikimedia projects lie in the Wikimedia culture. Demographically, the vast majority of contributors are young, single, childless white males (median age = 22). The right to contribute anonymously (and thus without real-life repercussions and accountability) ranges at the very top of the Wikimedia community's value system. Generally, the rights of contributors have a higher standing in Wikimedia than the rights of people depicted or written about. In a way this is not surprising, and reflects the human tendency to think of one's own needs first– the policies are written by these anonymous contributors.

The public's needs are quite different. When it comes to an Internet giant as influential and visible as the Wikimedia Foundation, the public has a right to expect some balance, accountability and plain professionalism. The public deserves more reliable controls, especially in light of Wikimedia UK's recent successful application for charitable status.

### **Proposed solutions**

The Wikimedia Foundation should use some of its \$20 million (and rising) annual income from donations to fund an independent watchdog, similar to the Press Complaints Commission:

- Small operation with 2–3 professional full-time staff.
- Possibly affiliated to the Press Complaints Commission.
- Analysis and adjudication of complaints, with published findings.
- Fully independent of Wikimedia Foundation and Wikimedia UK.

The Charity Commission should require Wikimedia Foundation, via Wikimedia UK:

- To help enforce the controls that they claimed were in place and ensure that they work reliably and effectively.
- To submit to independent audits of performance.

Wikimedia Foundation should remove all or part of its biographies from the main Wikipedia project, and move them to a separate Wikimedia project where editors are required to disclose their identity, thus putting an end to anonymous editing of the biographies of people who are not household names.

Photographs of living people engaged in sexual acts should be handled in a similar way. An image filter similar to the one in Google, Flickr and YouTube should be implemented.

## Wikipedia biographies: a venue for anonymous defamation

Wikipedia biographies are usually the top Google link for their subject's name. These biographies are wide open to anonymous attacks. Anyone with an axe to grind can and does edit them, and they are often slanted in obvious or subtle ways against their subjects.

### Case studies

The following are case studies from recent weeks (December 2011 to January 2012) that were brought to the attention of one of the authors of this submission (AK).

#### Rita M. Gross (Dec. 2011)

This was a Wikipedia biography of a notable Buddhist feminist scholar (University of Wisconsin).

- Prominent subheading “Brushes with the law”, detailing alleged driving offences.<sup>144</sup>
- The material presented in this section was added by an anonymous contributor.
- It represented more than half the body of the biography.
- It was in clear violation of Wikipedia’s policies, citing purported court records (primary sources) only, and no secondary sources (press reports) – something which Wikipedia’s policy for biographies of living persons expressly forbids.<sup>145</sup>
- Dr. Gross twice removed the violating material.
- In each case, experienced Wikipedia editors *restored* the material because “it was sourced”, i.e. had a footnote reference, without looking at and evaluating the source for policy compliance.
- Dr. Gross was left warning messages about conflict-of-interest editing.
- Dr. Gross persevered in spite of these discouraging responses, and requested that her biography be deleted altogether:<sup>146</sup>

*I recently checked the Wikipedia page about me and discovered that someone had inserted a section in my very brief entry on "Brushes with the Law." Much of the information is inaccurate and the rest is irrelevant. The listed reference did not check out when I tried to check the author's references. I tried to edit the article myself, but the offending material was repeatedly re-inserted.*

*When I read some of the history of the page, I was amazed at some of the things that had been done to it over the years, like substituting "shitface" for my last name. In view of the mean and inaccurate things people are doing to this page, I request that the page be taken down entirely.*

- Further research showed that the “Brushes with the law” section was added by someone from her own campus.
- Her biography was eventually deleted as defamatory.<sup>147</sup>

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<sup>144</sup> At the time of writing, the biography as it was is still viewable in Google’s cache of “Ask Jeeves”, one of many websites which “mirror” Wikipedia, i.e. host copies of Wikipedia pages. The URL of this Google cache is [http://webcache.googleusercontent.com/search?q=cache:oLYvpK6eX\\_cj:uk.ask.com/wiki/Rita\\_M.\\_Gross](http://webcache.googleusercontent.com/search?q=cache:oLYvpK6eX_cj:uk.ask.com/wiki/Rita_M._Gross)

<sup>145</sup> See [http://en.wikipedia.org/wiki/Wikipedia:BLPPRIMARY#Misuse\\_of\\_primary\\_sources](http://en.wikipedia.org/wiki/Wikipedia:BLPPRIMARY#Misuse_of_primary_sources): “Do *not* use trial transcripts and other court records, or other public documents, to support assertions about a living person.”

<sup>146</sup> [http://en.wikipedia.org/w/index.php?title=Wikipedia:Biographies\\_of\\_living\\_persons/Noticeboard&diff=466340766&oldid=466326864](http://en.wikipedia.org/w/index.php?title=Wikipedia:Biographies_of_living_persons/Noticeboard&diff=466340766&oldid=466326864)

- I contacted Dr. Gross (GROSSRM@uwec.edu) to ask if she would be available for questions.
- She replied that she was, and added:

*I remain appalled at the lack of any oversight of entries, especially entries on living people. Frankly, my accomplishments are noteworthy enough to deserve a page, but it was horrifying to see that a student who had a grudge against me could enter lies on my Wikipedia page with no oversight from Wikipedia itself. [...] Since my experience, I have heard about stories about other people who have had similar experiences with Wikipedia. It is shameful that Wikipedia continues to allow people's reputations to be damaged in its misguided policies of letting anyone have free access to these pages. As an academic, I am used to peer-review and this experience demonstrates that the failures of a peer review system are far less damaging than opening a medium to anyone to use for private and vengeful purposes.*

### **Tahir Abbas (Dec. 2011)**

This was a Wikipedia biography of a UK scholar and commentator on Muslim affairs.

- The biography was turned into an attack page in late 2009.
- Section with very prominent “Plagiarism” heading inserted.
- This section made up a good quarter of the entire biography.
- The material was based on a single article in *Times Higher Education (THE)*.
- The *THE* article's content was selectively summarised, omitting information favourable to Dr. Abbas.
- When Dr. Abbas complained and tried to edit his biography, he was banned from contributing.
- It later turned out that the *THE* source was not only unfairly summarised, but was itself unfairly slanted against Dr. Abbas.
- Its publishers removed it from the *THE* website and other archive services such as LexisNexis two years later, in November 2011, in response to a defamation claim by Dr. Abbas.
- Even after the source was withdrawn by the publisher, and the publisher wrote a letter to advise interested parties such as Google and Wikipedia that the article had been removed from their website, anonymous Wikipedia editors argued strenuously that the content should be retained in Wikipedia.
- The page was finally deleted as an attack page after more than 2 years.<sup>147</sup>
- Dr. Abbas maintains that the Wikipedia page, the number one Google link for his name for most of this time, severely damaged his professional and personal life.
- Dr. Abbas (tahir\_abbas@hotmail.co.uk) is available to answer questions.

### **Ian Dowbiggin (Jan. 2012)**

Wikipedia biography of one of the world's foremost historians of medicine; Fellow of the Royal Society of Canada, author of books published by Oxford University Press, Cambridge University Press, University of California Press. Dowbiggin was raised as a Catholic and is active in an ecumenical Christian ministry.

- The biography said little about Dr. Dowbiggin's academic mainstream reception.

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<sup>147</sup> See [http://en.wikipedia.org/wiki/Wikipedia:Articles\\_for\\_deletion/Rita\\_M.\\_Gross](http://en.wikipedia.org/wiki/Wikipedia:Articles_for_deletion/Rita_M._Gross)

<sup>148</sup> See [http://en.wikipedia.org/wiki/Wikipedia:Articles\\_for\\_deletion/Tahir\\_Abbas\\_\(3rd\\_nomination\)](http://en.wikipedia.org/wiki/Wikipedia:Articles_for_deletion/Tahir_Abbas_(3rd_nomination))

- Instead, it featured short hand-picked passages designed to portray the subject as a homophobe and Christian fundamentalist crank.
- His Wikipedia biography misrepresented sources, attributing statements to Dr. Dowbiggin which he had not made.
- Dr. Dowbiggin was blocked from Wikipedia over 2 months ago when he tried to edit his biography.
- He was blocked after just 7 edits, by a Wikipedia administrator calling himself “Catfish Jim and the soapdish”.
- One of the anonymous contributors who was responsible for the state of the biography is now himself blocked for having operated several pseudonymous accounts side by side.
- Dr. Dowbiggin requested deletion of the biography.<sup>149</sup>
- The request was denied, but some of the worst failings of the biography were corrected.
- Inaccurate material could be reintroduced by an anonymous account at any time.

### Root causes in Wikipedia culture

Problems with biographies are exacerbated by a selfish and irresponsible Wikipedia culture. In many ways, Wikipedia is inhabited by an insular community that considers itself all-powerful, shielded by anonymity and lack of real-life accountability.

There are double standards. There is an us-and-them mentality: editors enshrine rights and protections for themselves in site policy, but biography subjects do not have a lobby in the formulation of Wikipedia policy. This shows in how site policies are slanted against them:

- Wikipedia contributors have made the right to edit anonymously a matter of fundamental site policy.
- Pointing out the real-life identity of another editor (including an editor who is defaming you in your biography) is one of the most severe “crimes” in the world of Wikipedia, and grounds for a permanent site ban.<sup>150</sup>
- Writing in Wikipedia that you are thinking of suing another contributor for libel is grounds for an immediate block, preventing you from making any further edits to Wikipedia.<sup>151</sup>
- Yet no policy prevents stalkers and people who are in a legal or personal dispute with you from editing your biography – likely the most important document for your online reputation – from behind the veil of anonymity.
- Violations of Wikipedia’s own policies are not dealt with reliably.
- Such violations are often casually restored, and defended as “sourced”.
- Complaints by editors receive immediate attention from administrators.
- Biography subjects who e-mail the Foundation with a complaint, on the other hand, often have to wait weeks or months for a reply.

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<sup>149</sup> See [http://en.wikipedia.org/wiki/Wikipedia:Articles\\_for\\_deletion/Ian\\_Dowbiggin](http://en.wikipedia.org/wiki/Wikipedia:Articles_for_deletion/Ian_Dowbiggin)

<sup>150</sup> See [http://en.wikipedia.org/wiki/Wikipedia:Outing#Posting\\_of\\_personal\\_information](http://en.wikipedia.org/wiki/Wikipedia:Outing#Posting_of_personal_information): “Posting another editor’s personal information is harassment, unless that person voluntarily had posted his or her own information, or links to such information, on Wikipedia.”

<sup>151</sup> See [http://en.wikipedia.org/wiki/Wikipedia:No\\_legal\\_threats](http://en.wikipedia.org/wiki/Wikipedia:No_legal_threats): “If you make legal threats or take legal action over a Wikipedia dispute, you may be blocked from editing so that the matter is not exacerbated through other channels. Users who make legal threats will typically be blocked from editing while legal threats are outstanding.”

## Wikipedia demographics

According to a 2010 survey by the United Nations University,<sup>152</sup> contributors to the English Wikipedia are overwhelmingly single young males:

- Contributors are 87% male.
- Median age = 22 years .
- Mode (most frequent age) = 18 years.
- Mean (average age) = 25 years.
- 66% are single, only 15% are parents.
- Only about 1 in 50 contributors is a mother.

These demographics have their own, intrinsic effect on the formation of community consensus.

## Wikipedia infrastructure

To an outsider (and even many insiders), Wikipedia's governance and policy structure is labyrinthine and arcane. Making an effective case for a defamatory biography to be tidied up requires intimate familiarity with Wikipedia's policies and site infrastructure, and many years' experience. It requires social capital and standing within the Wikipedia community. These are all things that subjects of Wikipedia biographies don't have.

Biography subjects typically just notice with alarm that what it says at the top Google link for their name is inaccurate and tinged with apparent malice. They go to the website to fix it. They often end up having a Kafkaesque experience were they are hazed and attacked, their changes and corrections are undone, and they are blocked from editing, while their anonymous tormentors are protected.

It is worth noting that social capital and familiarity with Wikipedia are not necessary to slant a biography against its subject. Anyone with an Internet connection and an axe to grind, anywhere in the world, can do it, at any time, just by editing the article. Wikipedia's internal policies and processes tilt the playing field in favour of its anonymous contributors. This is not surprising, as they are the people who define these internal policies and processes, without being accountable to anyone but themselves.

The Wikimedia Foundation is well aware of these shortcomings. But it refuses to assume any editorial responsibility, as it would then lose Section 230 Protection<sup>153</sup> and become legally accountable for defamatory content. The Foundation's prime concern in this regard is to avert any possibility that the Foundation could be successfully sued.

By making available a mechanism that allows anonymous contributors to create a page that is destined to become the top Google search result for any notable person's name, the Foundation has a moral responsibility for any abuses that occur. But it shirks legal responsibility to the extent that it will not undertake such reasonable steps as could be taken to protect people's reputations against anonymous attacks (e.g. employing professional staff monitoring its over 600,000 biographies of living people, requiring editors of biographies to reveal their own identities to the Foundation, or instituting a "pending changes" function

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<sup>152</sup> See [http://www.wikipediasurvey.org/docs/Wikipedia\\_Overview\\_15March2010-FINAL.pdf#page=7](http://www.wikipediasurvey.org/docs/Wikipedia_Overview_15March2010-FINAL.pdf#page=7)

<sup>153</sup> See <https://www.eff.org/issues/bloggers/legal/liability/230>

where any change to a biography first needs to be reviewed by an experienced editor before it goes live).

## **Lack of accountability and its wider effects**

### **Copyright violations**

Wikipedia contains thousands of anonymous copyright violations.<sup>154</sup> There is a huge backlog of copyright investigations, going back to 2009.<sup>155</sup> This is partly due to a lack of volunteers interested in this work; the Foundation takes the view that it cannot and will not direct volunteers to work on a particular task.

This helps put Wikipedia's recent high-profile opposition to SOPA<sup>156</sup> in perspective: Wikimedia feared it would be asked to clean house and stop linking to infringers.

### **Propagation of antisocial views**

Anonymous contributors in Wikipedia adopt extreme views they would not normally put forward in public, due to the lack of social constraints and any real-world repercussions. In particular, there is a fundamentalist anti-religionist viewpoint that is more common in Wikipedia than in education and society at large. The following examples are taken from the Muhammad images arbitration case:<sup>157</sup>

- *“Proposals to examine the relevance of images more closely or more carefully because of religious offense are indirect methods of paying attention to that religious offense, and are not acceptable.”*  
(Wikipedia administrator, candidate for the site's arbitration committee)
- *“Muslim scholars are not reliable sources about Muhammad, no more than they or Christian scholars are reliable sources about Jesus Christ as a historical figure. Anyone that believes someone to be a prophet, divine, or blessed by supernatural beings is [in]capable of being disinterested or objective about the factual nature of the person's life or historical impact. It's an insurmountable obstacle.”*  
(Wikipedia administrator)
- *“In my world view, people should be offended by almost nothing as I find that being offended is simply allowing someone or something else to control your emotions [...] I honestly do not have empathy for people who choose to be offended”*  
(Longstanding Wikipedia contributor)
- *“Oppose. This is basically a proposal for a policy change whereby NOTCENSORED would cease to apply where religious or social morality is a factor.”*  
(Longstanding Wikipedia contributor)
- *“We should be prejudiced against Islam, or indeed any other stone age mythology. Of course it is less valid than other points of view.”*  
(Wikipedia contributor)

### **Unfiltered adult content**

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<sup>154</sup> See <http://en.wikipedia.org/wiki/Wikipedia:CCI>

<sup>155</sup> See [http://en.wikipedia.org/wiki/Wikipedia:CCI#Open\\_investigations](http://en.wikipedia.org/wiki/Wikipedia:CCI#Open_investigations)

<sup>156</sup> See <http://www.bbc.co.uk/news/technology-16590585>

<sup>157</sup> See [http://en.wikipedia.org/wiki/Wikipedia:Arbitration/Requests/Case/Muhammad\\_images/Workshop](http://en.wikipedia.org/wiki/Wikipedia:Arbitration/Requests/Case/Muhammad_images/Workshop)

Wikipedia, by policy,<sup>158</sup> chooses to disregard the offensiveness of any of its content (“NOTCENSORED” policy). In theory, according to the “neutral point of view” and “due weight” policy, Wikipedia should be mainstream. It shouldn’t feature more offensive content than reputable published sources. In practice, however, anonymous contributors invoke “NOTCENSORED” every time a suggestion is made to remove offensive material, whether its presence makes educational sense or not, and the material is retained.

Wikimedia sites contain the most explicit sexual media, material one would be very unlikely to find even in specialist educational works. Adult content is not hidden by default, and unlike all other major websites, visitors (including minors) have no way of filtering adult content out. The international Wikimedia “community” has so far steadfastly resisted implementation of even a voluntary, user-enabled image filter proposed by the Wikimedia Foundation (US). The Foundation is not actually in control, but dependent on having its mostly anonymous contributor base on board.

### **Adult material in Wikipedia**

Photographs/videos embedded as article illustrations include material usually only found in pornography sites. Examples include the Wikipedia articles on:

- Ejaculation
- Hogtie bondage
- Fisting
- Autofellatio
- Pearl necklace (sexuality)
- Hentai

### **Adult material in Wikimedia Commons**

Wikimedia Commons is a media archive that holds public-domain image, audio and video files for use in other Wikimedia projects, such as Wikipedia, and for use (including commercial re-use) by the general public.

Wikimedia Commons includes thousands of sexually explicit images. Even the most innocuous search can present the user with examples of sexually explicit content. Contributors often show a complete disregard for personality rights. Examples include such cases as an anonymous contributor uploading sexually explicit images of a former partner without their knowledge and consent, or a woman photographed in public, with the image file titled “Chavette.jpg” and then used to illustrate the Wikipedia article “Chav”. Proposals to delete such material are often fought, and frequently unsuccessful.

Explicit sexual content in Wikimedia Commons includes:

- Dozens of (male) masturbation videos.<sup>159</sup>
- Dozens of images of sexual (vaginal, anal) penetration.<sup>160</sup>

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<sup>158</sup> See <http://en.wikipedia.org/wiki/Wikipedia:NOTCENSORED>

<sup>159</sup> For examples see [http://commons.wikimedia.org/wiki/Category:Male\\_masturbation\\_\(animated\)](http://commons.wikimedia.org/wiki/Category:Male_masturbation_(animated)) and [http://commons.wikimedia.org/wiki/Category:Videos\\_of\\_male\\_masturbation](http://commons.wikimedia.org/wiki/Category:Videos_of_male_masturbation)

<sup>160</sup> For examples see <http://www.webcitation.org/6531ovsHC>, <http://www.webcitation.org/64xlvFTAi>, [http://commons.wikimedia.org/wiki/Category:Sexual\\_penetrative\\_use\\_of\\_cucumbers](http://commons.wikimedia.org/wiki/Category:Sexual_penetrative_use_of_cucumbers)

- Vintage pornography,<sup>161</sup> including drawings of bestiality<sup>162</sup> and incestuous child abuse.<sup>163</sup>
- Users can and do encounter such media in response to innocuous search terms, such as “electric toothbrush”,<sup>164</sup> “Caucasian”,<sup>165</sup> “drinking”,<sup>166</sup> “jumping ball”<sup>167</sup> (cf. the Google result for “jumping ball”!<sup>168</sup>).<sup>169</sup>
- Minors are actively involved in administering and curating this content.
- Almost all of the most viewed files in Wikimedia Commons are of adult content.<sup>170</sup>

It should be noted that this is not just the work of casual or fringe contributors. Many Commons administrators, even some Wikimedia UK staff, are well known for uploading and supporting the presence of such media in Wikimedia projects.

For example, Ashley Van Haeften (User:Fæ), Wikimedia UK director,<sup>171</sup> told the Joint Committee in November<sup>172</sup> that Wikipedia biographies follow “good editorial policies”:

- *“... they fairly represent the enforcement of polices to ensure facts are presented with appropriate weight and are verifiable. In my opinion, Wikipedia already has more credibility than the majority of mainstream tabloid press ... Wikipedia works because of strong editorial policies that the community believes in ...”*

Yet in July 2011, User:Fæ inserted<sup>173</sup> information on the release of a celebrity porn video into the biography of a living person, sourced to an adult video streaming website<sup>174</sup> and related press releases from this adult entertainment company. He then complained<sup>175</sup> when another editor – quite correctly, according to Wikipedia’s policy on biographies of living persons – deleted this material on policy grounds. Similarly, in Wikimedia Commons Mr. Van Haeften, as User:Fæ, voted<sup>176</sup> to keep a slow-motion “bouncing penis” video,<sup>177</sup> arguing that the video had educational value. It is worth noting that Wikimedia Foundation received a complaint about this video from a real-life educator, a schoolteacher who had 15 students

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<sup>161</sup> See [http://commons.wikimedia.org/wiki/Category:Videos\\_from\\_Polissons\\_et\\_galipettes](http://commons.wikimedia.org/wiki/Category:Videos_from_Polissons_et_galipettes)

<sup>162</sup> See [http://commons.wikimedia.org/wiki/File:Martin\\_Van\\_Maele\\_-\\_La\\_Grande\\_Danse\\_macabre\\_des\\_vifs\\_-\\_25.jpg](http://commons.wikimedia.org/wiki/File:Martin_Van_Maele_-_La_Grande_Danse_macabre_des_vifs_-_25.jpg)

<sup>163</sup> See [http://commons.wikimedia.org/wiki/File:Martin\\_Van\\_Maele\\_-\\_La\\_Grande\\_Danse\\_macabre\\_des\\_vifs\\_-\\_29.jpg](http://commons.wikimedia.org/wiki/File:Martin_Van_Maele_-_La_Grande_Danse_macabre_des_vifs_-_29.jpg)

<sup>164</sup> See [http://commons.wikimedia.org/wiki/Special:Search/all:electric\\_toothbrush](http://commons.wikimedia.org/wiki/Special:Search/all:electric_toothbrush)

<sup>165</sup> See <http://commons.wikimedia.org/wiki/Special:Search/all:caucasian>

<sup>166</sup> See <http://commons.wikimedia.org/wiki/Special:Search/all:drinking>

<sup>167</sup> See [http://commons.wikimedia.org/wiki/Special:Search/all:jumping\\_ball](http://commons.wikimedia.org/wiki/Special:Search/all:jumping_ball)

<sup>168</sup> See <http://www.google.co.uk/search?gclid=CAwQAQAAAAIAAA&sa=N&tab=wi&biw=1063&bih=627>

<sup>169</sup> See [http://meta.wikimedia.org/wiki/Controversial\\_content/Problems](http://meta.wikimedia.org/wiki/Controversial_content/Problems) for further examples

<sup>170</sup> For a list of most viewed files, see <http://stats.grok.se/commons.m/top>

<sup>171</sup> See <http://uk.wikimedia.org/w/index.php?title=Board&oldid=18631>

<sup>172</sup> See [http://www.parliament.uk/documents/joint-committees/Privacy\\_and\\_Injunctions/ucjCPI28111ev7.pdf](http://www.parliament.uk/documents/joint-committees/Privacy_and_Injunctions/ucjCPI28111ev7.pdf)

<sup>173</sup> See [http://en.wikipedia.org/w/index.php?title=Karrine\\_Steffans&diff=prev&oldid=437423587](http://en.wikipedia.org/w/index.php?title=Karrine_Steffans&diff=prev&oldid=437423587) for a record of the edit. The text User:Fæ added is shown at the top, with green background.

<sup>174</sup> See <http://vivid.com/celebs/superhead>. This shows clips from a celebrity porn video featuring the subject of this Wikipedia biography. The video was released against her wishes, and timed to coincide with a successful book release of hers.

<sup>175</sup> See the discussion beginning at

[http://en.wikipedia.org/wiki/Talk:Karrine\\_Steffans/Archive\\_2#Blanking\\_of\\_contentious\\_material\\_from\\_a\\_BLP](http://en.wikipedia.org/wiki/Talk:Karrine_Steffans/Archive_2#Blanking_of_contentious_material_from_a_BLP)

<sup>176</sup> See [http://commons.wikimedia.org/w/index.php?title=Commons:Deletion\\_requests/File:Slow-motion-bouncing-penis.gif&diff=next&oldid=64077873](http://commons.wikimedia.org/w/index.php?title=Commons:Deletion_requests/File:Slow-motion-bouncing-penis.gif&diff=next&oldid=64077873) for a record of the vote.

<sup>177</sup> See <http://www.webcitation.org/654VwRiP0> or <http://commons.wikimedia.org/wiki/File:Slow-motion-bouncing-penis.gif>



sent to this video by a prank link on an external website. The fact is that not even a tabloid newspaper would feature such content on its website. Neither would any reputable medical or other genuinely educational website.

### **Present status**

For all its weaknesses in handling biographies and other controversial content, Wikipedia contains much useful information. Most media commentators are positive, although it must be said that most commentators don't really understand the internal workings of Wikipedia and other Wikimedia sites.

There is little public awareness of systemic problems. When journalist Johann Hari admitted he had smeared rivals by editing their Wikipedia biographies, and apologised publicly,<sup>178</sup> it was seen as his failing, not a failing of the Wikipedia system. Yet smears Hari inserted – allegations of homophobia, antisemitism and alcoholism – remained visible for weeks on Wikipedia before they were removed.

If Wikimedia UK desires recognition as a charity in this country, it should be accountable to society. **Most importantly, those personally damaged by irresponsible Wikimedia editing need to be given a voice.**

### **Proposed solutions**

The solutions proposed below could be implemented singly or in combination.

### **Self-regulation**

The Wikimedia Foundation has an annual global donation income of \$20 million.<sup>179</sup> Around \$1 million<sup>180</sup> of this is generated in the UK, tax-free thanks to Wikimedia UK's charity status. Some of this money should fund an independent watchdog, similar to the Press Complaints Commission:

- Small operation with 2–3 professional full-time staff.
- Possibly affiliated to the Press Complaints Commission.
- Fully independent of Wikimedia Foundation and Wikimedia UK.
- Analysis and adjudication of complaints, with published findings.

### **Charity Commission**

The Charity Commission should require Wikimedia Foundation, via Wikimedia UK:

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<sup>178</sup> See <http://www.independent.co.uk/opinion/commentators/johann-hari/johann-hari-a-personal-apology-2354679.html>

<sup>179</sup> See <http://blogs.reuters.com/mediafile/2012/01/04/despite-tough-economy-wikimedia-raises-20-million-in-donations/>

<sup>180</sup> See [http://uk.wikimedia.org/wiki/2012\\_Activity\\_Plan](http://uk.wikimedia.org/wiki/2012_Activity_Plan)

- To make it easier to flag biased biographies for attention, e.g. via a clickable icon on little-watched biography pages.
- To help enforce the controls that they claimed were in place and ensure that they work reliably and effectively.
- To submit to independent audits of performance.

### **Image filter**

Wikimedia Foundation should implement an image filter similar to the one used by all other major websites, including Google, YouTube and Flickr, to prevent accidental exposure of users to adult content.

### **Identification requirement**

Wikimedia Foundation should remove all or part of its biographies from the main Wikipedia project, and move them to a separate Wikimedia project where editors are required to disclose their identity, thus putting an end to anonymous editing of relatively unknown people's biographies. Adult content should be handled in a similar way.

### **Benefits to Wikimedia Foundation**

The importance of Wikimedia sites has grown from inconspicuous beginnings over a decade ago to the point where Wikipedia is commonly the top Google link for any person or topic today. In part, this is due to good relations with Google, Inc., a key donor to Wikimedia. As more and more people obtain a significant and growing part of their knowledge about the world online, the importance of Wikipedia is set to increase further. But such influence carries with it a responsibility. If Wikimedia wants to be seen as a responsible provider, adopting regulatory standards similar to those adopted by the press should be a natural development, and ultimately reflect positively on Wikimedia.

3 February 2012

## **Law Society—Written evidence**

### **Introduction and Summary**

The Law Society is the representative body for more than 145,000 solicitors in England and Wales ('the Society'). The Society negotiates on behalf of the profession, and lobbies regulators, government and others.

This response has been prepared with the assistance of the Law Society Privacy Law Reference Group, which is made up of senior claimant and defendant solicitors, and solicitors from the broadcast and print media. It has been informed by the considerable expertise of the Group's varied membership, and so presents a realistic and balanced view of how privacy law functions in practice.

We warmly welcome the process of extended consultation and scrutiny being conducted on privacy law reform. We would further welcome the opportunity to give oral evidence to the Committee.

The key points of our evidence are as follows:

- We would not support a statutory law of privacy. Parliament has already legislated by way of the Human Rights Act. The courts are generally applying the public interest test appropriately and we do not perceive an imbalance in the substantive law.
- There are problems with the courts' ability to provide a remedy that protects privacy effectively, which have led to the unsatisfactory situation where claimants seek to prolong the life of interim injunctions indefinitely. Provision of an effective remedy may necessarily require derogations from the principle of open justice.
- The use of specialist judges at first instance is highly desirable, which would be a practical proposition if more use is made of the return date mechanism described below.
- Preventing injunctions from being undermined will require a coordinated approach, involving: thorough pursuit of contempt proceedings where injunctions are breached by both traditional and new media publishers; restricting notice of injunctions to key individuals; and implementation of technical measures by new media networks.
- Parliament must enforce appropriate use of its privilege through a thorough public interest test and process to ensure it does not undermine the courts' ability to do justice.

### **General Comments**

Through extensive consultation with our membership, we have concluded that there are few problems with the substantive law of privacy. Our primary concerns relate to procedural issues, and ultimately the ability of the courts to grant effective remedies in cases where the public interest lies in favour of protecting privacy.

The right to privacy can conflict with other fundamental principles; open justice underpins the rule of law within our constitution, and freedom of expression is an essential safeguard of our democracy. Each may demand that another is sacrificed in order to be satisfied.

The balance between these rights is fluid and highly case sensitive. It is the role of the courts to arbitrate which should prevail in any given case, and they have developed a comprehensive balancing test with an “intense focus” on the facts. If the courts determine this public interest demands that freedom of expression should prevail, then the remedy is relatively simple; publication is permitted. Conversely, if the courts determine that the public interest demands that an individual's privacy is protected in a given case, they should be able to provide an effective remedy but one that takes account of the realities of how that privacy, and ultimately the authority of court may be subsequently undermined.

Such a remedy is difficult to provide under the existing system. As the Master of the Rolls's Report on Super-Injunctions, Anonymised Injunctions and Open Justice ('the Report') noted, injunction applicants presently have an incentive to prolong the life of an interim injunction, as it grants them relief against any notified party. Applicants then have a disincentive to proceed, as the threshold for securing a closed trial is high, and the final injunction binds only the party it was applied for against. The result has been a number of applicants obtaining interim injunctions and then proceeding no further with their cases. Until recently, this practice would appear to have been tacitly accepted by all parties involved, claimant and media alike.

It is unsatisfactory for claimants to rely indefinitely on interim injunctions, although the series of events that has resulted in this situation is comprehensible, in that it is the only available route to protect privacy. Simply placing a time limit on interim injunctions as recommended by the Report does not enable the courts to provide an effective remedy for the applicant, and therefore decreases the ability of the courts' ability to do justice, which the Report rightly notes as being of paramount importance<sup>181</sup>.

The right to privacy is unusual in that once breached, a restorative remedy is usually not possible; the person can rarely be put in the position they were in before the breach occurred. Often the remedy sought is one that prevents a breach in the first instance, which is often by way of an application for an injunction. The challenge in such circumstances is to provide relief without putting the claimant's privacy at risk. This may often conflict with the principle of open justice; conducting justice openly in such cases may, as the Report observes, "frustrate the court's ability to do justice"<sup>182</sup>.

In our view, the very nature of the right to privacy is likely to mean that the number of cases where derogations from open justice are strictly necessary in order to do justice will be higher in matters relating to privacy than in other areas of law. Such cases may therefore necessarily not be as "wholly exceptional"<sup>183</sup> as the Report expects. The law needs to reflect this reality through effective remedies if the right to privacy is to be protected; this may include consideration of derogations such as closed trials or final injunctions capable of binding third parties. We feel greater weight than the Report suggests should be placed on the fact that even where such derogations are made, injunctions remain challengeable if the facts of a case change so as to affect the balance of the public interest.

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<sup>181</sup> See *Report on Super-Injunctions, Anonymised Injunctions and Open Justice* 2011, para 1.21

<sup>182</sup> See *supra*, para 1.19

<sup>183</sup> See *supra*, Annex A: *Draft Practice Guidance for Interim Non-Disclosure Orders* para 10

## Questions

*1. How the statutory and common law on privacy and the use of anonymity injunctions and super-injunctions has operated in practice*

- **Have anonymous injunctions and super-injunctions been used too frequently, not enough or in the wrong circumstances?**

Our understanding is that presently, no super-injunctions are in existence, and that the rate of anonymised injunctions has remained relatively steady, with approximately 50-100 granted in the past ten years (i.e. an average of 5-10 per year).

The question regarding the frequency of their use is ambiguous. The relevant issue is not how many individuals have sought to apply and obtain such injunctions (as this could well depend on the actions of third parties), but whether the courts are granting them appropriately.

With respect to their use in the wrong circumstances, problems can arise when there is insufficient time to give consideration to the facts. Courts ultimately rely on the facts presented in the claimant's application, and occasionally the respondent may not be present if a derogation has been sought. Practitioners have noted that there can be a significant difference in outcome where a judge has no specific expertise in media law or experience with media litigators; for example, an application heard late on a Friday before a duty judge may result in a greater chance of an interim injunction being granted, as the court may be more inclined to maintain protection of privacy until the matter can be more fully considered by a judge with the relevant experience at appeal.

We therefore consider the use of specialist judges to be more than the superficially attractive option the Report suggests, as they are likely to ensure better first-instance decisions, accordingly a reduction in injunctions granted in the wrong circumstances and fewer appeals. We do however recognise that this may be impractical for the courts to implement, particularly as it would require a specialist to be available at weekends on a frequent basis.

The approach taken in the recent *Hirschfeld* case<sup>184</sup> may provide a way forward, whereby the decision on whether to continue an anonymity order in a case heard out of court hours by a non-specialist judge is readily referred to a specialist for review at a return date hearing soon after, with interim protection for the claimant. This process would evidently have associated costs, but they are likely to be less than appealing a first instance decision. Guidance to this effect could be issued to duty judges to promote this as an option.

- **Are the courts making appropriate use of time limitations to injunctions and of injunctions contra mundum (i.e. injunctions which are binding on the whole world) and how are such injunctions working in practice?)**

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<sup>184</sup> *Hirschfeld v McGrath* [2011] EWHC 249 (QB)

Our understanding is that of the two most recent super-injunctions, one was removed on appeal and the other time limited. With respect to super-injunctions only, we are content with the process and draft order set out in the Report that would ensure that a time limitation is set.

Practitioners have indicated that while injunctions *contra mundum* are highly rare, they can also be very difficult to enforce, particularly in other jurisdictions such as the US.

- **What can be done about the cost of obtaining a privacy injunction? Whilst individuals the subject of widespread and persistent media coverage often have the financial means to pursue injunctions, could a cheaper mechanism be created allowing those without similar financial resources access to the same legal protection?**

It is difficult to reduce costs without prejudicing the parties to an injunction (most notably the defendant).

The cost of privacy injunctions has increased largely as a result of case law. Privacy has been a developing area, with the courts gradually elaborating the process over a succession of cases. Many such developments have increased the amount of work required by the parties – for example, increasing the amount of information that must be supplied by the applicant, so that the respondent has sufficient information to decide whether or not to fight the application. These additional requirements have generally been implemented at the request of respondent parties, who are typically media publishers. In principle, such requirements may be justified, but they come with additional cost, which is usually front-loaded. It may be possible to establish a cheaper mechanism that imposed fewer requirements, but that may not achieve an acceptable balance between giving respondents the information they need, and the cost of providing it.

It is worth noting that the nature of the circumstances in which injunctions are often applied for (i.e. impending publication) means applications are drafted and heard at the last minute, which also serves to increase costs.

Although we are unaware of any instances of its use, legal aid would appear to currently be available in principle.

- **Are injunctions and appeals regarding injunctions being dealt with by the courts sufficiently quickly to minimise either (where the injunction is granted or upheld) prolonged unjustifiable distress for the individual or (where an injunction is overturned or not granted) the risk of news losing its current topical value?**

It is our understanding that parties can generally get back to court quickly enough to enforce or challenge injunctions, although some practitioners reported experiencing delays at first instance due to the issues with non-specialist judges described above.

- **Should steps be taken to penalise newspapers which refuse to give an undertaking not to publish private information but also make no attempt to defend an application for an injunction in respect of that information, thereby wasting the court's time?**

No. Such a proposal would be too onerous on the media and restrict freedom of expression too readily. We acknowledge that these circumstances generate costs for applicants and the courts that would be avoided were undertakings secured, but the proposal would mean that media outlets would have to choose between three undesirable options: routinely give undertakings and so successively reduce their ability to report widely; refuse to give undertakings and fight every application in court with the associated cost that would entail, or; refuse to give undertakings and not fight every application in court, and so be penalised. We stress that our concern here does not relate to such a choice in individual cases; rather, that the proposal could create a widespread culture in which any individual wishing to avoid scrutiny in the press could request such undertakings and rely on the financial pressure of the prospective penalty to ensure that they were secured. Media outlets would then have to be highly selective in choosing which cases to not issue undertakings on as they would not have the financial resources to risk a fine or fight all of them.

*2. How best to strike the balance between privacy and freedom of expression, in particular how best to determine whether there is a public interest in material concerning people's private and family life*

- **Have there been and are there currently any problems with the balance struck in law between freedom of expression and the right to privacy?**

The public interest test is typically well applied by the courts, and therefore an appropriate balance is struck between the two rights. However, we refer to our comments throughout on providing a viable remedy for protecting privacy, and above, recommending specialist judges to ensure that the urgency and timing of applications does not have an inappropriate effect on their outcome.

- **Who should decide where the balance between freedom of expression and the right to privacy lies?**

It is appropriate for the courts to decide which right prevails in instances where the two conflict. It is impossible to legislate for every eventuality or developing social mores, and no other body (whether Parliament or otherwise) is in a position to carry out this task.

- **Should Parliament enact a statutory privacy law?**

Although we can see value in the process of codification in granting visible democratic legitimacy to the courts' processes for arbitrating privacy and free expression, we would not support codification of the right to privacy.

Parliament effectively already enacted a statutory privacy law when it introduced the Human Rights Act 1998, and left the courts to develop the process. There is a real likelihood and indeed danger that any further legislation would simply try to codify (and thus 'fossilise') the decisions made by the courts to date in what remains a

developing area of law. It is not clear what assistance a statute would provide unless the objective was to change the law as it currently stands, which we do not feel is necessary or desirable.

- **Should Parliament prescribe the definition of ‘public interest’ in statute, or should it be left to the courts?**
- **Is the current definition of ‘public interest’ inadequate or unclear?**

We would not support a statutory definition of the public interest. Practitioners from across claimant, defendant and in-house media specialisations could see no problems with the current test, and largely did not experience difficulty advising on it.

A statutory definition would dispose of a huge body of case law, and potentially create a discrepancy between the term's use in different areas of law. As a more general point, it should be noted that the public interest is by nature a fluid concept, which the courts are able to develop as it changes over time; it would be undesirable to crystallise the concept as the present interpretation through statute.

- **Should the commercial viability of the press be a public interest consideration to be balanced against an individual's right to privacy?**

No. We very much doubt such an approach would be compliant with the Convention. Where Articles 8 and 10 conflict, the public interest test involves balancing the right to privacy against the right to freedom of expression, not the right of a free press to remain profitable. As a matter of principle, the press should not be enabled to break laws or breach rights simply on the grounds that they will not otherwise be commercially viable; the public interest must rest in the communication of the information to the public, and not in financially supporting the bearer of the information.

- **Should it be the case that individuals waive some or all of their right to privacy when they become a celebrity? A politician? A sportsperson? Should it depend on the degree to which that individual uses their image or private life for popularity? For money? To get elected? Does the image the individual relies on have to relate to the information published in order for there to be a public interest in publishing it (a ‘hypocrisy’ argument)? If so, how directly?**
- **Should any or all individuals in the public eye be considered to be ‘role models’ such that their private lives may be subject to enhanced public scrutiny regardless of whether or not they make public their views on morality or personal conduct (i.e. in the absence of a ‘hypocrisy’ argument)?**

We do not agree that an individual's profession should automatically disqualify them from the right to privacy and would not support statutory provisions which achieved that. Such provisions would be unlikely to be compliant with Article 8. These types of issues are already considered by the courts when deciding the balance of the public



interest<sup>185</sup>, and it is appropriate that such matters continue to be considered and developed by way of case law.

- **In the context of sexual conduct, should it be the case that a person’s conduct in private must constitute a significant breach of the criminal law before it may be disclosed and criticised in the press?**

We would not support such a provision. There may be instances where the public interest falls on the side of disclosing private sexual conduct without such conduct having been a significant breach of the criminal law.

- **Are the courts giving appropriate weight to the value of freedom of expression in ‘celebrity gossip’ and ‘tittle-tattle’?**

We consider courts to be appropriately applying the public interest test and therefore taking any value of freedom of expression in ‘celebrity gossip’ into account.

- **Are damages a sufficient remedy for a breach of privacy? Would punitive financial penalties be an effective remedy? Would they adequately deter disproportionate breaches of privacy?**

The risk of paying damages arising out of a breach of privacy is to a large extent already taken into account by certain elements of the press as a cost of doing business. Introducing punitive damages would effectively raise the threshold of expected profit required for running a story, although we consider they could still prove effective.

It should be noted that claimants can already apply for aggravated damages or an inquiry into damages. It is our understanding that these measures are not widely used, in part because it can be difficult to determine or show what loss or profit flows from a breach of privacy. In some cases, such as *Mosley*<sup>186</sup> (where exemplary damages were dismissed), it may be easier to determine, but many others are not as clearly defined; their use remains a live issue in current phone interception cases. Practitioners have suggested that allowing successful privacy claimants to claim indemnity costs for such applications may help increase their use.

- **Should we introduce a prior notification requirement, requiring newspapers and other print media to notify an individual before information is published, thereby giving the individual time to seek an injunction if a court agrees the publication is more likely than not to be found a breach of privacy? If so, how would such a requirement function in terms of written content online e.g. blogs and other media?**

No. Considering in particular the diversity of online media in particular, such a requirement would be impractical, unduly onerous on publishers and likely to have a considerable chilling effect of freedom of expression.

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<sup>185</sup> See for example *Ferdinand v MGN Ltd* [2011] EWHC 2454 (QB), *A v B plc* [2003] QB 195, *Campbell v MGN Ltd* (CA) [2002] EWCA Civ 1373

<sup>186</sup> *Mosley v News Group Newspapers Ltd*, [2008] EWHC 1777 (QB);

- **Should aggravated damages be payable if a media publisher does not give prior notification to the subject of a publication which a court finds is in breach of that individual's privacy?**

No; this would in effect be double penalisation. A publisher considering publication of any information which may be private, or which may not satisfy the public interest test

already risks penalisation due to a subsequent action for breach of privacy. Even where a publisher takes a conscious decision not to notify in the hope of avoiding a potential injunction, they still risk the same potential penalisation as would be applicable under breach of an injunction. Furthermore, penalisation for failure to notify would also be nonsensical without a prior notification obligation, which we disagree with as stated above.

- **Is section 12 of the Human Rights Act 1998 appropriately balanced? Should the media's freedom of expression be protected in stronger terms? Or is there a disproportionate emphasis on the media's freedom of expression over the right to privacy? Has Section 12 of the Human Rights Act 1998 ensured a more favourable press environment than would be the case if Strasbourg jurisprudence and UK injunctions jurisprudence were applied in the absence of Section 12?**

We support the Human Rights Act and feel it is appropriate for the Act to give no preference to either right; the Act directs the court to examine the application for relief in the context of the importance of freedom of expression and to judge it in terms of the public interest. As indicated above, we do not feel that there is any imbalance in the substantive law.

- **Is the test in section 12 for an injunction to be granted too high a threshold? Should that test depend on the type of information about to be published? Has the court struck the right balance in applying section 12?**

We understand section 12 to generally be working well. The public interest test under s12(4a) already takes the type of information about to be published into account.

- **Is there an anomaly requiring legislative attention between the tests for an injunction for breach of privacy and in defamation?**

We are not aware of such an anomaly. The court is well equipped in privacy to determine whether there was a reasonable expectation of privacy and to carry out any balancing exercise at an early stage. In defamation claims, it is not possible to determine as readily at an early stage whether the statement concerned is true or not and/or whether any other defences apply.

*3. Issues relating to the enforcement of anonymity injunctions and super-injunctions, including the internet, cross-border jurisdiction within the United Kingdom, parliamentary privilege and the rule of law*

- **How can privacy injunctions be enforced in this age of ‘new media’? Is it practical and/or desirable to prosecute ‘tweeters’ or bloggers? If so, for what kind of behaviour and how many people – where should or could those lines be drawn?**

Legislators and potential claimants should be realistic about what the law can practically achieve and enforce. Those contemplating litigation need to consider the difficulties of enforcing any injunction and whether it is ultimately in their interests to seek one. It should be the claimant’s choice as to whether or not to litigate bearing in mind these risks.

With this qualification, we consider that the following recommendations, if pursued in coordination, would help considerably with the problems posed by enforcing injunctions in the context of social media.

#### *Contempt proceedings*

Deterring breaches through social media is at least partly a question of enforcement, although this route is often impractical; prosecution is costly, perpetrators can be difficult to locate and may use technology to remain anonymous. Ultimately, prosecution of tweeters or bloggers will at best provide damages, yet may be counterproductive to the protection of privacy due to the ‘self-repairing’ nature of the internet; removal of a few references to a matter can lead to their replication on a far larger scale. Even in cases where this has not occurred, breaches may be occurring on too large a scale to practically prosecute all involved – this ‘safety in numbers’ reduces the deterrent effect of any favourable judgment or successful prosecution.

It may be the case that the courts will have to make a well-publicised judgment awarding damages against a social media publisher before any deterrent effect on other such publishers is produced by injunctions. Most claimants are reluctant to bring such proceedings as it risks raising the profile of their own case, which would work against their very reasons for litigating. The Attorney General or Director of Public Prosecutions may therefore be in a better position to pursue such proceedings, and we would welcome their intervention along these lines.

#### *Liability of ISPs, social media networks etc*

Technical measures implemented by new media providers (that would for example, automatically remove content in breach of injunctions) could greatly assist the proliferation of injuncted material.

In defamation cases, innocent disseminators of defamatory material (such as ISPs, social media providers etc) have a defence to liability for such material if they can show they took reasonable care in relation to its publication<sup>187</sup>. In practice, showing reasonable care requires innocent disseminators to investigate notices of defamatory material they have published and take them down if they are found to be defamatory (the ‘notice and takedown’ procedure).

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<sup>187</sup> Defamation Act 1996, s.1

We would welcome debate on stronger application of the same principle in privacy cases. Claimants are unlikely to pursue providers themselves due to the cost, time and increased profile this would involve, in addition to difficulties dealing with the different jurisdictions in which providers may be based. However, making the position of providers on avoiding liability clearer, as perhaps is the case with defamation, may encourage them to implement technical measures as outlined above.

*Limiting distribution of notices*

In some circumstances, the objective of protecting privacy might be better achieved by limiting dissemination of injunctioned information. Our understanding is that, under the existing system, notices of injunctions served on the media are typically cascaded widely through such organisations on the basis that journalists should be aware of their legal obligations. Unsurprisingly, such wide distribution can lead to leaks, whereby the injunctioned information is circulated more widely to external parties, who may then publish it via social media. Regardless of whether the authenticity of such leaks can then be determined, they then contribute to speculation which may eventually serve to undermine an injunction. We would therefore support a modification to the process, requiring distribution of such notices to be limited to senior editorial staff only, who would then be responsible for ensuring the injunction was not breached by their organisation. This would increase accountability of those in possession of the injunctioned information and would therefore be likely to reduce the chance of leaks and consequent speculation.

This does not however represent a complete solution; in scenarios where a non-media party to an injunction wishes to disclose their story (for example, a party to an extra-marital relationship that is not the applicant), then it is possible for that party to engender speculation anonymously through social media or otherwise undermine the injunction by seeking publication of their story in jurisdictions where it would be difficult to enforce the injunction. This would however be true of any injunction.

- **Is it possible, practical and/or desirable for print media to be restrained by the law when other forms of ‘new media’ will cover material subject to an injunction anyway? Does the status quo of seeking to restrict press intrusion into individual’s private lives whilst the ‘new media’ users remain unchallenged represent a good compromise?**

We agree with the courts that there can still be an interest in upholding injunctions against major print media even when information is widely available online<sup>188</sup>; the nature of the damage to the individual’s privacy may well be different. Upholding injunctions in these circumstances may also go some way to counteracting the incentive for publishers to leak information and thereby seek to undermine injunctions. Maintaining this approach should be coupled with enforcement of injunctions against breaches via new media to prevent the mainstream media being disadvantaged.

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<sup>188</sup> See *CTB v News Group Newspapers Ltd & Anor (No 3)* [2011] EWHC 1334 (QB)

- **Is enough being done to tackle ‘jigsaw’ identification by the press and ‘new media’ users? For example see Mr Justice King’s provisional view in *NEJ v. Wood* [2011] EWHC 1972 (QB) at [20] that information published in the *Daily Mail* breached the order of Mr Justice Blake, and the consideration by Mr Justice Tugendhat in *TSE and ELP v. News Group Newspapers* [2011] EWHC 1308 (QB) at [33]-[34] as to whether details about TSE published by *The Sun* breached the order of Mrs Justice Sharp.**

Any predisposition of the media to undermine an injunction via behaviour likely to lead to jigsaw identification should be dealt with via contempt proceedings. Establishing clear case law on this issue may deter the media from engaging in this type of behaviour, and the courts have indicated in the judgments above that they are willing to rule on the issue, but that such applications are not being made. We repeat our suggestion that the Attorney General or Director of Public Prosecutions may be in a better position than claimants to pursue such proceedings.

- **Are there any concerns regarding enforcement of privacy injunctions across jurisdictional borders within the UK? If so, how should those concerns be dealt with?**

It is appropriate for the claimant to enforce judgments across borders within the UK. In one recent scenario where a Scottish newspaper decided to publish the details of an anonymised injunction where the English press had not done so, it is our understanding that it was a question of the applicant having not sought to enforce the injunction in the Scottish jurisdiction through the existing interdict process. This process comes at a cost, which may be inhibiting claimants from routinely applying for them unless there appears to be a threat to publish in that jurisdiction. A streamlined system for registering English injunctions in Scotland may assist with this issue.

Claimant solicitors do however have concerns regarding the enforcement of such injunctions on a wider scale, namely within Europe and the US. These problems are unlikely to be resolved without international political cooperation.

## **Parliamentary Privilege**

*With regard to the enforcement of privacy injunctions and the breaching of them during Parliamentary proceedings, is there a case for reforming the Parliamentary Papers Act 1840 and other aspects of Parliamentary privilege? Should this be addressed by a specific Parliamentary Privilege Bill or is it desirable for this Committee to consider privilege to the extent it is relevant to injunctions?*

- **Should Parliament consider enforcing ‘proper’ use of Parliamentary Privilege through penalties for ‘abuse’?**
- **What is ‘proper’ use and what is ‘abuse’ of Parliamentary Privilege?**
- **Is it desirable to address the situation whereby a Member of either house breaches an injunction using Parliamentary Privilege using privacy law, or is that a situation best left entirely to Parliament to deal with? Indeed, is it**

**possible to address the situation through privacy law or is that constitutionally impermissible? Could the current position in this respect be changed in any significant way? If so, how?**

The correct use of privilege is rightly the prerogative of Parliament to determine. However, the prospect of undermining injunctions raises serious concerns about the integrity and respect for the courts and their ability to do justice.

In our view the current position has not proved adequate in preventing breaches of injunctions by parliamentarians where there is no clear public interest argument. A public interest test with a high threshold must be seen to be applied by Parliament through a thorough procedure when the correct use of privilege is in doubt; this has not been the case to date.

*4. Issues relating to media regulation in this context, including the role of the Press Complaints Commission and the Office of Communications (OFCOM)*

### **PCC**

We limit our comments to practitioners' experiences of using the PCC. Practitioners widely note that the limited remedies available through the PCC severely restrict its utility in resolving privacy disputes.

The PCC has a strong regional structure in place for dealing with apologies and similar less formal remedies, but is ineffective when damages become the issue. In these cases, practitioners do not usually advise client to make use of the PCC as it has few powers over publishers; a strong breach of privacy case is usually taken to court because the court can provide a more appropriate remedy for the claimant. The PCC is however used in more delicate situations where claimants do not desire the high profile that litigation can produce, for example in the case of professionals such as doctors.

### **OFCOM**

We again limit our comments to practitioners' experiences of the OFCOM code. It is our understanding that broadcasters do not typically encounter problems with OFCOM procedures, which do not prevent true public interest stories from being published. We understand that recent cases in which OFCOM has decided against broadcasters have been useful in providing them with guidance.

October 2011

## Lawyers for Media Standards—Written evidence

### I. How the statutory and common law on privacy and the use of anonymity injunctions and super-injunctions has operated in practice

**a. Have anonymous injunctions and super-injunctions been used too frequently, not enough or in the wrong circumstances?**

We do not consider there to be a particular problem in this regard. We note that, to our knowledge, no injunctions have been granted since June of this year and no super injunctions since August of last year. Nor do we consider injunctive relief to be illegitimate; privacy cannot be restored in respect of information already disclosed.

**b. Are the courts making appropriate use of time limitations to injunctions and of injunctions contra mundum (i.e. injunctions which are binding on the whole world) and how are such injunctions working in practice?**

We note that there is much public confusion surrounding the meaning and effect of phrases such as super-injunctions, hyper-injunctions and injunctions contra mundum. The injunction contra-mundem was originally conceived as an exceptional tool, to be used only in very rare cases (e.g. *Thompson and Venables*). We consider it is arguable that such injunctions are now being used too regularly, constituting a disproportionate interference with Article 10. Otherwise we consider that injunctions are working well in practice, save for concerns as to their enforceability with the huge increase in the use of social media and the global nature of the internet (which means it cuts across all jurisdictions), and the courts are generally making appropriate use of time limitations following the *Terry* case and the guidance note recently published by the Master of the Rolls.

**c. What can be done about the cost of obtaining a privacy injunction? Whilst individuals the subject of widespread and persistent media coverage often have the financial means to pursue injunctions, could a cheaper mechanism be created allowing those without similar financial resources access to the same legal protection?**

There is no doubt that the costs of obtaining injunctive relief are prohibitive for individuals of modest means. In spite of the existing practical difficulties of using conditional fee arrangements to obtain injunctive relief, already articulated by others before this committee, we are nonetheless hugely concerned that, if implemented, the Legal Aid, Sentencing and Punishment of Offenders Bill (LASPO) would only further worsen the situation, and would be catastrophic in respect of the ability of persons to bring privacy and libel actions more generally. The effect of LASPO would be that all but the 'super-rich' would be denied the opportunity of redress in respect of invasions into their private life.

**d. Are injunctions and appeals regarding injunctions being dealt with by the courts sufficiently quickly to minimise either (where the injunction is granted or upheld) prolonged unjustifiable distress for the individual or (where an injunction is overturned or not granted) the risk of news losing its current topical value?**

We are not aware of any cases in which this has been a problem.

- e. **Should steps be taken to penalise newspapers which refuse to give an undertaking not to publish private information but also make no attempt to defend an application for an injunction in respect of that information, thereby wasting the court's time?**

In the absence of any defence, the refusal to give an undertaking not to publish private information should result in an appropriate costs penalty.

**2. How best to strike the balance between privacy and freedom of expression, in particular how best to determine whether there is a public interest in material concerning people's private and family life**

- a. **Have there been and are there currently any problems with the balance struck in law between freedom of expression and the right to privacy?**

It is now well established that the law gives equal weight to freedom of expression and the right to privacy. We consider this to be a legitimate approach, which recognises the value in both rights, enabling cases to be decided on their individual merits. The key consideration, as the courts have repeatedly emphasised is “an intense focus on the facts of the case.”

- b. **Who should decide where the balance between freedom of expression and the right to privacy lies?**

Due to the impossibility of parliament legislating for every possible scenario, we believe that the courts, as they do now, are best equipped to decide as the balance to be struck between freedom of expression and privacy in individual cases by reference to the relevant constitutional framework. The claim in this respect that judges have created a law of privacy without democratic legitimacy and against the will of parliament is misinformed. The development of a law of privacy was a foreseen consequence of the implementation of the Human Rights Act.

- c. **Should Parliament enact a statutory privacy law?**

The fact-sensitive nature of privacy cases is such that it would be difficult for Parliament to legislate for an approach in any greater detail than that presently contained in the common law. That said, even if parliament was only to codify the present position at common law it may be that the law would be able to command a greater respect amongst the media and general public by virtue of what may be a perceived improvement in democratic legitimacy.

- d. **Should Parliament prescribe the definition of ‘public interest’ in statute, or should it be left to the courts?**

The fact-sensitive nature of privacy cases is such that it would be difficult for Parliament to reach a statutory definition of ‘public interest’.

There is a danger of unduly narrowing the meaning of ‘public interest’ if it is codified. Alternatively, if the definition is widely drawn then the courts will be required to interpret it anyway.

- e. **Is the current definition of ‘public interest’ inadequate or unclear?**

We do not consider that there is a definition of the public interest as such, although we do note the distinction frequently drawn by the courts between matters of public interest and matters of interest to the public.



**f. Should the commercial viability of the press be a public interest consideration to be balanced against an individual's right to privacy?**

Insofar as freedom of expression is a right guaranteed equally to all, the law should not in effect confer on the press a wider right to speech than that afforded to the wider public because of the economic pressures it is currently facing.

**g. Should it be the case that individuals waive some or all of their right to privacy when they become a celebrity? A politician? A sportsperson? Should it depend on the degree to which that individual uses their image or private life for popularity? For money? To get elected? Does the image the individual relies on have to relate to the information published in order for there to be a public interest in publishing it (a 'hypocrisy' argument)? If so, how directly?**

We accept that, in certain situations, it may be that individuals who choose to place themselves in the public eye do not benefit from the same expectation of privacy as 'ordinary' members of the public, but it can never be the case that an individual waives all their privacy rights by virtue of their position. Specific considerations attach to politicians because of the importance of free and informed democratic debate, and the right of the public to make informed decisions about who they choose to represent their interests. The courts have generally placed greater emphasis on freedom of speech in relation to political debate – see e.g. defamation defences.

Even in instances where it is said that an individual does not have a reasonable expectation of privacy, however, it should be remembered that the publication of private information about that person will also often have an impact on others, e.g. partners/children who cannot be said to have waived their right to privacy in relation to that information. Everyone is entitled to a "zone of privacy" which should be protected by the courts; however, the size of that zone will vary from person to person depending on how much of one's private life a claimant has chosen to put into the public domain.

**h. Should any or all individuals in the public eye be considered to be 'role models' such that their private lives may be subject to enhanced public scrutiny regardless of whether or not they make public their views on morality or personal conduct (i.e. in the absence of a 'hypocrisy' argument)?**

Outside of public office, we do not consider the role model argument to be persuasive.

**i. Are the courts giving appropriate weight to the value of freedom of expression in 'celebrity gossip' and 'tittle-tattle'?**

The court in *Mosely* acknowledged that when balancing freedom of expression against an individual's Article 8 rights, it will be necessary to examine the use to which the defendant intends to put his right to freedom of expression. Where the right to freedom of expression is asserted as a justification for the publication of celebrity gossip and tittle tattle, the right is correctly accorded less value than where the purpose to which the right to freedom of expression is put is political speech.

- j. In the context of sexual conduct, should it be the case that a person's conduct in private must constitute a significant breach of the criminal law before it may be disclosed and criticised in the press?**

No. It may be in the public interest to publish information about sexual conduct with no criminal element in order to expose hypocrisy where, for example, a politician who has campaigned on a platform of 'family values' is found to have committed adultery or visited prostitutes.

- k. Could different remedies (other than damages) play a role in encouraging an appropriate balance?**

There may be scope for more effective regulation of the press in deterring breaches of privacy.

- l. Are damages a sufficient remedy for a breach of privacy? Would punitive financial penalties be an effective remedy? Would they adequately deter disproportionate breaches of privacy?**

Damages and punitive damages will not generally be a sufficient remedy for breach of privacy, although the latter may have some value in providing a deterrent to breaches. Often the only effective remedy will be an injunction preventing the disclosure of private information into the public domain in the first place.

- m. Should we introduce a prior notification requirement, requiring newspapers and other print media to notify an individual before information is published, thereby giving the individual time to seek an injunction if a court agrees the publication is more likely than not to be found a breach of privacy? If so, how would such a requirement function in terms of written content online eg blogs and other media?**

A prior notification requirement with regards to the publication of potentially private information would disproportionately prejudice Article 8 rights in favour of freedom of expression.

Newspapers may be deterred from publishing material that is genuinely in the public interest because of the costs associated with defending the inevitable injunction application that would follow a prior notification. Publication is also often time sensitive; it may be in the public interest to publish a particular story at a specific time. If newspapers are prevented from publishing at that time they may drop the story, with the result that information that may have been deemed publishable at trial is effectively excluded from the public domain.

- n. Should aggravated damages be payable if a media publisher does not give prior notification to the subject of a publication which a court finds is in breach of that individual's privacy?**

Yes. Aggravated damages would provide a more effective deterrent to breaches of privacy, particularly if the resources and size of the publisher is taken into account when determining the size of the award.

However, the quantum of aggravated damages should reflect the fact that some breaches of privacy are more egregious than others. It may be that aggravated damages should not be available in cases in which the newspaper acts in good faith, in order to nullify any potential chilling effect.

- o. Is section 12 of the Human Rights Act 1998 appropriately balanced? Should the media’s freedom of expression be protected in stronger terms? Or is there a disproportionate emphasis on the media’s freedom of expression over the right to privacy? Has Section 12 of the Human Rights Act 1998 ensured a more favourable press environment than would be the case if Strasbourg jurisprudence and UK injunctions jurisprudence were applied in the absence of Section 12?**

Given the inadequacy of damages as a remedy for breach of privacy, it is appropriate that the test for granting interim relief is more permissive than that applied in defamation.

- p. Is the test in section 12 for an injunction to be granted too high a threshold? Should that test depend on the type of information about to be published? Has the court struck the right balance in applying section 12?**

The type of information to be published is a necessary factor in deciding whether it is more likely than not that a claimant will succeed at trial; if the information in question is gossip or relates to, for example, sexual conduct it will be more difficult for the press to establish that they are likely to demonstrate a public interest in disclosure at trial.

- q. Is there an anomaly requiring legislative attention between the tests for an injunction for breach of privacy and in defamation?**

We consider the differences in approach justified and we therefore consider that legislative attention is unnecessary.

### **3. Issues relating to the enforcement of anonymity injunctions and super-injunctions, including the internet, cross-border jurisdiction within the United Kingdom, parliamentary privilege and the rule of law**

- a. How can privacy injunctions be enforced in this age of ‘new media’? Is it practical and/or desirable to prosecute ‘tweeters’ or bloggers? If so, for what kind of behaviour and how many people – where should or could those lines be drawn?**

It is possible (although expensive) to seek a *Norwich Pharmacal* order against ISPs to identify tweeters or bloggers who hide behind the anonymity of the internet in breaching privacy injunctions. Individuals usually lack the financial means of the print media, so may be more responsive to the threat of financial sanction.

- b. Is it possible, practical and/or desirable for print media to be restrained by the law when other forms of ‘new media’ will cover material subject to an injunction anyway? Does the status quo of seeking to restrict press intrusion into individual’s private lives whilst the ‘new media’ users remain unchallenged represent a good compromise?**

New media presents a significant challenge to privacy law. However, online breaches of privacy are not speciously different to the print media and should be treated accordingly. The ability of an individual who has had their privacy breached online to take action is of crucial importance.

- c. **Is enough being done to tackle ‘jigsaw’ identification by the press and ‘new media’ users? For example see Mr Justice King’s provisional view in NEJ v. Wood [2011] EWHC 1972 (QB) at [20] that information published in the Daily Mail breached the order of Mr Justice Blake, and the consideration by Mr Justice Tugendhat in TSE and ELP v. News Group Newspapers [2011] EWHC 1308 (QB) at [33]-[34] as to whether details about TSE published by The Sun breached the order of Mrs Justice Sharp.**

As in defamation, the court should be able to judge whether the press is in breach of a privacy injunction by reference to the circumstances of the publication as a whole.

- d. **Are there any concerns regarding enforcement of privacy injunctions across jurisdictional borders within the UK? If so, how should those concerns be dealt with?**

Yes, such difficulties in enforcing privacy injunctions undermine respect for the law and should be remedied by appropriate legislative action.

- e. **PARLIAMENTARY PRIVILEGE:**

- i) **With regard to the enforcement of privacy injunctions and the breaching of them during Parliamentary proceedings, is there a case for reforming the Parliamentary Papers Act 1840 and other aspects of Parliamentary privilege? Should this be addressed by a specific Parliamentary Privilege Bill or is it desirable for this Committee to consider privilege to the extent it is relevant to injunctions?**

It is important that in seeking to strengthen the law of privacy we do not inadvertently erode the protection of democratic free speech. Statutory reform (and by likely implication, the narrowing of Parliamentary Privilege) is therefore undesirable.

- ii) **Should Parliament consider enforcing ‘proper’ use of Parliamentary Privilege through penalties for ‘abuse’?**

Yes. Internal reform of parliamentary rules is preferable to statutory reform.

- iii) **What is ‘proper’ use and what is ‘abuse’ of Parliamentary Privilege?**

Parliamentary Privilege is a mechanism by which democratic free speech is protected. Its purpose is to allow MPs to engage in uninhibited debate without fear that they will be sued in defamation.

However, where an MP intentionally and wilfully uses Parliamentary Privilege to circumvent the law of privacy and violate the terms of a judicially determined privacy injunction, this is a clear abuse of Parliamentary Privilege.

- iv) **Is it desirable to address the situation whereby a Member of either house breaches an injunction using Parliamentary Privilege using privacy law, or is that a situation best left entirely to Parliament to deal with? Indeed, is it possible to address the situation through privacy law or is that constitutionally impermissible? Could the current position in this respect be changed in any significant way? If so, how?**

We are concerned that the use of privacy law to address any such breaches would be constitutionally impermissible.

#### **4. Issues relating to media regulation in this context, including the role of the Press Complaints Commission and the Office of Communications (OFCOM) PCC**

- a. Do the guidelines in section 3 of the Editors' Code of Practice correctly address the balance between the individual's right to privacy and press freedom of expression?**

The decision of the PCC in the *Kimberley Fortier* adjudication suggests that section 3 provides a more restrictive approach to the protection of privacy than the courts do in relation to photographs. In its findings, the PCC stated that it did not generally consider that photographs taken in a public place were capable of breaching an individual's privacy, in circumstances where there had been no harassment.

Section 3 emphasises the relevance of the complainant's own disclosure of information, and in relation to this the PCC also takes a position regarding when information will have lost its quality of privacy that is less generous than that taken by the courts. The *William Zach* complaint highlights the impact this has on the protection of privacy offered by the PCC.

- b. How effective has the PCC been in dealing with bad behaviour from the press in relation to injunctions and breaches of privacy?**

Whilst the PCC is sometimes more effective than it is given credit for – in relation to 'door stepping', for example – the limited sanctions it has at its disposal is a real cause for concern. For the PCC to be truly effective, it also requires all newspapers to engage with it, and of course Express Newspapers do not. Unfortunately, the common perception of the PCC is that it is a toothless tiger in thrall to its paymasters, the press; the prospects of it improving its public image and reputation in its current form are remote.

- c. Does the PCC have sufficient powers to provide remedies for breaches of the Editors' Code of Practice in relation to privacy complaints?**

Not in our view.

- d. Should the PCC be able to initiate its own investigations on behalf of someone whose privacy may have been infringed by something published in a newspaper or magazine in the UK?**

If the individual doesn't complain then it's hard to see why the PCC should get involved. Privacy has a strong subjective element – can someone's privacy ever be breached if they don't care that the information is being published? Given that the PCC is free to use, there is nothing preventing someone from making a complaint.

- e. Should the PCC have the power to consider the balance between an individual's privacy and freedom of expression prior to the publication of material – or should this power remain with the Courts?**

We can't think of a reason why they shouldn't, although it would be largely ineffective since:

- a) they have no real sanctions available if they consider that publication would amount to an unjustifiable breach of privacy – they can't prevent the newspaper from publishing anyway;

- b) it wouldn't change the fact that newspapers aren't required to give prior notification; and
- c) it's unclear whether the PCC has sufficient resources to be able to conduct an investigation within such a short timeframe.

**f. Is there sufficient awareness in the general public of the powers and responsibilities of the PCC in the context of privacy and injunctions?**

Not in our view.

**OFCOM**

**g. Do the guidelines in Section 8 of the Ofcom Broadcasting Code correctly address the balance between the individual's right to privacy and freedom of expression?**

Yes, the code strikes a fair balance.

**h. How effective has Ofcom been in dealing with breaches of the Ofcom Broadcasting Code in relation to breaches of privacy?**

Ofcom is generally thought to be more effective than the PCC.

**i. Is there a case that the rules on infringement of privacy should be applied equally across all media content?**

Yes, although breaches of privacy tend to be associated more with the print media.

23 December 2011

## Lord Lester of Herne Hill QC—Written evidence

This evidence is submitted in response to the questions raised by the Committee and focuses on the issues of UK and European law those questions raise, citing parliamentary and judicial sources.<sup>189</sup>

### **(I) How the statutory and common law on privacy and the use of anonymity injunctions and super-injunctions has operated in practice**

*a. Have anonymous injunctions and super-injunctions been used too frequently, not enough or in the wrong circumstances?*

*b. Are the courts making appropriate use of time limitations to injunctions and of injunctions contra mundum (i.e. injunctions which are binding on the whole world) and how are such injunctions working in practice?*

*c. What can be done about the cost of obtaining a privacy injunction? Whilst individuals the subject of widespread and persistent media coverage often have the financial means to pursue injunctions, could a cheaper mechanism be created allowing those without similar financial resources access to the same legal protection?*

*d. Are injunctions and appeals regarding injunctions being dealt with by the courts sufficiently quickly to minimise either (where the injunction is granted or upheld) prolonged unjustifiable distress for the individual or (where an injunction is overturned or not granted) the risk of news losing its current topical value?*

*e. Should steps be taken to penalise newspapers which refuse to give an undertaking not to publish private information but also make no attempt to defend an application for an injunction in respect of that information, thereby wasting the court's time?*

1. Lord Neuberger MR's Report on Super-Injunctions, Anonymised Injunctions and Open Justice<sup>190</sup> ("the Neuberger Report") suggested, on the basis of the evidence available, that

*"[A]pplicants now rarely apply for [super-injunctions] and it is even rarer for them to be granted on anything other than an anti-tipping-off, short-term basis."<sup>191</sup>*

2. However the Neuberger Report also acknowledged a lack of empirical evidence on the use of such injunctions, which it recognised made it

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<sup>189</sup> The author is indebted to the staff of the Odysseus Trust, Jo Dawson, Sophia Harris and Caroline Baker for their contribution to this paper

<sup>190</sup> 20 May 2011

<sup>191</sup> Page iv

*“impossible to verify whether and to what extent super-injunctions and anonymised injunctions are being granted by the courts”,<sup>192</sup> and “has encouraged a view that an entirely secret process has developed in the civil courts, and that this is improper in principle, risks neutering press freedom to report matters of public interest and undermines the public’s right to be informed of court proceedings.”<sup>193</sup>*

3. The Neuberger Report therefore recommended the introduction of a data recording system; and Practice Direction 51F now provides for a pilot scheme for the recording of data in relation to injunctions prohibiting publication of private or confidential information, to run from 1 August 2011 to 31 July 2012.

4. Having considered the circumstances in which derogations from the principle of open justice might be permissible, the Neuberger Committee concluded that:

*“What is clear, though, is that the impression, which, as Tugendhat J noted in Terry v Persons Unknown [2010] 1 FCR 659 (Terry), ‘claimants’ advisers’ seemed to have gained ‘that extensive derogations from open justice should be routine in claims for misuse of private information’ is misconceived. Derogations from open justice can never be matters of routine. They can only ever be exceptional and can only be justified on grounds of strict necessity.”<sup>194</sup>*

5. Lord Neuberger MR has now issued Practice Guidance on best practice in interim non-disclosure orders. The power to grant a super-injunction, that is, an injunction which contains a prohibition on reporting the fact of the proceedings, remains, but such an order will be granted only in the rarest of cases and only where strictly necessary. Applications will only be heard in private if and to the extent the court is satisfied that *“by nothing short of the exclusion of the public can justice be done”*. The burden of persuading the court that a restriction should be imposed lies with the person seeking it, who must provide cogent and clear evidence in support. The Guidance reaffirms Tugendhat J’s decision in *Terry*<sup>195</sup> that any party seeking an interim non-disclosure order must notify all respondents to the application *and* any non-parties who are to be served with or otherwise notified of the order.
6. Given the lack of empirical evidence on the use of injunctions, it would be premature to make firm recommendations as to how the law might be improved until evidence has demonstrated the extent of any continuing problem on the basis of data collected under the pilot scheme. The Neuberger Committee opined that any perceived problem with the operation of the law may have been exaggerated as a result of opportunism on the part of claimants’ representatives and self-interest on the part of the media. It is to be hoped that the Master of the Rolls’ Practice Guidance will resolve the issue satisfactorily, but it is too early to tell.

## **(2) How best to strike the balance between privacy and freedom of expression, in particular how best to determine whether there is a public interest in material concerning people’s private and family life**

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<sup>192</sup> Paragraph 4.4

<sup>193</sup> Paragraph 4.5

<sup>194</sup> Paragraph 1.37

<sup>195</sup> *Terry v Persons Unknown* [2010] 1 FCR 659



a. *Have there been and are there currently any problems with the balance struck in law between freedom of expression and the right to privacy?*

7. In balancing the two fundamental rights to freedom of expression and respect for personal privacy, the European Court of Human Rights has tilted the balance towards personal privacy where “public figures” are concerned (unlike its approach in defamation cases). In *Von Hannover*,<sup>196</sup> Princess Caroline of Monaco was pursued by German paparazzi photographers. She sought injunctive relief from the German courts which granted relief so far as pictures of her with her children were concerned, but refused so far as they depicted her in public going about her daily life. The German courts decided that considerations of press freedom and the public’s interest in a “figure of contemporary society” militated against injunctive relief. Princess Caroline complained to the Strasbourg Court which upheld her claim of breach of Article 8, on the basis that a publication must contribute to a debate of general interest in order to outweigh Article 8 rights.
8. However, in the recent *Mosley*<sup>197</sup> case the Strasbourg Court placed a greater emphasis on freedom of expression in refusing the application for a pre-notification requirement in privacy cases:

*“[T]he Court has consistently emphasised the need to look beyond the facts of the present case and to consider the broader impact of a pre-notification requirement. The limited scope under Article 10 for restrictions on the freedom of the press to publish material which contributes to debate on matters of general public interest must be borne in mind. Thus, having regard to the chilling effect to which a pre-notification requirement risks giving rise, to the significant doubts as to the effectiveness of any pre-notification requirement and to the wide margin of appreciation in this area, the Court is of the view that Article 8 does not require a legally binding pre-notification requirement.”*<sup>198</sup>

9. An application to refer the *Mosley* case to the Grand Chamber was refused, so it should be treated as an authoritative ruling, leaving the UK with a wide margin of discretion as to how to balance these competing rights.
10. English law traditionally adopted a formulaic approach to personal privacy as part and parcel of the need to formulate a case not as a privacy violation but as a breach of confidence or as some other form of physical tort.<sup>199</sup> By contrast, Article 8 protects a general right to privacy, that is, an opportunity to live out one’s private life free from undue interference, comment, intrusion, recording or monitoring, in both private and (where appropriate) public spaces. It is a right negatively protecting the individual against the abuse of power by the state and its agents, as well as positively requiring the state to protect an individual’s private life from unwarranted intrusion by others.

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<sup>196</sup> [2005] 40 EHRR 1

<sup>197</sup> *Mosley v United Kingdom*, Application no. 48009/08, 10 May 2011

<sup>198</sup> [132]

<sup>199</sup> Anthony Lester QC, “English Judges as Lawmakers”, *Public Law* (1993) 269, at 284-85

11. British courts have developed the tort of “misuse of private information” in giving effect to the UK’s positive obligations under Article 8. Courts consider two central questions:
  - a. whether, in all the circumstances of the case, a claimant has a “reasonable expectation of privacy” in respect of the disclosed facts, so as to engage Article 8 rights;<sup>200</sup> and, if so
  - b. whether any countervailing public interest justifies interference with the claimant’s rights.<sup>201</sup>
12. Where both Article 10 and Article 8 are engaged,
  - a. neither Article *as such* has precedence over the other;
  - b. where the values protected by the two Articles are in conflict, it is necessary to conduct a careful scrutiny of their comparative importance in the particular case;
  - c. the necessity for limiting each right is assessed objectively in accordance with the principle of proportionality.<sup>202</sup>
13. In his evidence to the Commons Culture Media and Sport Committee in 2009, the then Lord Chancellor, the Rt Hon Jack Straw MP, stated that:

*“My experience of decisions in respect of human rights over the years is that some of those which caused the greatest initial excitement have ended in a situation where, because of changed circumstances or appeals to the Court of Appeal or the Law Lords, things have calmed down, because those senior courts have produced a better balance.”*<sup>203</sup>
14. The editor of *The Guardian*, Mr Alan Rusbridger, suggested in his evidence that the problem was that the courts had not yet been required to balance Article 8 and Article 10 in “a good case where someone has tried to gag a newspaper with a really good public interest defence” and that therefore “we have to give it a bit more time”.<sup>204</sup>
15. The Culture Media and Sport Committee concluded that:

*“The Human Rights Act has only been in force for nine years and inevitably the number of judgments involving freedom of expression and privacy is limited. We agree with the Lord Chancellor that law relating to privacy will become clearer as more cases are decided by the courts.”*<sup>205</sup>
16. Not many cases have yet proceeded to full trial. The judgment in the recent *Ferdinand*<sup>206</sup> case, as well as anecdotal evidence of a reduction in the number of injunctions sought since *Terry*, suggest that the courts are striking an appropriate balance.

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<sup>200</sup> *Campbell v MGN Ltd* [2004] 2 AC 157, per Lord Nicholls [11]-[22]

<sup>201</sup> Per Baroness Hale at [137]

<sup>202</sup> *Re S (A child) (Identification: Restrictions on Publication)* [2005] 1 AC 593 (HL)

<sup>203</sup> *Press Standards, Privacy and Libel*, Second Report of Session 2009-10 HC 362-I, paragraph 66

<sup>204</sup> Paragraph 63

<sup>205</sup> Paragraph 67

<sup>206</sup> *Ferdinand v MGN* [2011] EWHC 2454 (QB)

*b. Who should decide where the balance between freedom of expression and the right to privacy lies?*

17. Parliament has provided a framework of principles, by means of the Human Rights Act 1998, within which to balance the competing rights of freedom of expression and respect for personal privacy. The prime responsibility for maintaining that balance is that of the media themselves through effective self-regulation, with the courts becoming involved only where self-regulation has failed to protect the right to respect for private life against unwarranted media intrusion.
18. Section 3 of the Human Rights Act 1998 requires UK courts to take account of Strasbourg Court case law without being bound to give effect to judgments as directly binding precedents, except where those judgments directly implicate the UK.<sup>207</sup> Section 12 emphasises the need to have particular regard to the importance of freedom of speech when deciding whether to grant relief, amongst other things, to protect respect for personal privacy.
19. The judicial recognition and development in English law of a right of personal privacy against unwarranted media intrusion was foreseen during the passage of the Bill.<sup>208</sup> Indeed, section 12 was introduced for precisely this reason: in order to set a higher threshold for the granting of interlocutory injunctions in media intrusion cases in recognition of the dangers of prior restraint for freedom of expression.
20. Ultimately the balancing act between the competing interests being claimed must be carried out by the courts. As the Neuberger Report stated:

*“It is for the courts, through a consideration of the law and its development since 2000, to examine the substantive legal issues in individual future cases taking account of the individual circumstances that arise in such cases, and, where appropriate, to provide an authoritative statement of the law.”*<sup>209</sup>
21. However, effective self-regulation by the media is essential to avoid unnecessary litigation and the risk of courts usurping the role of editors and journalists. That was recognised by Parliament in including in section 12(4)(b) of the Human Rights Act the need for the court to have regard to any relevant privacy code. The courts have interpreted the reference to privacy codes in section 12 as creating an incentive to the media to comply with such codes so as to be able to show that a contested publication was in the public interest.<sup>210</sup> This approach avoids the need for a statutory underpinning, over and above the Human Rights Act, and a similar reference to professional codes should be included in the Government’s forthcoming Defamation Bill as a relevant factor in determining whether the public interest is served by the publication concerned.

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<sup>207</sup> Article 46 of the Convention imposes an obligation on Contracting States to abide by final judgments against them

<sup>208</sup> Lord Irvine of Lairg LC HL Hansard, 24 November 1997, col 783

<sup>209</sup> Paragraph 1.11

<sup>210</sup> In *A v B (a company)* [2002] EWCA 337, [2003] QB 195, at paragraph 11 (xiv), Lord Woolf referred with approval to the comments of Brooke LJ in the Court of Appeal in *Douglas v Hello! Ltd* [2001] QB 967, at paragraph 94 that “a newspaper which flouts the Press Complaints Commission’s Code on privacy is likely to find that its claim to free speech is outweighed by privacy considerations.”

22. The fact that a newspaper organisation refuses or fails to become bound by a system of self-regulation should also be treated as relevant in deciding whether the publication was in the public interest. The Committee may wish to adopt this proposal as well as the Draft Defamation Bill Committee’s (the “Mawhinney Committee”) recommendation, in the context of the forthcoming Defamation Bill, that “when deciding whether publication was responsible, the court should have regard to any reasonable editorial judgment of the publisher on the tone and timing of the publication.”<sup>211</sup>

23. The Strasbourg Court in *Mosley* also acknowledged the relevance and importance of self-regulation,<sup>212</sup> and recognised the importance of editorial discretion:

*“It is to be recalled that methods of objective and balanced reporting may vary considerably and that it is therefore not for this Court to substitute its own views for those of the press as to what technique of reporting should be adopted ... .”*<sup>213</sup>

24. It is vital therefore to have a system of effective self-regulation with adequate resources, independence and the ability to provide effective remedies which are compatible with self-regulation, as distinct from remedies that would make the PCC into a court or tribunal exercising judicial powers.

*c. Should Parliament enact a statutory privacy law?*

25. Before the Human Rights Act 1998 brought the Convention right to respect for private life, home and correspondence into UK law, various bodies had examined the case for and against privacy legislation. An official inquiry chaired by Sir Kenneth Younger decided that it would be wrong to introduce legislation to protect personal privacy.<sup>214</sup> Sir David Calcutt QC’s inquiry<sup>215</sup> into Privacy and Related Matters was set up in 1989 following completion of two Private Member’s Bills concerned with Privacy (John Browne MP, Con) and the Right of Reply (Tony Worthington MP, Lab). The Report was also against privacy legislation, although on the basis of effective self-regulation.

26. In 1995, the Conservative Government’s White Paper, *Privacy and Media Intrusion*,<sup>216</sup> rejected proposals for statutory press regulation, and approved continuing self-regulation.

27. The New Labour Government continued this approach after 1997, stating, in its response to the Commons Culture, Media and Sport Committee’s recommendation that legislation be brought forward:

*“The weighing of competing rights in individual cases is the quintessential task of the courts, not of Government, or Parliament. Parliament should*

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<sup>211</sup> Joint Committee on the Draft Defamation Bill Report, Session 2010-2012, HL Paper 203 paragraph 65 (e)

<sup>212</sup> [31]-[40]

<sup>213</sup> [11]

<sup>214</sup> Report of the (Younger) Committee on Privacy, July 1972, Cmnd 5012.

<sup>215</sup> 1990, Cm 1102.

<sup>216</sup> Cm 2918

*only intervene if there are signs that the courts are systematically striking the wrong balance; we believe there are no such signs.*<sup>217</sup>

28. In its 2007 Report *Self-regulation of the Press*, the successor Commons Committee on Culture, Media and Sport concluded that:

*“To draft a law defining a right to privacy which is both specific in its guidance but also flexible enough to apply fairly to each case which would be tested against it could be almost impossible.”*<sup>218</sup>

29. More recently, the Committee’s *Report on Press Standards Privacy and Libel* concluded:

*“Given the infinitely different circumstances which can arise in different cases, and the obligations of the Human Rights Act, judges would inevitably still exercise wide discretion. We conclude, therefore, that for now matters relating to privacy should continue to be determined according to common law, and the flexibility that permits, rather than set down in statute.”*<sup>219</sup>

30. A Privacy Act could do little more than codify the existing Convention and UK legal criteria as to how the balance should be struck between free speech and personal privacy. It would therefore make little difference as far as the courts are concerned, because it would necessarily remain their task to weigh and balance the public interest in particular cases. As at present, it would have to comply with the Convention criteria on the right to free expression and the right to respect for personal privacy and the striking of a fair balance between these competing rights.

*d. Should Parliament prescribe the definition of ‘public interest’ in statute, or should it be left to the courts?*

*e. Is the current definition of ‘public interest’ inadequate or unclear?*

31. Context is everything. It is difficult to envisage how a definition of public interest might be drafted with sufficient precision to assist the courts and others, except by prescribing a non-exhaustive list of relevant factors to be considered in determining where the public interest lies in any particular circumstances.

32. The Government recently considered whether a statutory definition of public interest would be desirable in relation to the *responsible journalism* defence in the Draft Defamation Bill. Rejecting the possibility the Consultation Paper stated:

*“We believe that this is a concept which is well-established in the English common law and that in view of the very wide range of matters which are of public interest and the sensitivity of this to factual circumstances, attempting to define it in statute would be fraught with problems. Such*

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<sup>217</sup> Culture, Media and Sport Select Committee, *Privacy and media intrusion, Replies to the Committee’s Fifth Report of Session 2002-03*, First Special Report of Session 2003-4, HC 213, paragraph 2.3

<sup>218</sup> Culture Media and Sport Committee, *Privacy and media intrusions*, Fifth Report of Session 2002-03, HC 458-I, paragraph 53

<sup>219</sup> Paragraph 67

*problems include the risk of missing matters which are of public interest resulting in too narrow a defence and the risk of this proving a magnet for satellite litigation adding to costs in relation to libel proceedings.”<sup>220</sup>*

33. This conclusion was endorsed by the Mawhinney Report.<sup>221</sup>

*f. Should the commercial viability of the press be a public interest consideration to be balanced against an individual’s right to privacy?*

34. Lord Bingham explained that:

*“In a modern, developed society it is only a small minority of citizens who can participate directly in the discussions and decisions which shape the public life of that society. The majority can participate only indirectly, by exercising their rights as citizens to vote, express their opinions, make representations to the authorities, form pressure groups and so on. But the majority cannot participate in the public life of their society in these ways if they are not alerted to and informed about matters which call or may call for consideration and action. It is very largely through the media, including of course the press, that they will be so alerted and informed. The proper functioning of a modern, participatory democracy requires that the media be free, active, professional and inquiring. For this reason the courts, here and elsewhere, have recognised the cardinal importance of press freedom and the need for any restriction on that freedom to be proportionate and no more than is necessary to promote the legitimate object of the restriction.”<sup>222</sup>*

35. The commercial viability of the press is obviously very important, since the media are the eyes and ears of the public and act as public watchdog in exposing abuses of power and anti-social malpractice. The commercial viability of the press is vital to enable the public to be well informed, as is the need for media plurality and protection against undue concentrations of media ownership or restrictive practices. The right to freedom of expression and communication of information and opinions is not served by a monopoly of views or a monopoly of methods of delivery, whether by the print media or the electronic media.

36. In his recent speech on press freedom, Lord Judge LCJ recalled that:

*“There can be no independent press if the independent press cannot survive in the marketplace. The different newspapers have to sell, and they sell in greater or lesser numbers as the public chooses to buy the product. And as the public chooses to buy, so the advertisers will pay for advertising space. Whether we call it choice, or competition, we need a press which responds to the demands of everyone who buys newspapers. And of course, it is part of the exercise of our own constitutional freedoms that we should*

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<sup>220</sup> Draft Defamation Bill Consultation, March 2011, CP3/11, Ministry of Justice, paragraph 13

<sup>221</sup> Draft Defamation Bill Report, Session 2010-2012, HL Paper 203, HC 930-1, page 8

<sup>222</sup> *McCartan Turkington Breen v Times newspapers Ltd* [2001] 2 AC 277 (HL), at 290G-91A

*be able to choose for ourselves the newspapers we buy and read. We are not cut from identical cloth.”*<sup>223</sup>

37. Commercial survival is vital, but the pursuit of profit and commercial viability cannot of course justify what would otherwise be unwarranted media intrusion upon an individual’s personal privacy. But recent Supreme Court cases rightly acknowledge the important role of editorial judgment in deciding how best to engage the interest of readers and so encourage a viable press. Lord Hope recalled that the Strasbourg Court had observed that:

*“[I]t was not for it, nor for the national courts for that matter, to substitute their own views for those of the press as to what technique of reporting should be adopted by journalists. It recalled that article 10 protects not only the substance of the ideas and information expressed but also the form in which they are conveyed”.*<sup>224</sup>

38. Similarly, Lord Rodger noted that:

*“The judges are recognising editors know best about how to present material in a way that will interest the readers of their particular publication and so help them to absorb the information. A requirement to report it in some austere, abstract form, devoid of much of human interest, could well mean that the report would not be read and the information would not be passed on. Ultimately, such an approach could threaten the viability of newspapers and magazines, which can only inform the public if they attract enough readers and make enough money to survive.”*<sup>225</sup>

*g. Should it be the case that individuals waive some or all of their right to privacy when they become a celebrity? A politician? A sports person?*

*Should it depend on the degree to which that individual uses their image or private life for popularity? For money? To get elected? Does the image the individual relies on have to relate to the information published in order for there to be a public interest in publishing it (a ‘hypocrisy’ argument)? If so, how directly?*

*h. Should any or all individuals in the public eye be considered to be ‘role models’ such that their private lives may be subject to enhanced public scrutiny regardless of whether or not they make public their views on morality or personal conduct (i.e. in the absence of a ‘hypocrisy’ argument)?*

39. It is well-recognised in Convention and English case law that, in view of the role played by politicians in a democratic society, the limits of acceptable criticism of such persons are wider than with respect to private individuals. It is also well-recognised that the limits are wider as regards public figures who knowingly and inevitably expose themselves to public scrutiny, such as elected politicians or prominent business men

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<sup>223</sup> The Rt Hon the Lord Judge, Lord Chief Justice of England and Wales, 13<sup>th</sup> Annual Justice Lecture, *Press Regulation*, 19 October 2011

<sup>224</sup> *In re BBC* [2009] 3 WLR 142, at [25], referring to *Jersild v Denmark* (1994) 19 EHRR 1

<sup>225</sup> *In re Guardian News and Media* [2010] 2 AC 697, at [63]-[64]

who are actively involved in the affairs of a large public company.<sup>226</sup> As Baroness Hale stated:

*“The free exchange of information and ideas on matters relevant to the organisation of the economic, social and political life of the country is crucial to any democracy. Without this, it can scarcely be called a democracy at all. This includes revealing information about public figures, especially those in elective office, which would otherwise be private but is relevant to their participation in public life.”*<sup>227</sup>

40. In *Mosley v MGN*<sup>228</sup> Eady J explained that it is not possible to make

*“[B]road generalisations of the kind to which the media often resorted in the past, such as ... ‘Public figures must expect to have less privacy’ or ‘People in positions of responsibility must be seen as ‘role models’ and set us all an example of how to live upstanding lives’. Sometimes factors of this kind have a role to play when the ‘ultimate balancing exercise’ comes to be carried out, but generalisations can never be determinative. In every case ‘it all depends’.”*<sup>229</sup>

41. For example in *Campbell*, Lord Carswell concluded that the publication of facts that would otherwise be regarded as confidential information was justified on the basis that Naomi Campbell was :

*“[a] well-known figure who courts rather than shuns publicity, described as a role model for other young women, who had consistently lied about her drug addiction and compared herself favourably with others in the fashion business who were regular users of drugs. By these actions she had forfeited the protection to which she would otherwise have been entitled and made the information about her addiction and treatment a matter of legitimate public comment on which the press were entitled to put the record straight.”*<sup>230</sup>

42. In *Ferdinand*, Nichol J concluded that it was not a matter for the court to decide whether the captain of the England football team, or presumably anyone else, was or should be seen to be a role model, but rather whether the publication contributed to a public debate on the matter:

*“The captain of England’s football team, for a substantial body of the public, would come comfortably within [a list of those from whom higher standards were expected].”*<sup>231</sup>

43. The case law illustrates the wide variety of factual circumstances and the importance of the specific context in the particular case.

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<sup>226</sup> E.g., *Lingens v Austria* (1986) 8 EHRR 407, at [42]; *Fayed v United Kingdom* (1994) 18 EHRR 393, at [75].

<sup>227</sup> *Campbell v MGN* [2004] UKHL 22, at [148]

<sup>228</sup> [2008] EWHC 1777 (QB)

<sup>229</sup> [12]

<sup>230</sup> *Campbell v MGN Ltd* [2004] UKHL 22

<sup>231</sup> *Ferdinand v MGN* [2011] EWHC 2454(QB) at [90]



*i. Are the courts giving appropriate weight to the value of freedom of expression in ‘celebrity gossip’ and ‘tittle-tattle’?*

*j. In the context of sexual conduct, should it be the case that a person’s conduct in private must constitute a significant breach of the criminal law before it may be disclosed and criticised in the press?*

44. The Strasbourg Court has explained that:

*“[T]here is a distinction to be drawn between reporting facts – even if controversial – capable of contributing to a debate of general public interest in a democratic society, and making tawdry allegations about an individual’s private life . . . . In respect of the former, the pre-eminent role of the press in a democracy and its duty to act as a ‘public watchdog’ are important considerations in favour of a narrow construction of any limitations on freedom of expression. However, different considerations apply to press reports concentrating on sensational and, at times, lurid news, intended to titillate and entertain, which are aimed at satisfying the curiosity of a particular readership regarding aspects of a person’s strictly private life. Such reporting does not attract the robust protection of Article 10 afforded to the press. As a consequence, in such cases, freedom of expression requires a more narrow interpretation.”<sup>232</sup>*

45. Nichol J recently stated in *Ferdinand*:

*“Freedom of expression applies to banal and trivial expression as well as matters of public interest, but that right has to be balanced against the rights of others to protect their privacy, the extent to which the content is of public interest or contributes to a debate of general interest assumes a much greater importance. Indeed, the contribution which the publication makes to a debate of general public interest is the decisive factor in deciding where the balance falls between Article 8 and Article 10.”<sup>233</sup>*

46. In *Terry*, Tugendhat J stated that when determining whether there is a public interest in the exposure of conduct, it is not for the court to express a view on such matters, rather what matters is whether there is some level of public debate on the issue:

*“There is much public debate as to what conduct is or is not socially harmful. Not all conduct that is socially harmful is unlawful . . . . The fact that conduct is private and lawful is not, of itself, conclusive of the question whether or not it is in the public interest that it be discouraged. There is no suggestion that the conduct in the present case ought to be unlawful or that any editor would ever suggest that it should be. But in a plural society there will be some who would suggest that it ought to be discouraged . . . . Freedom to live as one chooses is one of the most valuable freedoms. But so is the freedom to criticise (within the limits of the law) the conduct of*

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<sup>232</sup> *Mosley* [114]

<sup>233</sup> [62]

*other members of society as being socially harmful, or wrong. Both the law and what are and are not acceptable standards of behaviour have changed very considerably over the years, particularly in the last half century or so. During that time these changes ... [have] been achieved as a result of public discussion and criticism of those engaged in what were, at the time, lawful activities.”*

47. Again, it is not possible to prescribe general rules to apply to particular categories of information. Where the balance falls between the different interests depends upon the context and particular circumstances.

*k. Could different remedies (other than damages) play a role in encouraging an appropriate balance?*

48. An account of the profits is available as a discretionary remedy, and may sometimes play a role in achieving an appropriate balance.
49. As regards injunctive relief, the fundamental principle in defamation cases is that, where the defendant undertakes to prove the truth of the libel, injunctive relief will be granted only where the claimant can show that the plea of justification is bound to fail.<sup>234</sup> Injunctions may be granted to restrain the publication of confidential information, based on the principle that damages are unlikely to be an adequate remedy, or that if relief is not granted, there will be no confidence in the material by the time of the trial.<sup>235</sup>
50. Injunctions may also be granted to restrain wrongful invasions of personal privacy, but they require a very high level of justification because of their impact upon freedom of expression. The Strasbourg Court has emphasised the particular dangers inherent in prior restraints and the need for particular scrutiny by the courts of such measures, given that as far as the press is concerned news is a perishable commodity, and to delay its publication even for a short period may well deprive it of all value and interest.<sup>236</sup> Where the information is not intimate and is more in the nature of a commercial interest, the rule against prior restraint should apply to applications for injunctive relief based on a threatened invasion of personal privacy.
51. The Court of Appeal has rejected an attempt to lower the threshold for the granting of injunctions in defamation cases in light of the Human Rights Act.<sup>237</sup> The Court was prepared to accept that reputation was protected by Article 8, but concluded that such rights are protected under English law by the trial process. They could not be given great weight before the trial of the action, compared with the importance of the freedom of the press to report matters of public interest. This was because section 12(3) of the Human Rights Act had been inserted specifically to protect freedom of expression and Parliament could not be taken to have intended the enactment to abrogate existing common law rights.

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<sup>234</sup> *Bonnard v Perryman* [1891] 2 Ch 269, 284.

<sup>235</sup> *Attorney-General v Newspaper Publishing Ltd* [1988] Ch 333, at 358, *per* Sir John Donaldson MR.

<sup>236</sup> *Observer and Guardian v United Kingdom* (1991) 14 EHRR 153, at [60]

<sup>237</sup> *Greene v Associated Newspapers Limited* [2005] QB 972

52. This approach has been followed in privacy cases where the claimant's main concern is protection of reputation. For example in *Terry Tugendhat J* refused to grant an injunction on the basis that:

*“[T]he nub of the applicant’s complaint is to protect [LNS’s] reputation, in particular with sponsors, and so ... the rule in *Bonnard v Perryman* precludes the grant of an injunction; and ... in any event damages would be an adequate remedy for LNS.”*<sup>238</sup>

*l. Are damages a sufficient remedy for a breach of privacy? Would punitive financial penalties be an effective remedy? Would they adequately deter disproportionate breaches of privacy?*

53. In *Mosley*, the Strasbourg Court considered the use of punitive financial penalties as a means of enforcing a pre-notification requirement, and concluded that this would:

*“[R]un the risk of being incompatible with the requirements of Article 10 of the Convention. [The court] reiterates in this regard the need to take particular care when examining restraints which might operate as a form of censorship prior to publication. It is satisfied that the threat of ... punitive fines would create a chilling effect which would be felt within the spheres of political reporting and investigative journalism, both of which attract a high level of protection under the convention.”*<sup>239</sup>

54. There are a number of principled objections to the use of punitive damages which apply beyond the context of claims for breach of privacy. As *Eady J* pointed out in *Mosley*:

*“It is trite knowledge that punitive damages are anomalous in civil litigation in a number of respects. First, they bring the notion of punishment into civil litigation when damages are usually supposed to be about compensation. Secondly, the defendant’s means can be taken into account because these damages are in some ways analogous to a fine ... Thirdly, despite that, every such sum awarded goes not to the state itself, as is the case with a fine, but to the claimant in the litigation. It represents to that extent a windfall.*

[...]

*“I therefore rule that exemplary damages are not admissible in a claim for infringement of privacy, since there is no existing authority ... to justify such an extension and, indeed, it would fail the tests of necessity and proportionality.”*<sup>240</sup>

*m. Should we introduce a prior notification requirement, requiring newspapers and other print media to notify an individual before information is published, thereby giving the individual time to seek an injunction if a court agrees the publication is more likely than not to be found a breach of privacy? If*

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<sup>238</sup> [149]

<sup>239</sup> [129]

<sup>240</sup> [194]-[197]

*so, how would such a requirement function in terms of written content online eg blogs and other media?*

55. The Strasbourg Court rightly decided in *Mosley* that such a requirement would give rise to an unjustified chilling effect on legitimate journalism and would in any case be ineffective because of the generally acknowledged need for a public interest exception.<sup>241</sup>
  56. The fundamental objection to a duty to give prior notice is the same, whether it is imposed by statute law, the common law, or a professional code. The objection is that such a general duty involves a sweepingly broad prior restraint that would chill freedom of expression.
  57. There is wide consensus among the great majority of Convention States, and in the wider common law world (eg., Australia, Canada, New Zealand, South Africa, the UK and the USA) against the imposition of a duty of this kind, because of the importance of freedom of expression. This is in contrast with former Soviet bloc States. For example, Article 49 of the ‘Russian Statute on the Mass Media’ provides, as regards the Duties of Journalists, that “*The journalist shall be obliged to obtain the consent of a private citizen or his lawful representatives (except where it is necessary to protect public interests) to the spread in a mass medium of information about his private life.*” Similar provisions are to be found in the laws of Albania, Azerbaijan, Latvia, Moldova, Poland and Ukraine, requiring prior notice, at least where the public interest is not implicated.
- n. Should aggravated damages be payable if a media publisher does not give prior notification to the subject of a publication which a court finds is in breach of that individual’s privacy?*
58. The Culture, Media and Sport Committee suggested that it would be “*appropriate to encourage editors and journalists to notify in advance the subject of a critical story*” when assessing damages, subject to a public interest exception, by amending the Civil Procedure Rules to make failure to pre-notify an aggravating factor.<sup>242</sup>
  59. The Strasbourg Court commented in *Mosley* that the conduct of the newspaper was “*open to severe criticism*”<sup>243</sup> and took “*note of the recommendation of the Select Committee that the Editors’ Code be amended to include a requirement that journalists should normally notify the subject of their articles prior to publication*”.<sup>244</sup>
  60. However, the Court also noted the availability of “*aggravated damages where additional features or the intrusion or the defendant’s post publication conduct makes the original injury worse.*”<sup>245</sup>
  61. In the current state of the law, the court may take into account the absence of prior notification when assessing damages. The Civil Procedure Rules could perhaps be amended to make this clear.

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<sup>241</sup> [132]

<sup>242</sup> Paragraph 93

<sup>243</sup> [130]

<sup>244</sup> [131]

<sup>245</sup> [41]

*o. Is section 12 of the Human Rights Act 1998 appropriately balanced? Should the media's freedom of expression be protected in stronger terms? Or is there a disproportionate emphasis on the media's freedom of expression over the right to privacy? Has Section 12 of the Human Rights Act 1998 ensured a more favourable press environment than would be the case if Strasbourg jurisprudence and UK injunctions jurisprudence were applied in the absence of Section 12?*

62. Section 12 was included in the Human Rights Act 1998 so as to set a higher threshold for the granting of interlocutory injunctions in privacy cases in recognition of the dangers of prior restraint for freedom of expression.<sup>246</sup>

63. The following guidance on the application of section 12 was given by the House of Lords in *Cream Holdings v Banerjee*:<sup>247</sup>

*“There can be no single, rigid standard governing all applications for interim restraint orders. Rather, on its proper construction the effect of section 12(3) is that the court is not to make an interim restraint order unless satisfied the applicant's prospects of success at the trial are sufficiently favourable to justify such an order being made in the particular circumstances of the case. As to what degree of likelihood makes the prospects of success ‘sufficiently favourable’, the general approach should be that courts will be exceedingly slow to make interim restraint orders where the applicant has not satisfied the court he will probably (‘more likely than not’) succeed at the trial. In general, that should be the threshold an applicant must cross before the court embarks on exercising its discretion, duly taking into account the relevant jurisprudence on article 10 and any countervailing Convention rights. But there will be cases where it is necessary for a court to depart from this general approach and a lesser degree of likelihood will suffice as a prerequisite.”<sup>248</sup>*

64. The Culture, Media and Sport Committee considered the operation of section 12 in practice, and concluded that:

*“Without appropriate data on injunctions we are unable to come to definitive conclusions about the operation of section 12 of the Human Rights Act, nor do we believe that the Ministry of Justice can effectively assess its impact.”<sup>249</sup>*

65. The Neuberger Report endorsed this conclusion and the need for empirical data, albeit with the proviso that data would need to be “scrutinised in the wider context of the nature of the substantive law and the claims involved.”<sup>250</sup>

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<sup>246</sup> “... the provision (HRA s12) is intended overall to ensure ex parte injunctions are granted only in exceptional circumstances.... we expect that injunctions will continue to be rare, as they are at present.” The Rt Hon Jack Straw MP, HC Hansard, 02 July 1998, col 535.

<sup>247</sup> [2004] UKHL 44; [2004] 1 AC 253

<sup>248</sup> [22]

<sup>249</sup> Paragraph 37

<sup>250</sup> Paragraph 4.8

p. Is the test in section 12 for an injunction to be granted too high a threshold? Should that test depend on the type of information about to be published? Has the court struck the right balance in applying section 12?

66. The threshold for the granting of injunctions in cases involving freedom of expression is not too high. It reflects the Strasbourg Court's statement of principle in *Spycatcher* that:

*"The dangers inherent in prior restraints are such that they call for the most careful scrutiny on the part of the court. This is especially so as 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 its value and interest."*

67. The requirement in section 12 that the court have regard to the extent to which it would be in the public interest, together with the guidance in *Cream Holdings v Banerjee*, mean that the test is already applied according to the context of the type of information about to be published.

68. For example, in *John Terry (LNS) v Persons Unknown*<sup>251</sup>, Tugendhat J discharged an earlier injunction, having concluded that damages would be an adequate remedy in the circumstances of the case:

*"This is not a case where, on the evidence before me, the potential adverse consequences are particularly grave. On the evidence, ... I do not think it likely that [John Terry] regards as particularly sensitive information of the kind that is sought to be protected."*

q. Is there an anomaly requiring legislative attention between the tests for an injunction for breach of privacy and in defamation?

69. There is no anomaly requiring legislative attention, for the reasons given in answer to the previous questions.

### **(3) Issues relating to the enforcement of anonymity injunctions and super-injunctions, including the internet, cross-border jurisdiction within the United Kingdom, parliamentary privilege and the rule of law**

e (i) With regard to the enforcement of privacy injunctions and the breach of them during parliamentary proceedings, is there a case for reforming the Parliamentary Papers Act 1840 and other aspects of Parliamentary privilege? Should this be addressed by a specific Parliamentary Privilege Bill or is it desirable for this Committee to consider privilege to the extent it is relevant to injunctions?

70. Article 9 of the 1689 Bill of Rights ensures that neither the Crown nor the courts can interfere with the business of Parliament. Consequently there is no question that a super-injunction or any court order could extend to Parliament or restrict Parliamentary debate or proceedings. As the report of the 1999 Joint Committee on

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<sup>251</sup> [2010] EWHC 119

Parliamentary Privileges stated that “*in the case of court injunctions restraining publicity: these bind the media but not either House.*”<sup>252</sup> However, as the Companion to the Standing Orders and Guide to the Proceedings of the House of Lords states: “*The privilege of freedom of speech in Parliament places a corresponding duty on members to use the freedom responsibly. This is the basis of the sub judice rule. Under the rule both Houses abstain from discussing the merits of disputes about to be tried and decided in the courts of law.*”<sup>253</sup>

71. It is important that *sub judice* rules are applied in practice to “*avoid any possible interference with the administration of justice*”.<sup>254</sup> Their purpose is to strike the balance between Parliament’s constitutional duty and role and the constitutional role of the courts.
72. The Neuberger Report<sup>255</sup> makes clear that, although there is no question that a super-injunction or any court order could extend to Parliament or restrict Parliamentary debate or proceedings, the position in relation to media reporting is less clear.
73. In general, media reporting of the proceedings of Parliament would not appear to come within the protection of the Parliamentary Papers Act 1840 because it does not simply reprint copies of *Hansard* or amount to summaries of *Hansard* or parliamentary proceedings so they may not attract qualified privilege. When media reporting of Parliamentary proceedings does not attract qualified privilege, it is unclear whether it would be protected at common law from contempt proceedings if it breached a court order.
74. The Neuberger Committee concluded that:

*“[it] appears to be an open question whether, and to what extent, the common law protects media reporting of Parliamentary proceedings where such reporting appears to breach the terms of a court order and is not covered by the protection provided by the 1840 Act. What is clear is that unfettered reporting of Parliamentary proceedings (in apparent breach of court orders) has not been established as a clear right.”*<sup>256</sup>
75. The Committee are invited to adopt the recommendations by the Mawhinney Report<sup>257</sup> that the Defamation Bill to be introduced by the Government should include provisions in the forthcoming Defamation Bill which provide the press with “*a clear and unfettered right to report on what is said in Parliament and with the protection of absolute privilege for any such report which is fair and accurate*” as well as “*protecting all forms of communication between constituents and their MP (acting in his or her official capacity as an MP) by qualified privilege.*”
76. The Mawhinney Report expressed concern at the time which would elapse before a Parliamentary Privilege Bill would be introduced and enacted, and therefore

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<sup>252</sup> Report of the Joint Committee on Parliamentary Privileges, chaired by Lord Nicholls of Birkenhead, First Report, HL 43-1 / HC 214-1, paragraph 204

<sup>253</sup> Companion to the Standing Orders and Guide to the Proceedings of the House of Lords, 2010, p.73 paragraph 4.60.

<sup>254</sup> Lord Judge, 2009, quoted at paragraph 6.8 of the Neuberger Report

<sup>255</sup> Report of the Neuberger Committee, p76, paragraph 6.33

<sup>256</sup> Report of the Neuberger Committee, p76, paragraph 6.33

<sup>257</sup> HL Paper 203, HC 930-1, 19 October 2011, paragraphs 51-2

recommended urgent legislative action by means of the forthcoming Defamation Bill.<sup>258</sup> It is to be hoped that the Committee will reach a similar conclusion.

(ii) *Should Parliament consider enforcing ‘proper’ use of Parliamentary Privilege through penalties for ‘abuse’?*

77. The Bill of Rights 1689 forbids the impeachment or questioning of parliamentary debates and proceedings “*in any court or place out of Parlyament*”. Parliament in return has made it a rule that it will not interfere with the decisions of the courts. Each House already possesses the inherent power to discipline its members and both disciplinary and penal powers are applicable to Members and non-Members.<sup>259</sup>
78. Both Houses of Parliament have Codes of Conduct which are overseen by independent Commissioners investigating breaches. These investigations are then submitted to the Select Committee on Standards and Privileges and the Sub-Committee on Lords’ Conduct, respectively. The Codes of Conduct relate to the general behaviour of Members and Peers and include the registration of financial interests.
79. The *sub judice* rules for both Houses are contained in resolutions. In both Houses, the *sub judice* rules prohibit the discussion of active criminal proceedings and active civil proceedings including any application made in civil proceedings, such as an injunction. Active appellate proceedings are also covered.
80. Proceedings in the House of Commons are overseen by the Speaker. The Speaker can call Members to order, order Members to resume their seat or ask Members to leave the Chamber. Persistent disregard for the Standing Orders can lead to the Member being named by the Speaker. This is followed by a motion for suspension moved by the Government. The Serjeant at Arms can forcibly remove a Member who refuses to withdraw and the ultimate penalty available against Members is expulsion.<sup>260</sup>
81. Proceedings in the House of Lords are overseen by the Lords Speaker. Peers can be suspended temporarily which can last until Parliament is dissolved.<sup>261</sup>
82. The Lords Committee on Privileges has found that the writ of summons issued to each Peer contains the implied condition that Peers must respect the rules of the House. The House must, therefore, possess the powers necessary to enforce its rules.<sup>262</sup>
83. Since both Houses have the inherent power to discipline their Members, the means by which they decide to exercise this power fall within the regulation of the Houses of their own procedures. Either House could, therefore, create additional disciplinary sanctions.

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<sup>258</sup> HL Paper 203, HC 930-1, October 2011, paragraph 50

<sup>259</sup> Joint Committee on Parliamentary Privilege, First Report, HL 43-1 / HC 214-1, paragraph 262

<sup>260</sup> House of Commons, Factsheet G6, Disciplinary and Penal Powers of the House, September 2010

<sup>261</sup> House of Lords, Companion to the Standing Orders and Guide to the Proceedings of the House of Lords, 2010

<sup>262</sup> House of Lords Privileges Committee, First Report, The Powers of the House of Lords in respect of its Members, HL 87, paragraph 6



(iii) *What is the ‘proper’ use and what is ‘abuse’ of Parliamentary Privilege?*

84. In *R v Chaytor*,<sup>263</sup> the Court of Appeal concluded that, in relation to the activities of an MP, parliamentary privilege is confined to speaking in Parliament, participation in the work of Committees, and activities closely connected to those core functions.
85. An ‘abuse’ of Parliamentary Privilege amounts to a contempt of Parliament. Erskine May defines this broadly as:

*“[A]ny act or omission which obstructs or impedes either House in the performance of its functions, or which obstructs or impedes any Member or officer of the House in the discharge of his duty, or which has a tendency to produce such a result, may be treated as a contempt (or abuse) even if there is no precedent for the offence.”*<sup>264</sup>

86. In deciding whether or not to proceed against someone against whom a charge of contempt has been made, the House of Commons has particular regard to their resolution of February 1978 that such action should be taken only when the House is satisfied that to do so is in the interests of reasonable protection against obstruction causing or likely to cause substantial interference with its functions.<sup>265</sup>
87. The Commons Committee of Privileges has advised that parliamentary privilege does not protect those who may volunteer information of public concern to Members in their personal capacity. However, the position of someone providing information to a member in connection with the exercise of his or her parliamentary duties has in some instances been regarded as enjoying qualified parliamentary privilege at common law.<sup>266</sup>
88. It is important that *sub judice* rules are applied by the Speakers of both Houses to avoid an abuse of parliamentary privilege and the breach of the well-established constitutional principle that Parliament will not interfere with the courts and the courts will not interfere with parliamentary proceedings. On the other hand, too expansive an interpretation of the *sub judice* rules would diminish the effectiveness of the work of parliamentary committees, such as the Joint Committee on Human Rights,<sup>267</sup> since it would mean that the courts should refrain from having regard to relevant committee reports to avoid any “questioning” of Parliamentary proceedings.

(iv) *Is it desirable to address the situation whereby a Member of either House breaches an injunction using Parliamentary Privilege using privacy law, or is that a situation best left entirely to Parliament to deal with?*

*Indeed, is it possible to address the situation through privacy law or is that constitutionally impermissible?*

*Could the current position in this respect be changed in any significant way? If so, how?*

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<sup>263</sup> *R v David Chaytor (1), Elliot Morley (2), James Devine (3), Lord Hanningfield (4)* [2010] EWCA Crim 1910

<sup>264</sup> 23<sup>rd</sup> edition, 2004, p128 (referring to the Report of the Select Committee on the Official Secrets Act 1938-1939)

<sup>265</sup> Halsbury's Laws, (5th ed 2010), Vol. 78, "Parliament", paragraph 1083

<sup>266</sup> *Ibid.*, paragraph 1089

<sup>267</sup> The author serves as a member of that Committee

89. The effect of Article 9 of the Bill of Rights 1689 is that an injunction or court order cannot extend to Parliamentary debate or proceedings, so the issue here is not the breach of an injunction or court order by a Member of either House, it is the breaching of the *sub judice* rules. These exist to strike the balance in accordance with the separation of powers between Parliament and the independent judiciary in a democracy governed by the rule of law.
90. If an MP or Peer could be prosecuted via a newly-fashioned privacy law for the breach of an injunction this would erode the principle of absolute parliamentary privilege protected by Article 9 of the Bill of Rights. It would be more appropriate to make effective use of the House's disciplinary and penal procedures when an MP or Peer flouts the *sub judice* rules. Both Houses possess the inherent power to discipline their members and therefore to create effective sanctions for breach of the Standing Orders or Resolutions.
91. The Joint Committee on Parliamentary Privilege suggested that the House of Commons should take to itself the power to fine Members for contempt. This would be an extension of the principle of financial penalty which is already inherent in the suspension of a Member.<sup>268</sup> They also recommended that the House of Lords' power to fine Peers should be confirmed.<sup>269</sup>
92. These are matters that are better left to Parliament in clarifying and enforcing the disciplinary powers of each House rather than via legislation.

#### **(4) Issues relating to media regulation in this context, including the role of the Press Complaints Commission and the Office of Communications (OFCOM)**

##### **PCC**

*a. Do the guidelines in section 3 of the Editors' Code of Practice correctly address the balance between the individual's right to privacy and press freedom of expression?*

93. The guidelines in section 3 of the Editors' Code set out the basic right to respect for privacy in similar terms to Article 8 ECHR. Section 3 includes the ruling of the European Court of Human Rights in *Von Hannover*<sup>270</sup> that public individuals have a right to privacy when in public in places where there is a reasonable expectation of privacy, and also requires editors to justify an interference with any individual's private life without their consent.
94. These provisions must be read together with the definition of public interest set out by the Editors' Code which provides an exception to the Section 3 rules. Public interest is defined as including but not limited to: "i) *detecting or exposing crime or serious impropriety; ii) protecting public health and safety; iii) preventing the public from being misled by an action or statement of an individual or organisation.*"<sup>271</sup> This last aspect – preventing the public from being misled by an action or statement of an individual or organisation

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<sup>268</sup> Joint Committee on Parliamentary Privilege, First Report, 30 March 1999, HL 43-I / HC 214-I, paragraph 279

<sup>269</sup> *Ibid.*

<sup>270</sup> *Von Hannover v. Germany*, Application no. 59320/00, (2005) 40 EHRR 1

<sup>271</sup> Editors' Code of Practice available at: [http://www.pcc.org.uk/assets/111/Code\\_of\\_Practice\\_2011\\_A4.pdf](http://www.pcc.org.uk/assets/111/Code_of_Practice_2011_A4.pdf)

– has been circumscribed by the courts, notably in *Campbell v MGN*<sup>272</sup> and *MGN v UK*<sup>273</sup> where it was held that only the core facts necessary to correct a misleading statement are within the public interest.

95. The Editors' Code therefore correctly requires editors to balance the individual's right to respect for personal privacy with the public interest in publishing information and opinions about the individual. The Editors' Code also requires editors, whenever the public interest is invoked, *"to demonstrate fully that they reasonably believed that publication, or journalistic activity undertaken with a view to publication, would be in the public interest."* Section 3 combined with the Editors' Code's provisions on the public interest require the same sort of objective balancing exercise between privacy and freedom of expression as is undertaken by the courts.

*b. How effective has the PCC been in dealing with bad behaviour from the press in relation to injunctions and breaches of privacy?*

*c. Does the PCC have sufficient powers to provide remedies for breaches of the Editors' Code of Practice in relation to privacy complaints?*

96. In his recent speech on press freedom, Lord Judge LCJ made observations which deserve to be quoted fully, and with which the author respectfully agrees. He said:<sup>274</sup>

*"Whatever means of regulation are designed to reduce the occasions of unacceptable behaviour by elements of the press they must not simultaneously, even if accidentally, diminish or dilute the ability and power of the press to reveal and highlight true public scandals or misconduct ....*

*"The Press Complaints Commission is now 20 years old. Not long after its 10th Birthday the Media Committee of the House of Commons pointed out that the PCC has neither authority nor resources 'other than what is ceded voluntarily to it by the press industry'. Membership is not obligatory. The Commission has no investigative power. In reality it has no disciplinary power. When it works, as most of the time it does, it is because the press itself is prepared to comply with its rulings, not because it is under legal compulsion to do so. Its main role, and I do not seek to diminish it with faint praise, is to provide a sort of ombudsman/mediation service between the newspaper and an individual group which is aggrieved by an article. It cannot award compensation. To criticise the PCC for failing to exercise powers it does not have is rather like criticising a judge who passes what appears to be a lenient sentence, when his power to pass a longer sentence is curtailed.*

*"Nevertheless the PCC has been subjected to a number of criticisms.... Even if they are fully justified, the criticisms of themselves do not automatically exclude self-regulation or a form of self-regulation in the*

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<sup>272</sup> *Campbell v MGN Limited* [2004] UKHL 22

<sup>273</sup> *MGN Limited v. The United Kingdom* (Application no. 39401/04), 18 January 2011

<sup>274</sup> The Rt Hon the Lord Judge, Lord Chief Justice of England and Wales, 13th Annual Justice Lecture, *Press Regulation*, 19 October 2011

*future. In other words, it does not follow that we should jump from the present system to government regulation or regulation by a government appointed body which would give ultimate power to government. I hasten to add that I will be equally unenthusiastic about regulatory control in the hands of the judiciary....*

*“We must remember, that whatever lies ahead, the ordinary law of the land will continue. Crime will be crime. Injunctive relief where appropriate, with alleged breaches of any Code should be available to be deployed in argument in support of the application. Contempt of court powers will remain. So will liability to damage for breach of confidence and defamation.*

*“May I offer just a few thoughts very brief on how the PCC might be strengthened. What should be its new powers? Perhaps the first question is whether it should continue to be called the PCC. Is the brand's name too damaged? I shall call it an improved PCC, by which I mean a more powerful body. It is immediately attractive to suggest all sorts of controlling and disciplinary powers being vested in the new body – that it must not be a toothless tiger. But we need to be careful. There is no point in a toothless tiger, but the concept of giving what would in effect be censorship and licensing powers over a constituent part of the press to a body vested with responsibilities for the whole of the press should set alarm bells ringing. And the problems would be aggravated by the fact that in a self regulatory body, at least some of the members will be editors of rival competing newspapers, and this might then call into question the fairness of any such adjudicating system. Should the body have power to prevent publication, or should its role be limited to remedies for publication outwith the Code?*

*“The first responsibility of the new PCC would be, of course, to continue the conciliatory/mediation work which is so successfully carried now. But consideration would have to be given to whether it would be vested with power to make express findings that the code then current had been broken, and if so to direct the terms of any apology or appropriate article in the offending newspaper, and if the power is granted, to make an order for compensation. Two further points. The new PCC – that is the new body currently in my contemplation in any new system of self-regulation - must be all inclusive. You might perhaps be willing to discount a news sheet circulated to about 25 people, but any national or regional paper would have to be included. In short any new PCC would require to have whatever authority is given to it over the entire newspaper industry, not on a self-selecting number of newspapers.*

*“The final point for mention ... is the issue of the appointment of the membership of the new regulatory body. I suggest that the sensible approach would be to avoid all government involvement in the process. The choice of members and their removal should similarly be independent of government. Again the structures would arise for discussion. There are a very large number of bodies operating in the public interest which are independent of government. One example is the Bar Standards Board. Another is the Judicial Appointments Commission. It is, of course essential*

*to the way in which any of this may work that the membership should include a significant number of editors, and/or representatives of the newspaper industry as well as what I shall describe as ‘civilians’. All I am saying is that structures like these are not beyond the realm of achievement.”*

97. The PCC’s present remedy for breaches of the privacy provisions of the Editors’ Code is limited to the power to require the publication of a critical ruling “*with due prominence*”. The PCC says this “*is a serious outcome for any editor and puts down a marker for future press behaviour.*” The PCC does not have the power to fine newspapers or order the payment of damages, nor does it have the power to prevent publication.<sup>275</sup>
98. The courts have indicated, in the context of section 12 of the Human Rights Act, that a newspaper which flouts the Press Complaints Commission’s Code on privacy is likely to find that its claim to free speech is outweighed by privacy considerations. That important incentive should, in the author’s view, be strengthened in libel cases by including in the forthcoming Defamation Bill, a provision making compliance with a professional code a relevant factor in determining whether a given publication is in the public interest.
99. It would also be desirable for the PCC to be able to make direct findings of breaches of the Code and to direct the offending publisher to display the finding prominently. However, a power to require an apology would not be sensible. An apology must be sincere rather than coerced.
100. It would be very problematic to introduce a power to fine or to award damages, for two main reasons. First, the existence of such a power would be likely to deter publishers who might otherwise be willing to become bound by the PCC’s Code and the exercise of the PCC’s powers. Secondly, a power to fine or award damages would involve the determination of civil rights and obligations within the meaning of Article 6(1) of the European Convention on Human Rights, and would have to be exercised or reviewed by a body satisfying the Article 6 (1) requirement of being an independent and impartial court or tribunal.
- d. Should the PCC be able to initiate its own investigations on behalf of someone whose privacy may have been infringed by something published in a newspaper or magazine in the UK?*
101. If the power to investigate is understood in this context to mean a power to engage with the publisher to resolve or examine a complaint, then the existence of such a power is necessary for the effective functioning of the PCC. But the PCC’s powers should not be extended to those given to the police service, including powers of search and seizure. Police powers are subject to statutory and common law safeguards. It would be incompatible with a system of voluntary self-regulation to entrust the PCC with coercive powers.
102. The PCC currently has the power to conduct an investigation only where there is a complaint. The power is exercised by requesting a response to from the editor. In the

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<sup>275</sup> PCC guidance, Making a Complaint, available at: <http://www.pcc.org.uk/complaints/makingacomplaint.html>

author's opinion, the PCC should have the power to initiate its own inquiries on behalf of someone whose privacy may have been infringed. It should also have the power to inquire and report on compliance with its Code generally, and not only in individual cases.

*e. Should the PCC have the power to consider the balance between an individual's privacy and freedom of expression prior to the publication of material – or should this power remain with the Courts?*

103. The European Court of Human Rights has ruled that damages are a sufficient remedy for breaches of privacy,<sup>276</sup> and that a pre-notification regime is not required to protect the right to privacy even where it is clear that the publication in question had no public interest.<sup>277</sup>

104. If an assessment undertaken prior to the publication of material involved a power to restrain publication, it would amount to a prior restraint on freedom of expression and communication, and a determination of the publisher's civil right to freedom of expression. It would have to be exercised by a body satisfying the Article 6 requirement of being an independent and impartial court or tribunal. Even if that were feasible in practice, it would replicate the function of the ordinary courts in granting injunctive relief. In principle the power should remain with the courts, and any pre-publication role for the PCC should be purely advisory.

*f. Is there sufficient awareness in the general public of the powers and responsibilities of the PCC in the context of privacy and injunctions?*

105. It appears that, of the over 3,000 complaints to the PCC since 1 January 2011, 61 have been privacy complaints. Of those, 56 cases were resolved without the need for adjudication. Of the five adjudicated cases, three were upheld.<sup>278</sup>

106. In 2010 there were over 6,000 complaints to the PCC of which 534 were resolved, 18 upheld on adjudication and 22 not upheld upon adjudication. Of these over 6,000 complaints, 389 were privacy complaints and, of those, six were upheld on adjudication and eight were not upheld on adjudication.<sup>279</sup>

107. It is a matter of speculation whether these statistics indicate a lack of sufficient general awareness of the PCC's role in relation to privacy concerns, or an awareness that the PCC lacks the power to provide effective remedies.

## **OFCOM**

*g. Do the guidelines in Section 8 of the Ofcom Broadcasting Code correctly address the balance between the individual's right to privacy and freedom of expression?*

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<sup>276</sup> *Von Hannover v Germany*, Application 59320/00, (2005) 40 EHRR 1.

<sup>277</sup> *Mosley v United Kingdom*, Application no. 48009/08, 10 May 2011. A request by Mr Mosley to refer the case to the Grand Chamber has since been refused.

<sup>278</sup> An analysis of the PCC 'Cases' site indicates that there were 3,239 complaints between 1 January 2011 and 23 September 2011. Of those 388 were resolved without an adjudication, 15 were upheld on adjudication and eight were not upheld on adjudication, see <http://www.pcc.org.uk/cases/index.html>

<sup>279</sup> Further analysis and aggregation of the PCC's monthly statistics for 2010 show that there were 6,122 complaints overall: <http://www.pcc.org.uk/cases/monthlysummaries.html>

108. In the author's opinion, the answer is in the affirmative.
109. The guidelines set out at Section 8 of the Broadcasting Code are based on the "warranted" principle:

*"[A]ny infringement of privacy in programmes, or in connection with obtaining material included in programmes, must be warranted."*<sup>280</sup>

110. The Broadcasting Code defines the meaning of "warranted" as follows:

*"In this section "warranted" has a particular meaning. It means that where broadcasters wish to justify an infringement of privacy as warranted, they should be able to demonstrate why in the particular circumstances of the case, it is warranted. If the reason is that it is in the public interest, then the broadcaster should be able to demonstrate that the public interest outweighs the right to privacy. Examples of public interest would include revealing or detecting crime, protecting public health or safety, exposing misleading claims made by individuals or organisations or disclosing incompetence that affects the public."*

111. The Broadcasting Code correctly recognises, in accordance with Convention criteria, that individuals can have a legitimate expectation of privacy even in public places, and it requires broadcasters to obtain the informed consent of individuals or organisations before their privacy is infringed by the making or the broadcast of a programme.
112. The Broadcasting Code defines key terms, such as "vulnerable people", and sections on how broadcasters should act in particular situations, for example, how broadcasters should treat individuals who are suffering or in distress. It is more detailed than the Editors' Code, while allowing broadcasters to justify alleged infringements of privacy. The Broadcasting Code encourages broadcasters to carry out their own balancing of privacy and freedom of expression.
113. Under the terms of their broadcast licences, broadcasters must abide by the provisions of the Broadcasting Code. It is rare that Ofcom penalises infringements of the right to personal privacy with anything more than publication of its adjudication in the Broadcast Bulletin, but Ofcom has the power to direct the broadcaster to broadcast a summary of its findings in exceptional cases, and, in very exceptional and serious cases, Ofcom may consider imposing a statutory sanction such as a fine upon the broadcaster.<sup>281</sup>
114. Ofcom's Procedures for the consideration and adjudication of Fairness & Privacy complaints<sup>282</sup> state that complaints must first be made through the broadcaster's own complaints procedure. Only if the complainant is not satisfied with the response is Ofcom's complaints procedure brought into play.

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<sup>280</sup> Rule 8.1 Broadcasting Code

<sup>281</sup> Ofcom, Consumers, Advice & Complaints, TV and Radio, A specific programme complaint, A specific programme: <https://stakeholders.ofcom.org.uk/tell-us/specific-programme-advice-3>

<sup>282</sup> Procedures for the consideration and adjudication of Fairness & Privacy complaints, 1 June 2011: <http://stakeholders.ofcom.org.uk/broadcasting/guidance/complaints-sanctions/fairness/>

115. Ofcom's published decisions show a sophisticated analysis of whether or not the right to privacy is engaged, whether it has been infringed and then whether or not the infringement was justified and proportionate. This is very similar to the analysis conducted by the courts. The Section 8 regime correctly addresses the balance between privacy and freedom of expression.

*h. How effective has Ofcom been in dealing with breaches of the Ofcom Broadcasting Code in relation to breaches of privacy?*

*i. Is there a case that the rules on infringement of privacy should be applied equally across all media content?*

116. The 'rules' (perhaps better described as principles) on infringement of privacy do apply equally across all media content by virtue of the Human Rights Act and the obligations imposed upon public authorities (including the courts, Ofcom and (indirectly) the PCC) by the Convention. However, the way in which those principles are applied differs as between the electronic and printing media.

117. To apply a uniform system of regulation to the electronic and printing media would involve a failure to recognise and respect the differences between them. The electronic media, unlike the print media, are licensed under statutory regimes derived from EU as well as domestic legislation.

118. Freedom of the press is an ancient civil liberty based on the principle of an unlicensed press. That principle has been upheld in this country ever since the abolition of the Court of Star Chamber in 1641. The electronic media require a system of licensing and regulation. To treat the print and electronic media alike by imposing a common statutory regime upon them would be oppressive and in violation of the freedom of the press.



## Lewis Silkin LLP—Written evidence

A new joint committee has been appointed by both Houses of Parliament to consider privacy and injunctions. The Joint Committee comprises 13 MPs and 13 Peers. It will take oral and written evidence and make recommendations in a report to both Houses. The Joint Committee invites interested organisations and individuals to submit written evidence as part of the inquiry.

The Joint Committee would welcome written submissions on all or any of the following questions:

**(1) How the statutory and common law on privacy and the use of anonymity injunctions and super-injunctions has operated in practice**

- a. *Have anonymous injunctions and super-injunctions been used too frequently, not enough or in the wrong circumstances?*

**Anonymous injunctions and super injunctions have not been used too frequently or not enough but on occasions they appear to have been used in the wrong circumstances. Certainly in the year 2011 the perception by many is that injunctions have been used by footballers to protect their privacy in circumstances where perhaps such protection is not justified.**

- b. *Are the courts making appropriate use of time limitations to injunctions and of injunctions contra mundum (i.e. injunctions which are binding on the whole world) and how are such injunctions working in practice?*

**On the whole the Courts are making appropriate use of time limitations on injunctions and injunctions contra mundum and in practice injunctions work save for the increasing concern as to the enforceability of injunctions with the ease in which they can be broken on the internet or by the social media, eg. Twitter.**

- c. *What can be done about the cost of obtaining a privacy injunction? Whilst individuals the subject of widespread and persistent media coverage often have the financial means to pursue injunctions, could a cheaper mechanism be created allowing those without similar financial resources access to the same legal protection?*

**The costs of obtaining a privacy injunction are high but then all litigation is costly and has become more costly.**

**An indemnity as to legal costs and the payment of the successful claimant's costs in full would at least provide a welcome protection for the litigant in knowing that if successful his costs can be recovered in full. It is difficult to imagine a cheaper mechanism than the one that presently exists but certainly with regard to the conditional fee arrangement it is to be hoped that a solution can be found to the sever reduction in the success fee so that access to justice is not denied to those who are unable to finance an application for an injunction where justice demands that they should be so able.**

- d. Are injunctions and appeals regarding injunctions being dealt with by the courts sufficiently quickly to minimise either (where the injunction is granted or upheld) prolonged unjustifiable distress for the individual or (where an injunction is overturned or not granted) the risk of news losing its current topical value?

**Injunctions and appeals regarding injunctions are being dealt with by the Courts reasonably quickly and the evidence appears to be that applicants are protected so that a newspaper cannot profit and indeed be punished by a failure to give an undertaking. In particularly serious circumstances where the publication of private information could have disastrous consequences eg. the threat of suicide or some other seriously damaging effect of a breach of a court injunction then there should of course be punishment in place similar to contempt of court which of course is there at the moment by way of a penalty available to the courts.**

- e. Should steps be taken to penalise newspapers which refuse to give an undertaking not to publish private information but also make no attempt to defend an application for an injunction in respect of that information, thereby wasting the court's time?

**(2) How best to strike the balance between privacy and freedom of expression, in particular how best to determine whether there is a public interest in material concerning people's private and family life**

- a. Have there been and are there currently any problems with the balance struck in law between freedom of expression and the right to privacy?  
**The media perceive there to be a problem but the balancing exercise carried out by the Courts works.**
- b. Who should decide where the balance between freedom of expression and the right to privacy lies?  
**The Courts.**
- c. Should Parliament enact a statutory privacy law?  
**No as it would introduce inflexibility where there needs to be flexibility and add to legal costs in seeking interpretation.**
- d. Should Parliament prescribe the definition of 'public interest' in statute, or should it be left to the courts?  
**No, the Courts have developed a definition.**
- e. Is the current definition of 'public interest' inadequate or unclear?  
**The current definition of "public interest" is adequate and reasonably clear. Public interest is a term that necessarily needs to be adapted according to those who go out of their way to seek publicity must expect their right to privacy to be restricted. However, any individual however much they seek publicity must still have certain areas of their life to which they retain a right to privacy. The hypocrisy argument – one which was recently debated in a case brought by the footballer Rio Ferdinand – is one which continually tests the courts. The public interest does have to be balanced**

**according to the role held by the individual in question and balanced out with his right to privacy and the hypocrisy that may be involved – eg having an affair with another individual.**

- f. Should the commercial viability of the press be a public interest consideration to be balanced against an individual's right to privacy?  
**Absolutely not. Privacy should be divorced from the financial state of the press which should be irrelevant to the right of privacy. To allow this to be a consideration would be to add a third stage to the two stage test.**
- g. Should it be the case that individuals waive some or all of their right to privacy when they become a celebrity? A politician? A sportsperson? Should it depend on the degree to which that individual uses their image or private life for popularity? For money? To get elected? Does the image the individual relies on have to relate to the information published in order for there to be a public interest in publishing it (a 'hypocrisy' argument)? If so, how directly?  
**All individuals have rights of privacy. Those in the public eye necessarily sacrifice some of them but never all. The circumstances in which public interest arises must depend on the particular facts in the particular case.**
- h. Should any or all individuals in the public eye be considered to be 'role models' such that their private lives may be subject to enhanced public scrutiny regardless of whether or not they make public their views on morality or personal conduct (i.e. in the absence of a 'hypocrisy' argument)?  
**Whether or not an individual in the public eye is a “role model” must depend on the facts of a particular case and the particular facts in that case since it may expose hypocrisy and may undermine the public faith in the individual in question who may in public be saying one thing and in private be doing something completely the opposite of that position. So hypocrisy and morality do play a part in a decision and should play a part in any decision of the court. There is a morality and/or hypocrisy argument should be one which reflects the public perception of the individual in question as opposed to the judge's personal perception. This was discussed at length in A v B, C & D 2005 EMLR851.**
- i. Are the courts giving appropriate weight to the value of freedom of expression in 'celebrity gossip' and 'tittle-tattle'?  
**The courts should not give other than minimum weight to the value of freedom of expression where it is expressed as celebrity gossips and tittle-tattle. The danger of doing so is to undermine and to downgrade the value of evidence and to cheapen the importance of an individual's right to privacy.**
- j. In the context of sexual conduct, should it be the case that a person's conduct in private must constitute a significant breach of the criminal law before it may be disclosed and criticised in the press?  
**B In the context of sexual conduct whilst it may not be necessary for there to be a significant breach of the criminal law before it may be disclosed and criticised in the press the disclosure of an individual's private life vis Mosley – is one that must be justified and be in the public interest. In the Mosley**

**case it was clear that the News of the World were involved in a “sting” on Mr Mosley and that what they published was an attempt to in fact destroy the individual by highlighting something that he did entirely in private and consensually, which was not criminal.**

- k. Could different remedies (other than damages) play a role in encouraging an appropriate balance?

**In privacy actions the most appropriate remedy for the applicant is to avoid publication thereby avoiding a breach of his privacy. Damages are never really an appropriate remedy since once the privacy has been breached the damage has been done. It is therefore desirable to consider all possible means of preventing the breach of privacy taking place hence the importance of the injunctive relief open to an individual facing a breach of privacy.**

- l. Are damages a sufficient remedy for a breach of privacy? Would punitive financial penalties be an effective remedy? Would they adequately deter disproportionate breaches of privacy?

**Damages are not a sufficient remedy for a breach of privacy unless they are substantial in the case of a serious breach. In the Mosley case the financial penalties may well have been ten times greater. Had they been then it would certainly have dissuaded the press. The difficulty is finding a balance between on the one hand protecting the privacy of the individual and also protecting in general the principle of freedom of expression and not destroying the press by making over stringent damage awards. So whilst there has to be a balance between a right of privacy and the right to freedom of expression there similarly has to be a balance in considering the level of damages that should be awarded. Again, it depends on the facts of the case.**

- m. Should we introduce a prior notification requirement, requiring newspapers and other print media to notify an individual before information is published, thereby giving the individual time to seek an injunction if a court agrees the publication is more likely than not to be found a breach of privacy? If so, how would such a requirement function in terms of written content online eg blogs and other media?

**The prior notification requirement whilst attractive in principle simply would not work in practice since it would have the effect of assisting those of malign intent where a newspaper would be obliged to forewarn such individuals or companies who were going to be acting in manner which and would enable them to apply for an injunction to prevent publicity to their inappropriate conduct. For that reason the European court were correct to refuse Mr Mosley for prior application requirement.**

- n. Should aggravated damages be payable if a media publisher does not give prior notification to the subject of a publication which a court finds is in breach of that individual's privacy?

**Aggravated damages should be available for award against a media publisher where his conduct is such where it would be appropriate give the serious breach of privacy for such an award to be made. The discretion is**

**already there for the court to take into account the conduct of the media publisher and it is not necessary for there to be any new law on the subject.**

- o. Is section 12 of the Human Rights Act 1998 appropriately balanced? Should the media's freedom of expression be protected in stronger terms? Or is there a disproportionate emphasis on the media's freedom of expression over the right to privacy? Has Section 12 of the Human Rights Act 1998 ensured a more favourable press environment than would be the case if Strasbourg jurisprudence and UK injunctions jurisprudence were applied in the absence of Section 12?

**Section 12 of the Human Rights Act insofar as it gives special consideration to protecting freedom of expression is appropriately balanced and it is not necessary to protect in even stronger terms. There is not a disproportionate emphasis on the media's freedom of expression over the right of privacy and in all Section 12 benefits freedom of expression and is an appropriate section which should remain.**

- p. Is the test in section 12 for an injunction to be granted too high a threshold? Should that test depend on the type of information about to be published? Has the court struck the right balance in applying section 12?

**The test for an injunction is not too high a threshold and the precedents that exist show that it has been applied successfully and fairly in the circumstances of most of the injunctions that come before the court.**

- q. Is there an anomaly requiring legislative attention between the tests for an injunction for breach of privacy and in defamation?

**There is no anomaly. In defamation, if the allegations are true, no injunction can be obtained. In privacy, truth is not the issue.**

**(3) Issues relating to the enforcement of anonymity injunctions and super-injunctions, including the internet, cross-border jurisdiction within the United Kingdom, parliamentary privilege and the rule of law**

- a. How can privacy injunctions be enforced in this age of 'new media'? Is it practical and/or desirable to prosecute 'tweeters' or bloggers? If so, for what kind of behaviour and how many people - where should or could those lines be drawn?

**The question as to whether privacy injunctions can be enforced in the age of "new media" applies to any form of injunction and it is a very real problem. The internet is largely uncontrolled which means that those who wish to breach an injunction can do so anonymously and hide behind the cloak of the internet service provider. This reality does mean that our courts must be vigilant in prosecuting tweeters and bloggers and those who are in contempt of court. This happened recently in relation to a number of super injunctions where the identity of the applicant was disclosed on the internet, in particular with regard to a well known footballer. The attorney general must be prompt in taking action so that there is a real deterrent to anybody seeking to breach an injunction by the knowledge that they will be prosecuted.**

- b. *Is it possible, practical and/or desirable for print media to be restrained by the law when other forms of 'new media' will cover material subject to an injunction anyway? Does the status quo of seeking to restrict press intrusion into individual's private lives whilst the 'new media' users remain unchallenged represent a good compromise?*

**Again the difficulty of new media covering material that print media would cover but not be subject to the same penalties is a matter which needs to be addressed. It is unfair for new media to be able to resist application for restrictions and injunctions when print media have no such option. This is especially so in the light of the fact that the print media is in decline whereas the new media is in ascendance.**

- c. *Is enough being done to tackle 'jigsaw' identification by the press and 'new media' users? For example see Mr Justice King's provisional view in NEJv. Wood [2011] EWHC 1972 (QB) at [20] that information published in the Daily Mail breached the order of Mr Justice Blake, and the consideration by Mr Justice Tugendhat in TSE and ELP v. News Group Newspapers [2011] EWHC 1308 (QB) at [33]-[34] as to whether details about TSE published by The Sun breached the order of Mrs Justice Sharp.*

**Jigsaw identification is but one of the difficulties that the courts must consider. Again, given that the internet is virtually uncontrolled the only way that the courts can deal with this is to have some form of immediate action taken by the attorney or the courts to ensure that penalties are given for conduct which amounts to a breach so that the press and new media are left in no doubt that with regard to jigsaw identification or other efforts to undermine the efficacy of an injunction are punished.**

- d. *Are there any concerns regarding enforcement of privacy injunctions across jurisdictional borders within the UK? If so, how should those concerns be dealt with?*

**The question of enforcement of privacy injunctions across jurisdictional borders within the UK remains a problem especially in relation to Scotland. This is a problem that can and must be addressed by the Courts in the respective jurisdictions so that there can be consistency in the application of the law of the different jurisdictions.**

- e. **PARLIAMENTARY PRIVILEGE:**

- i. *With regard to the enforcement of privacy injunctions and the breaching of them during Parliamentary proceedings, is there a case for reforming the Parliamentary Papers Act 1840 and other aspects of Parliamentary privilege? Should this be addressed by a specific Parliamentary Privilege Bill or is it desirable for this Committee to consider privilege to the extent it is relevant to injunctions?*

**No**

- ii. *Should Parliament consider enforcing 'proper' use of Parliamentary Privilege through penalties for 'abuse'?*

**No**

- iii. *What is 'proper' use and what is 'abuse' of Parliamentary Privilege?*

**Abuse of parliamentary privilege is where the "abuser" is using parliamentary privilege as an excuse to obtain a political advantage as opposed to using the occasion to promote a genuine grievance.**

- iv. *Is it desirable to address the situation whereby a Member of either house breaches an injunction using Parliamentary Privilege using privacy law, or is that a*

situation best left entirely to Parliament to deal with? Indeed, is it possible to address the situation through privacy law or is that constitutionally impermissible? Could the current position in this respect be changed in any significant way? If so, how?

**No. It is not sufficiently significant to require any further action to be taken whilst there have been a number of examples of breaches of parliamentary privilege during this year in connection with privacy cases they do not justify any further action to be taken given their rarity and because in the circumstances of some of the cases there was subsequently proved to be some justification in the breach that took place.**

**(4) Issues relating to media regulation in this context, including the role of the Press Complaints Commission and the Office of Communications (OFCOM)**

**PCC**

- a. Do the guidelines in section 3 of the Editors' Code of Practice correctly address the balance between the individual's right to privacy and press freedom of expression?  
**The guidelines in section 3 of the PCC code in large measure reflects the test that is applied in our courts. The difficult that the PCC and the courts face is in the interpretation of the "reasonable expectation of privacy" and those breaches that take place in public as opposed to private places.**
- b. How effective has the PCC been in dealing with bad behaviour from the press in relation to injunctions and breaches of privacy?  
**The PCC has not been effective in dealing with bad behaviour from the press because PCC is in large measure controlled by many members of the press who are adjudicators and because the PCC do not have the powers that they should have to deal with bad behaviour by the press.**
- c. Does the PCC have sufficient powers to provide remedies for breaches of the Editors' Code of Practice in relation to privacy complaints?  
**The PCC does not have sufficient power to provide remedies for breaches because it has no power to fine and no power to investigate. Nor does it have the power to demand a front page apology. On the other hand Ofcom which is a statutory body does have such powers and is seen to be more effective.**
- d. Should the PCC be able to initiate its own investigations on behalf of someone whose privacy may have been infringed by something published in a newspaper or magazine in the UK?  
**The PCC should be able to initiate investigations without interfering with the court's primary role of .....**
- e. Should the PCC have the power to consider the balance between an individual's privacy and freedom of expression prior to the publication of material - or should this power remain with the Courts? **It does already in limited respects.**
- f. Is there sufficient awareness in the general public of the powers and responsibilities of the PCC in the context of privacy and injunctions? **No.**

OFCOM

- g. *Do the guidelines in Section 8 of the Ofcom Broadcasting Code correctly address the balance between the individual's right to privacy and freedom of expression? **Yes***
- h. *How effective has Ofcom been in dealing with breaches of the Ofcom Broadcasting Code in relation to breaches of privacy? **Ofcom has in general been regarded as much more effective than the PCC.***
- i. *Is there a case that the rules on infringement of privacy should be applied equally across all media content? **Yes***

## SUMMARY AND OVERVIEW

There is little doubt that over the last year the law relating to privacy and injunctions has come under close scrutiny and in some respects been adjudged as failing to protect the rights of freedom of expression encapsulated in Article 10 of the European Convention on Human Rights, as incorporated in the Human Rights Act 1998.

However, on analysis, the criticism is both unfair and unjustified. The balancing exercise that must be carried out between Articles 8 (privacy) and Article 10 is a good one and the protection afforded by Section 12 of the Act with regard to the consideration to freedom of expression prior to granting any injunction is an important protection to the media. This year has been testing, given the number of injunctions sought by a particular section of society – footballers. Mistakes may have been made as is inevitable in relation to any balancing exercise which a court makes. However, we believe that there is no need to amend the existing law and that the development of the law of privacy in the courts is far preferable to the introduction of any statute by Parliament. There has now been built up a very important precedent by the Courts. They have also been able to reflect the changing mores that exists in our society. There is therefore a flexibility which would not be present if there were legislation. Legislation would also lead to a considerable amount of further litigation over interpretation of whatever law might be introduced.

Similarly, it is for the Courts to decide what is in the public interest. This they have done for many years and they have developed the test to be carried out in an efficacious way. The Press Complaints Commission must clearly be subject to radical overhaul in order for it to be effective but it is not necessary for it to be dismantled given that the code itself is useful and worthy. It is the lack of power and teeth which makes the PCC ineffectual.

There is no statistical evidence to show that the awarding of injunctions and super injunctions is excessive and/or an unfair restriction on freedom of expression.

There is abundant evidence that the cost of injunctions continues to increase. This is in part due to the introduction of further requirements on an applicant prior to making an application for relief. This is no bad thing but unfortunately there is no way of alleviating the cost, though there is surely a strong argument that a successful applicant should be awarded indemnity costs.

Finally, and importantly, from a practical point of view and in order to speed up the process, we believe that it is desirable that there be specialist media judges who should be responsible for dealing with privacy injunctions and the like. This would mean that only experienced media judges would be hearing applications as opposed to the current



procedure whereby it is simply who may be available. If this were done, we believe injunctions could be heard more quickly and fewer mistakes might be made.

In conclusion, the current system works, it does not need radical change but there are always areas where improvements can be made.

13 October 2011

Alastair Machray, Editor, *Liverpool Echo*, Richard Walker, Editor, *Sunday Herald*, John McLellan, Editor, *The Scotsman*, Matt McKenzie, Editor, *The Sunday Sun*, and Neil Fowler, Nuffield College, Oxford—Oral evidence (QQ 210–272)

**Alastair Machray, Editor, *Liverpool Echo*, Richard Walker, Editor, *Sunday Herald*, John McLellan, Editor, *The Scotsman*, Matt McKenzie, Editor, *The Sunday Sun*, and Neil Fowler, Nuffield College, Oxford—Oral evidence (QQ 210–272)**

[Transcript to be found under Richard Walker, Editor, \*Sunday Herald\*](#)

## Mr Andrew Marr—Written evidence

### I. The Background

The facts are these. In early 2008 I sought and obtained an injunction to prevent the publication of details of an affair I had had seven years before. This followed a late-night call to my wife by a newspaper gossip columnist.

I did not take out the injunction to preserve my job or because I was worried about the effect of the story on my reputation. At the time of the original story, I had told the BBC about it and offered my resignation: everybody I was close to had known the story long before. Nor was it the case that the other person involved wanted or had sought publicity. Rather, I had school-age children who had been badly upset by the original affair and were now very worried about a wave of publicity and the new hurt that would cause, reopening wounds in the family that had begun to heal.

I felt that what I had done, which had caused great damage to the family at the time, was nobody else's business. Had I campaigned about moral issues, I would have been a fair target as a hypocrite. Had I sought publicity for my family, using them to improve my standing in the world of television, the same would have applied. I had not.

There is a view, forcibly expressed, that because I earn my salary by interviewing others, and have asked intrusive (sometimes rude) questions, I was a fair target. A reasonable point - the only reasonable point against my use of an injunction.

My view is that I have only asked questions which were legitimate and reasonable, of politicians whose public power put them in a different position from private citizens. I had not tried gratuitously to probe other people's private lives, or set myself up as a moral campaigner. When other journalists tried to produce lists of my "intrusions" they seemed to me - admittedly not a neutral observer - to be pretty thin stuff. Asking the former prime minister Gordon Brown whether he took prescription drugs may not have been my finest hour, but hardly warranted a complete loss of any legal rights I might have had to privacy.

More broadly, I do not think that simply "being on television" should put one in a different category from other people. That completely confuses the public's interest and "the public interest". (If anyone in any kind of public role is therefore fair game, newspaper journalists are presumably drawn in too. This is a terrible prospect from which the moral sensibilities of the nation might never recover.)

This, I hope, explains the injunction. There are two further questions it does not explain. First, why a so-called "super-injunction"? Second, why did I then surrender the injunction under pressure from *Private Eye* and others?

The super-injunction arrived, as I understand it, for one reason only, which is that the newspaper habit of jigsaw identification was destroying any law of privacy very fast. The juxtaposition of a court story, a headline and a picture or two led to the stories being made completely clear almost at once. I think any honest editor would admit this. This, in turn, led to the claim that the story was already in the public domain and the swift collapse of

remaining legal protection. The ban on describing injunctions, originating in the family division, was the result. It is not a happy one; but it was a defensive measure.

This leads to the abandonment of the injunction by myself in 2011. On several occasions *Private Eye* had asked to see private papers, or to report the edges of the case and each time, I had shrugged and agreed, while insisting the full story remain private.

By 2011, several things had changed. The first and most important was that the issue of super-injunctions had become increasingly controversial. I do not know whether more had been granted than before, but I was as concerned as anyone else about their spread from family cases to commercial ones. If there was a hunt on to “out” people who had them, then to me the whole purpose was becoming ridiculous. Finally, time had moved on and some healing had happened. I had never intended the injunction to be permanent. It was a useful emotional plaster at a very traumatic time, not permanent plastic surgery.

I therefore decided not to try to return to court to re-establish any right I had to privacy and instead to let events take their course. That said, I still think the story I was involved in was a private one, and ought to have remained so. It isn't something I have talked about since, or intend to.

## **2. Thoughts about the wider issue.**

I believe there ought to be a right to privacy. I think it is important that there is a human space behind the front door where people can live, speak and act without being generally observed. To put it another way, most of us need a private space as well as a public space.

Some people do not agree. They would be happy to broadcast the most intimate details of their lives – and indeed many do, particularly younger people, on social networking sites. I am afraid some will live to regret it. But most people, if challenged to speak out about their personal and financial lives in great detail, will quite quickly quail.

If there should be a right to privacy, who should be included, and who should be exempted? The principles ought to be that invading someone's privacy is acceptable if it tells us something which affects their public role, and therefore their effect on the rest of us. It could be that they have been breaking the law; or have some habit or secret so time-consuming or destructive that they cannot be trusted to fulfill their public function, or which exposes them as an egregious hypocrite. In sum, loss of a right to privacy ought to be a matter of how people behave, not who they are. Being famous is not enough.

I suspect most people would go along with the argument thus far. The problem is, these are such bland and general thoughts they do not help much with individual cases, including mine. The exact nature of a footballer's moral authority, or whether a political journalist can do his job if he has behaved badly, or whatever, are individual judgements. In the end, they cannot be legislated on but must be heard and tested, and therefore will end up in court.

I have always argued that the proper place for the principles to be thoroughly aired and clarified as much as possible, is Parliament. *Private Eye* used this against me in the injunction argument because it asserted I had used judge-made law. In fact the enactment of the Human Rights Act was preceded by parliamentary debate, and at some length; but I agree that this is a matter too important and delicate for Parliament to leave it all to judges. I think further

Mr Andrew Marr—Written evidence

clarification of the law is essential. Other ways of preventing jigsaw identification (perhaps by agreement with editors) and the stricter definition of privacy should limit the number of such injunctions and stop commercial organisations free-loading on decisions in the family courts.

I have no idea as to whether this would have helped or hindered my case. But either way, it needs to happen.

October 2011

## Sir William McKay—Written evidence

### *Parliamentary privilege*

1. Privilege does not insulate proceedings in Parliament from the law of the land: privilege is part of the law of the land. Its central element is encapsulated in Article IX of the Bill of Rights 1689, a re-statement of the right to freedom of speech in Parliament as part of a general assertion of the rule of law in defiance of royal autocracy. Article IX has been judicially characterised as ‘of the highest constitutional importance’.<sup>283</sup>
2. Accordingly, in the present context both the Lord Chief Justice and the Master of the Rolls were of opinion that the courts could not make any order extending to Parliament or purporting to restrict or prohibit parliamentary debate or proceedings.<sup>284</sup> Perhaps advice should be given that when an application is made for an order restraining publication of matters before a court or of the very existence of such an order, and the order does or might bear on proceedings in Parliament, the order itself should briefly indicate to parties and their advisers the limits of its scope.

### *Parliamentary Papers Act 1840, defamation and contempt*

3. The freedom of the press to report what is said in Parliament is not part of the privilege of Parliament, but an essential link in the chain between those who make law and those affected by it. The Parliamentary Papers Act 1840 at section 1 confers absolute protection from civil or criminal proceedings on any ‘report, paper, votes or proceedings’ published under the authority of either House, and so certified by the appropriate authority. Section 3 provides a defence for ‘any extract from or abstract of’ such papers if publication is in good faith and without malice.
4. The Joint Committee on Defamation recently condemned the provisions of the Act of 1840 as outdated and in need of reform.<sup>285</sup> The previous government undertook to bring the Act up to date when opportunity arose but went out of office before they could do so.
5. Although the Official Reports (Hansard) and extracts or abstracts are (to differing degrees) protected, the kind of reports of proceedings found daily in the media are not. The Master of the Rolls thought it an ‘open question’ whether publication in the media of a report of proceedings in Parliament which had the effect of frustrating an injunction would be held to be in good faith and without malice and so protected by the 1840 Act.

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<sup>283</sup> It is however worth pointing out however that the Bill of Rights was not intended as a timeless statement of principles but was a collection of grievances in need of redress, in the case of article IX including the prosecution in King’s Bench of Speaker Sir William Williams for licensing by order of the House the publication of a pamphlet critical of James Duke of York and Albany. Hence many subsequent problems of interpretation.

<sup>284</sup> *Judiciary of England and Wales*, Statement by the Lord Chief Justice 20 October 2009; Committee on Super-Injunctions May 2011, paragraph 6.8.

<sup>285</sup> HL 203 HC 930-I (2010-2012) paragraph 51.

6. The media must therefore rely on the common law, and specifically on the decision in *Wason v Walter*<sup>286</sup> which protects honest, fair and accurate reporting of parliamentary proceedings. Common law protection applies in defamation proceedings, but there is evidently no case-law determining the extent of protection available to a fair and accurate report of parliamentary debates and papers in proceedings for contempt. It seems that in some circumstances media reports of parliamentary proceedings in breach of a court order would be considered to be contempt, and in others they would not. The Master of the Rolls summarised the position thus:

... unfettered reporting of parliamentary proceedings (in apparent breach of court orders) has not been established as a clear right.<sup>287</sup>

7. Reviewing this situation, the Joint Committee on Parliamentary Privilege<sup>288</sup> concluded:

if there is to be legislation, the position should sensibly be clarified in favour of the press. As the Clerks of the two Houses put it: why expose the media to criminal liability for publishing the same speech that the public can read in Hansard?

I remain of that view. Three hours after the making of a speech on the floor of the House of Commons the Hansard text is available on-line; there is live coverage on-line of floor and committee proceedings. It is difficult to see how a contempt hearing concerning a press report of proceedings could retain credibility if anyone with access to the internet could read or hear the original material. The sooner the law is comprehensively revised to take account of modern communications the better.

#### *The Houses and the courts*

8. As the Joint Committee on Parliamentary Privilege pointed out in the context of the *sub judice* rule, though the comment applies equally to the matter now under consideration:

... On the one hand, the rights of parties in legal proceedings should not be prejudiced by discussion of their case in Parliament, and Parliament should not prevent the courts from exercising their functions. On the other hand, Parliament has a constitutional right to discuss any matter it pleases.<sup>289</sup>

Conflicts between the two rights may be infrequent but they are very serious when they occur. Freedom of speech, like many other freedoms, is indivisible. The Clerk of the House has referred to Mr Enoch Powell's observation that 'there is no real distinction in this context between using and abusing privilege, or if there is it is a subjective decision.' Perfect reconciliation of the demands of Parliament and the courts, both equally absolute, has proved impossible. Perhaps a practical approach might be more productive, not diminishing the absolute character of freedom of speech in Parliament but doing what is possible to ensure that parliamentary freedoms do not come into conflict with the impartial administration of justice either

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<sup>286</sup> (1868) 4QB 73. Presumably s 15 of and schedule 1 to the Defamation Act 1996 would also be relevant.

<sup>287</sup> Committee on Super-Injunctions paragraphs 6.25, 6.28, 6.30 and 6.34.

<sup>288</sup> HL 43-I, HC 214-I (1998-99) paragraphs 364-5.

<sup>289</sup> *ibid* paragraph 191.

inadvertently or without the most serious parliamentary consideration of the consequences.

9. The Houses' existing *sub judice* rules will apply to interim injunctions at times when proceedings are active. They will not apply to inactive proceedings or super-injunctions, those which may in the interests of justice include provisions for party anonymity and a prohibition on disclosing the fact of the substantive order and proceedings.<sup>290</sup> Obviously parliamentary officials need to be aware of the status of vulnerable proceedings in order to advise Lords and Members and so avoid unnecessary collisions between the courts and the Houses.
10. This has long been a matter of practice. Officials of both Houses contact the Ministry of Justice and HM Courts and Tribunals Service to establish whether a question or motion proposed to be tabled by a Lord or Member is *sub judice* or covered by an injunction. In chapter 5 of the report of the Committee on Super-Injunctions, the Master of the Rolls put forward suggestions to solve the more difficult issue of identifying cases where anonymised or super-injunctions have been obtained.
11. A Lord or Member of the Commons may however be unwilling to take advice that a motion or question should be redrafted or not tabled, or may be determined to raise in debate matter covered by an interim injunction not otherwise *sub judice* or the existence of a super-injunction without giving any warning of his or her intention. It did not seem practical to the Joint Committee on Parliamentary Privilege to demand that a Lord or Member who wished to raise in debate a matter covered by an injunction should seek prior clearance. It would risk bringing the Speaker into an area of acute political controversy and by practice the Lord Speaker does not rule on matters of order. Another possibility was a requirement that a Member who knowingly breached the terms of an injunction (or revealed the existence of a super-injunction) should, after the event, be required to justify his or her conduct before a committee or risk punishment for misconduct. The Joint Committee on Privilege warmed to neither approach, at any rate while the number of such cases remained small.<sup>291</sup>
12. It seems to me that the best way forward would be to add injunctions where proceedings are not active and super-injunctions to proceedings covered by the *sub judice* resolution familiar in both Houses. The *sub judice* rule is well-understood and rarely if ever deliberately flouted. Some elaboration would probably be required (for example to define when proceedings are active) but the basic framework might remain.
13. If it were anticipated that the inclusion of injunctions in the *sub judice* resolutions was not an adequate defence against abuse or – the other side of the coin – too restrictive of freedom of speech in Parliament, a Commons Member who felt it his or her parliamentary duty to raise an issue covered by an injunction might be required to make formal application to the Speaker for the exercise of his discretion under the (amended) resolution. The Joint Committee on Parliamentary Privilege (paragraph 11 above) was concerned that a procedure on similar lines might risk drawing the Speakership into the political struggle. To meet that concern, the Speaker might be

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<sup>290</sup> There is a full definition at paragraph 2.14 of the report of the Committee on Super-Injunctions.

<sup>291</sup> HL 43-I, HC 214-I (1998-99) paras 203-211.



empowered, if he so wished, to consult the Chairman and two members of the Standards and Privileges Committee before taking his decision.

14. The Clerk of the Parliaments, while accepting that a solution involving the internal procedures of the Houses was preferable to legislation, sees 'formidable difficulties' in implementing an internal solution in the upper House. I hope however that what is proposed above may, if accepted in principle, prove adaptable to the practice of the Lords.

11 December 2011

## Media Standards Trust—Written evidence

### Summary

With respect to the legislative framework for privacy, the Media Standards Trust believes:

- The current legal settlement, in which privacy protection is based on Article 8 of the European Convention on Human Rights and accessible through the UK courts through incorporation via the Human Rights Act 1998, and is balanced by the right of freedom of expression as set out by Article 10 of the Convention, is the right one
- If, however, there is shown to be genuine public concern about the state of privacy law, then Parliament should consider whether to pass a privacy statute (a ‘front-door’ privacy law) with clearly set-out public interest defences
- Privacy injunctions should only be granted when there is a clear indication of potential harm from publication – for example in the case of children
- Sanctions for privacy intrusion should be strengthened such that enforcement becomes more effective (most notably punishment for breaches of Section 55 of the Data Protection Act)
- Publication of personal private information that breaches privacy law should be liable to exemplary punitive damages, taking into account public interest defences and adherence to press self-regulation (see below)

With respect to the regulatory framework for privacy, the Media Standards Trust believes:

- The new regulatory system ought to provide an accessible means of privacy protection to the public
- It should offer a pre-publication advisory service to public and publisher (as now) on issues of personal privacy/public interest
- It should include - within the code of practice – a clause stating that news organisations should notify people prior to publication, unless there is a clear public interest reason not to. Prior notification should then be taken into account if there is subsequent action taken
- It should monitor the press for evidence of breaches of clause 3 of the Editors’ Code of Practice (on privacy)
- It should proactively investigate evidence or allegations of abuse of privacy
- It should have the power to fine newspapers and offer compensation to victims for serious breaches of privacy
- It should aim - and have mechanisms to support this - to have a learning effect on those it regulates so that repeat breaches are prevented or deterred

## PART I: THE NEED FOR PRIVACY PROTECTION

### Misguided press attacks on a 'back door privacy law'

There have been extensive, and increasingly shrill, attacks on privacy injunctions and Britain's 'back-door privacy law' by certain sections of the British press.

These reached their peak in May 2011. The attacks were focused on injunctions, and argued that:

- Current privacy protection under the law is illegitimate: e.g. 'A MARRIED Premier League ace who romped with a leggy model has become the latest star to use his wealth and power to gag The Sun... Prime Minister David Cameron has joined critics who have blasted judges for creating a privacy law by the back door.' The Sun, 14<sup>th</sup> May, 2011
- The wealthy and powerful are increasingly resorting to injunctions to gag the press: e.g. 'The rich and the famous have obtained almost 80 gagging orders in British courts in six years, blocking the publication of intimate details about their private lives' Daily Telegraph, 13<sup>th</sup> May, 2011
- There are growing calls for legal reform: e.g. 'Call for 'gag shambles' law change', Daily Mirror, 25<sup>th</sup> May, 2011
- Injunctions have been made unsustainable by technology: e.g. 'Britain's worst kept secrets: Gagging orders are branded 'pointless' as millions trawl internet for names of celebrities linked to privacy cases', Daily Mail, 10<sup>th</sup> May, 2011

These attacks are highly misleading:

- Privacy protection based on Article 8 is not illegitimate. The precedents set around Article 8 of the European Convention on Human Rights (ECHR) are not illegitimate but are based on the usual way in which common law develops, and in particular how - since the passing of the Human Rights Act (HRA) which incorporated convention rights into UK law - the common law develops in UK domestic courts. Parliament discussed the implications of Article 8 during the passage of the Human Rights Act in 1998. Our own UK judges have made decisions on cases brought under Article 8 since the Convention was incorporated into UK law in 2000, as they were expected and required to do. These decisions are carefully considered and nuanced, as can be seen in cases like *Lord Browne vs Associated Newspapers*, *Max Mosley vs NGN*, and *Rio Ferdinand vs MGN*. Some decisions have gone in favour of the claimant, and some in favour of the defendant depending on the facts. The decisions have then formed precedents.
- In most cases where a privacy injunction is granted the newspapers do not challenge them in court on the grounds of public interest.

- There are calls to change the law radically, but these have been overwhelmingly made by those within the press itself or very close to it. The headline in the Mirror, for example ('Call for 'gag shambles' law change'), came from Lord Wakeham, previously chair of the PCC and one of those who argued against such a law back in 1998. The public, when questioned, supports privacy protection (see below).
- Privacy protection is about much more than what personal information the press can and cannot gather or publish.

However, the press is right to say that we do now have, as a result of the incorporation of the Convention into British law, an increasing body of precedents (case law) around privacy.

This is not, as much of the press argues, a bad thing. It is an entirely natural development reflecting the development of common law and the disintegration of practical and cultural boundaries around privacy.

#### Technological change and the need for a privacy law

Most of the hysterical press coverage of privacy injunctions fails to acknowledge that technological changes are driving the transformation of boundaries between public and private life. Without such acknowledgment we lack the context to decide how privacy can be protected in the digital age.

In the constrained media environment of the twentieth century there were practical limitations on the press' ability to report on people's private lives. There was, for example, only a limited amount of material the press could access – in terms of photographs, video, phone conversations etc. There were also practical constraints on what the papers could and could not publish. They were not able to publish video or audio, and they could only publish as much as could fit between the front and back pages of the print paper.

For the most part these practical constraints no longer exist. The press – or anyone else – can access huge amounts of personal material themselves and through others. A reporter can legitimately find personal information published on the internet or source recorded audio/video from members of the public. Equally, a reporter can illegitimately access private material or illicitly record personal moments or private phone calls. The papers can then publish as much of this material as they like – in text, audio, or video - online. Or anyone else can publish this information, on a website, on a blog, on a social networking site like Facebook, on twitter, on a wiki.

The information can then ripple rapidly outwards across the net.

We saw, with the case of Tyler Clementi, a university student in the US, how easy it is for anyone to record people's most private moments and then publish them to the world, with tragic effects. Clementi, who had not come out as gay, was filmed in bed with another man. After the film was posted online he committed suicide.

The removal of the practical constraints necessarily means that, if we want to protect private life and maintain private space, then these practical constraints have to be replaced

with something else. Preferably this would be cultural constraints. In other words, people would recognise the line between public and private and respect that line.

Yet the press makes a living out of transgressing this line. Sometimes these transgressions are legitimate – to investigate stories of genuine public interest. Sometimes they are illegitimate – hacking into voicemail searching for gossip or breaking into personal email accounts to gather confidential police or intelligence information (as in the allegations made by Panorama against the News of the World).

Where cultural constraints do not constrain publication, people have sought legal constraints based on the European Convention on Human Rights (ECHR). These people are, in effect, saying “this is where I believe my private life begins and your right to publish ends”. It is natural that people should try to do this, and it is equally natural that journalists should question where this line should be and challenge it if it prevents public interest reporting or prevents other reporting which is not actually a breach of privacy. But it is absurd not to acknowledge the tensions between the two, as some of the papers have been doing.

The front line of the battle for legal protection of private life is sex. Sex sells. Sex between two celebrities sells even more. Therefore the idea that the sex lives of celebrities will be off limits to the press scares the living daylights out of the tabloids. It would undermine the business model that many of them have developed over the last few decades.

On rare but revealing occasions they are quite explicit about their fears. Paul Dacre, the editor of the Daily Mail, gave the best exposition of this in his speech to the Society of Editors in 2008:

‘Put another way, if mass-circulation newspapers, which also devote considerable space to reporting and analysis of public affairs, don’t have the freedom to write about scandal, I doubt whether they will retain their mass circulations with the obvious worrying implications for the democratic process.’

Mr. Dacre’s directness is helpful, if rather frightening. But generally the press is much coy about the importance of privacy intrusion to their sales. Instead, they argue that privacy injunctions are a ‘legal weapon to the wealthy seeking to hide their failings from the public’ and that the law is being used simply ‘to hush up the sordid secret of a star’ (from ‘TV star’s shame hushed up forever’, MailOnline, 21-04-11). The public, the Mail asserts, has a right to know such secrets.

Most of us would recoil at the idea of such a commercial Faustian bargain. The proposition that certain publications should be given the freedom to intrude as much as they like into people’s personal lives so they can keep selling papers would not strike most people as a fair trade.

Moreover, the public does not, according to law, have a ‘right to know’ such secrets. They do, however, have a right to privacy protection and most of them are glad of this right and do not want to give it up.

Public support for privacy protection

The majority of the public (59%) believe it is vital that people have a right to respect for privacy, family life and the home. Another 36% think it is important (ComRes Human Rights Poll, September 2011).

To be more specific still; ‘Most people still regard the following as essentially private: sex and sexuality; health; family life; personal correspondence and finance (except where public monies are concerned)’, from Whittle and Cooper, *Privacy, Probity and the Public Interest*, p.2.

At the same time, the public recognises that privacy may need to be compromised where there is a public interest. Although even in these circumstances there are red lines the public do not think the media should cross. For example, research from 2002 found that 91% of people think that ‘No matter what someone has done, the media should never involve that person’s children’ (56% agreed strongly, 35% agreed), *The Public Interest, the Media and Privacy*, David E. Morrison and Michael Svennevig (available at <http://www.ofcom.org.uk/static/archive/bsc/pdfs/research/pidoc.pdf>).

People also recognise that, if privacy is protected, then some stories will go uncovered, or at least partially uncovered. Two thirds of people think the media ought to respect people’s privacy, even if that means not covering a story fully (66% agree, 27% strongly, from Morrison and Svennevig).

The corollary of this is that the public believe some people have a greater right to privacy from media intrusion than others. Children and ordinary people, the public believe, are entitled to greater privacy, for example, than celebrities or public officials. Although there is a general acceptance that everyone ought to have a right to privacy.

At the moment, people think the media intrude on people’s private lives far too often. A 2009 Ipsos MORI poll commissioned by the MST, conducted before the phone hacking revelations came to light, found that 70% of people think ‘There are far too many instances of people’s privacy being invaded by newspaper journalists’.

Nor do the public think the decision whether to act in the public interest can be left solely in the hands of newspaper editors. In the same survey only one in ten people said they would ‘trust newspaper editors to ensure that their journalists act in the public interest’.

So concerned were the majority of people at the extent of intrusion by the press that 60% said they thought ‘The government should do more to prevent national newspaper journalists from intruding on people’s private lives’. The Media Standards Trust does not support government intervention, but does support the legal protection that now exists under Article 8 of the Convention, as long as it is supported by a more effective self-regulatory system.

#### Arguments against privacy protection driven by commercial interest

Personal private information is, for certain media outlets, a commodity that can be bought and traded. As Sharon Marshall writes in *Tabloid Girl* (2010):

‘a tabloid hack can get any information they want. On anyone. There are ways and means. Newspapers used fixers. Bloggers... There was one freelancer who was

known for being able to pull people's medical records - no-one quite knew how he did it' (p.254).

Indeed one could draw up a price list of different types of private information, based on what different outlets will offer, and what they will pay (the two often being different).

For the covert video of Max Mosley's sex session the News of the World offered £25,000 to 'Women E' (from Mosley vs NGN). To Alfie Patten, the 12-year-old 'baby father' - who turned out not to be the father - The Sun agreed to pay £25,000 for photos and a video interview - <http://www.independent.co.uk/news/uk/home-news/father-at-13-little-children-big-money-1622477.html>. The Mail on Sunday paid a reported £100,000 and £6,000 to two former partners of Brian Paddick for their 'kiss and tell' stories (<http://www.guardian.co.uk/media/2003/dec/19/mailonsunday.pressandpublishing>).

These are commercial transaction, done with commercial aims in mind. The high minded pursuit of truth or freedom of expression does not enter into the calculation.

In fact, had these transactions been regulated in a more commercial manner then the papers could well have been prosecuted for breach of contract. Each of the people involved in the first two examples was reportedly paid less than half the originally agreed amount (see court records in Mosley case and Independent report above).

What would a world without privacy protection look like?

What would happen if, as some newspapers appear to want, the right to privacy protection under Article 8 was somehow reduced or removed, or access to its protection further restricted?

For the popular press, barter and blackmail would take over. Newspapers would gather large caches of private personal information which they would then publish or trade for other information with a promise not to publish (as there is evidence to suggest the News of the World did, with its dossiers on public figures, celebrities and others such as the victims lawyers – e.g. see <http://www.guardian.co.uk/media/2011/sep/03/phone-hacking-alleged-dossier-lawyers>).

Such a world would suit the editors of the popular press and would suit traders in personal information, but would be anathema to a fair and just system, and would, in many cases, lead to the suppression of the truth rather than its exposure.

Max Clifford has spoken openly about how this barter system works in favour of one person (his client) but against the interests of another:

'With Jude Law [when he had an affair with his children's nanny] I was able to use that to do all sorts of deals for other clients of mine. I could say to an editor, I'll give you this story if you help publicise something else I'm involved with' (from Telegraph via Whittle and Cooper - <http://www.telegraph.co.uk/culture/donotmigrate/3646851/Max-Clifford-exposed.html>).

Another method is to approach a potential source of personal information and blackmail them: 'We know this already and have a source who can reveal all. Tell us or we'll do it

anyway and make you look a lot worse'. This is reportedly what happened in the coverage of Will Young, and of Stephen Gately (see Whittle/Cooper, p.22-23). It is also described by Sharon Marshall in her memoir of the contemporary tabloid newsroom (Tabloid Girl, 2010).

This system, where no rule of law exists, works in favour of those who have media power and against those who do not. Those who have power can constrain or suppress information. Rebekah Brooks, for example, was able to prevent any coverage of her wedding to Charlie Brooks, despite a guest list including the Prime Minister, the Leader of the Opposition and many senior political figures. Those who do not have that power submit or broker what they can to protect their private life.

### PART 3: What next?

Does technology mean legal privacy protection is impossible to police?

Still, no matter what the courts or this Joint Committee on Privacy do or say in these cases, it will be increasingly difficult to police privacy injunctions in the internet era. That is the irony of the press outrage about pre-publication privacy protection. The breadth of some privacy injunctions is evidence not of their power but of their powerlessness. There is a certain absurdity to an injunction 'against the world' ('contra mundum') and the papers know it.

If people want to publish they can, and it is not then hard for the rest of us to search the internet and find who celebrity X and celebrity Y are. As David Aaronovitch wrote in The Times:

'It took me 15 minutes of googling to find out who the celebrity injunctors probably were. I got the actor through (believe it or not) a lower division football club's fan site. The TV personality could be guessed through hints provided by Private Eye. The football player I discovered through sources I may not divulge'.

This is not to say that breaching such injunctions is in the public interest. As said above, in almost all cases it is not. Nor is it to accept the blatantly self-serving arguments made by the press about censorship. The popular press rarely champion free speech and use it as an argument here to disguise their real commercial interest in publication.

The future of privacy injunctions

However, laws have to be enforceable. If a law is very difficult to enforce and is broken too regularly without consequences, then that law loses credibility and its efficacy is undermined.

It is, therefore, with some reluctance that we think injunctions should only be granted in cases where there is a clear potential harm. For example if it is clear that a child could be seriously damaged by the publication of the story.

In other cases people would not lose their right to privacy; rather they would be given exemplary damages after publication.

The future of privacy law



There is no need for Parliament to pass a privacy law. The current law, based on a balance of Article 8 – the right to privacy, and Article 10 – the right to free expression, strikes the right balance (outside the specific issue of privacy injunctions).

However, if it can be shown that there is sufficient public concern with the current state of privacy law such as to undermine the proper functioning of that law, then Parliament should, we believe, consider passing a privacy law, with clearly set out public interest exemptions. Such a law could not define every circumstance, nor should it, but would set a framework upon which judgements would then create precedent (i.e. ‘judge-made law’).

The chief benefit of debating, and then potentially passing, such a law would be to give it greater democratic legitimacy. The process of arguing out, in our representative chamber, the need for all of us to have private lives, and to discuss where the lines should be, would help to create a societal consensus that does not currently appear to exist, and could deal head-on with the arguments of the popular press that privacy protection is somehow wrong. It would also help editors and journalists, for whom the lack of clarity can itself be constraining.

If, after debate, Parliament decided the UK should have its own privacy law, there is a good chance it would not be all that different from the current Article 8, balanced by Article 10. It would almost certainly, for example, recognise that everyone had a right to respect for his/her privacy. And, it would balance this with the right of people to free expression. The differences might be in the clarity of public interest defences.

#### The role of press regulation

The first thing that should be said about press regulation and privacy, whether by the PCC or another body, is that it represents a small part of the issue. Privacy is far bigger than the press and for this reason it would be myopic to focus too much on press regulation.

With this narrow focus in mind, there is certainly a place, in a reformed system of press self-regulation, for a regulatory body to play a key role, particularly if injunctions are granted in fewer cases.

Regulation ought, if effective, to be a much sharper tool than the law. It should be able to investigate and address problems before they escalate. It should be able to take meaningful, and proportionate, action quickly. It should be accessible to everyone.

It should aim – and have mechanisms to support this – to have a learning effect on those it regulates so that repeat breaches are prevented or deterred and when they occur are subjected to stronger sanction.

At the moment, the Press Complaints Commission does its best given its resources and its remit. The PCC has enhanced its pre-publication advisory service, and now sends out regular desist notices to newspapers, magazines and broadcasters. It has a 24 hour service for people who find themselves at the centre of a media scrum.

Unfortunately its resources are scarce and its remit is narrow. It does not have the power or remit to properly investigate news gathering. It is not able to ensure a quick, prominent apology for people. It is not able to offer compensation or impose sanctions for privacy invasion. It is under-equipped to prevent the breach happening again.

To be effective when it comes to privacy protection a regulator has to do six things:

- Provide clear principles of privacy protection to member organisations
- Offer the public access to pre-publication privacy protection without recourse to the law
- Offer the public access to meaningful and proportionate redress for privacy intrusion post publication
- Monitor press coverage for evidence of privacy intrusion or abuse of news gathering methods
- Proactively investigate evidence or allegations of abuse of privacy
- Have a learning effect on those it regulates so that repeat breaches are prevented or deterred and when they occur are subjected to stronger sanction

The existing Editors' Code of Practice provides relatively clear principles, based closely on Article 8 of the HRA (although the public interest defences are too broad). The PCC offers advice and some protection for individuals prior to publication via desist notices and anti-harassment calls (although the effectiveness of this needs to be examined given what we now know about the extent of press intrusion).

However, when it comes to offering meaningful or adequate redress, monitoring news gathering methodologies, or proactively investigating, the PCC is not effective.

When it comes to privacy, the most meaningful protection a regulator can provide is pre-publication. This can include:

- Offering pre-publication advice (as now). This should include an strong indication of whether publication would breach the code
- Sending out desist notices or equivalent. Similar to current practice, though such notices should carry greater weight post-publication, if a news outlet decides to go ahead and publish
- A clause in the Code on prior notification. This would then be taken into account, both by the regulator and the courts, post-publication

However, pre-publication action is hard to enforce and becoming harder. The regulator should also have stronger remedies post-publication.

Greater post publication redress would not only give the regulator more leverage pre-publication, but would be both more proportionate and more meaningful than the current mechanisms available to the PCC.

Such redress could include:

- The power to direct an apology and/or a right to reply, within a specified time frame, and with the appropriate level of prominence
- The power to direct the publication to provide compensation, taking into account the value of the privacy intrusion to the paper, and its financial means

## Media Standards Trust—Written evidence

- The power, in exceptional circumstances, to fine a newspaper (for example when widespread malpractice is discovered)
- Actual mediation (as recognised in the courts) - which often involves actual face-to-face meetings with a mediator present

To be effective the regulatory framework has to be closely integrated with the law. The injured public will, inevitably, look at the options available to them and choose the one that they believe is accessible, independent, fair, and will provide them with adequate redress.

### Privacy is so much bigger than press

Aspects of our identity are now spread far and wide. Our financial details, our shopping habits, our medical histories, our parking fines, our relationships, our holidays, and our homes. Those who can access this information include banks, insurance companies, supermarkets, the police, the courts, the government, our friends, our colleagues, and our families.

Any future privacy protection has to recognise that such protection may be necessary from each and all of these different parties. This is why the law, applied equally to all, is a pre-requisite.

However, though a law is a pre-requisite, such a law has to recognise that privacy protection must take account of context and circumstances. This is why the law itself needs to be set on basic principles. Principles which are then built on by precedent. These principles, and these precedents, then have to be balanced by people's right to free expression and the right to publish in the public interest.

November 2011

## Sir Christopher Meyer, Martin Moore, Julian Petley, and John Kampfner—Oral evidence (QQ 404–444)

Evidence heard in Public

Questions 404–444

MONDAY 14 NOVEMBER 2011

Members present:

Mr John Whittingdale (Chairman)  
Baroness Bonham-Carter of Yarnbury  
Mr Ben Bradshaw  
Mr Robert Buckland  
The Lord Bishop of Chester  
Philip Davies  
Lord Dobbs  
George Eustice  
Lord Gold  
Lord Harries of Pentregarth  
Lord Hollick  
Martin Horwood  
Lord Janvrin  
Mr Elfyn Llwyd  
Lord Mawhinney  
Lord Myners  
Ms Gisela Stuart  
Lord Thomas of Gresford

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### Examination of Witnesses

*Witnesses:* **Sir Christopher Meyer**, former chair of the Press Complaints Commission, **Martin Moore**, director of the Media Standards Trust, **Julian Petley**, chair of the Campaign for Press and Broadcasting Freedom, and **John Kampfner**, chief executive, Index on Censorship.

**Q404 Chairman:** I welcome Sir Christopher Meyer, former chair of the Press Complaints Commission; Martin Moore, director of Media Standards Trust; Julian Petley, chair of the Campaign for Press and Broadcasting Freedom; and John Kampfner, chief executive of Index on Censorship. Perhaps I may start by asking how you view the present state of law relating to privacy and freedom of expression, and whether or not you think it is working well.

**Martin Moore:** I am Martin Moore, director of the Media Standards Trust and the Hacked Off campaign. If you mean specific court cases, there have been some mistakes, particularly on the law of confidence rather than privacy, but in general, yes. However, as referred to in the last session, there are issues about access to the law and transparency.

If you look at the judgments themselves, whether it be *Rio Ferdinand v Mirror Group Newspapers*, *Lord Browne v Associated Newspapers*, or *Max Mosley v News Group*, you see that in each case the judge has deliberated at length about the balance between article 8, right to privacy, and article 10, right to free expression, not just in a general way but in the specific case. In the Lord Browne case, the judge concluded that there were aspects of the case, for example the fact there was a relationship between Lord Browne and Jeff Chevalier, that needed to be in the public domain; otherwise, people would not understand why Jeff Chevalier had the important information that he had. When one looks at the details of each case, deliberation between the two rights has been careful, and the onus is on those who think the balance is not right to point to specific instances.

**Sir Christopher Meyer:** I largely agree with that. If we are talking about the quality of decisions and where judges come down in each case on the line that divides the private from the public space, to put it like that—public interest on the one hand and right to privacy on the other—it is agonisingly difficult. If I may anticipate perhaps a further question from the Joint Committee, there is no absolute definition of what comprises the public interest. Therefore, by definition when you get decisions by judges on matters of privacy they are almost intrinsically controversial. There is always somebody out there who will have a different opinion.

Given the framework of the law, the Human Rights Act and the balance between articles 8 and 10, judges work extremely hard, sometimes on a line-by-line basis—Mr Justice Eady has revealed that in one of his lectures—and come up with the best outcome they can manage. It is for us, Parliament, or whoever, to come up with something better. I do not think better exists, to be perfectly frank, and it certainly does not lie in a privacy law.

**John Kampfner:** Chairman, you and I this morning were at the Society of Editors on the same panel. There is much to be said on the specifics of the balance between articles 8 and 10, but I want to preface my remarks by trying to put the question of the three-legged stool we were talking about this morning: privacy, libel and press standards/press regulation.

We at Index have led the libel reform campaign, which we started in November 2009. It should be recalled that, before the Culture, Media and Sport Committee, Jack Straw when Justice Secretary saw no problem with the state of libel law as it was. After six months of very strong campaigning, we managed to secure from the three main political parties a commitment to libel reform. This is relevant to privacy, of which I hope to convince you.

The report of the Joint Committee to which several of you were party under Lord Mawhinney, who is no longer with us, is a major contribution. It is vital that we get the final Defamation Bill on the statute book as soon as possible and it is not thrown into the Leveson soup, because we are almost there. It would be an important moment in freeing not only the media but a public space in which the free speech of bloggers, activists, writers in fanzines, authors, doctors, scientists or whoever has been chilled for far too many years by a libel law that is not only bad but badly interpreted.

**Q405 Chairman:** I do not want to spend too much time on libel law, because Lord Mawhinney has dealt with that at some length.

**John Kampfner:** The more we can shore up article 10 provisions, the more Parliament can emphasise article 10. With respect, without referring necessarily to individuals here—your CMS Committee has been very strong—Parliament’s record in defending free expression over the last several years has been, almost unreservedly, poor. It was only when we made a fuss over the ridiculous super-injunction regarding the reporting of Parliament on Trafigura, referred to in the previous session, that Parliament acted. Parliament looked at exemptions from freedom of information for MPs’ expenses until it was forced into submission. At every step of the way Parliament has been quite weak in defending free expression.

If Parliament is now looking for a renaissance in that commitment, perhaps we can talk about the flip side, which is article 8. My one-sentence response to your original question is: the early judgments by the judges on interpreting article 8 were reasonably fair. The Von Hannover case in 2000 turned them quite strongly to a pro-privacy and anti-article 10 bent. Recent cases appear to be moving back towards a greater balance, and the Rio Ferdinand case was an example of that.

**Julian Petley:** To return to privacy, the way in which judges have tried to balance articles 8 and 10, while undertaking what they call an intense focus on the details of every individual case, has been an excellent way of proceeding. I cannot really see how they could have dealt with this in any other way.

Sir Christopher says we do not need a privacy law. The problem is that there is a de facto privacy law developing, thanks to article 8 of the European Convention on Human Rights. My argument is that we do need a privacy law developed by Parliament, but it is important to stress that it must be one that has proper public interest defences written into it; otherwise, the law will develop in an unsatisfactory and piecemeal way. If Parliament does enact a proper privacy law, it will have a democratic component to it, which some feel might be missing through judge-made law.

**Q406 Lord Myners:** Julian Petley has taken the wind from the sails of my question. Perhaps it is to Sir Christopher Meyer that I should address my first question. Surely, there is a need for democratic endorsement of the concept of privacy and that this is best achieved by the body people look to in order to perform that function, namely Parliament. Parliament should provide a framework for a clear, coherent and workable piece of legislation on the right of privacy, rather than judge-made law, which often evolves not in straight lines but from side to side. Why on earth would somebody in defence of democratic institutions oppose the idea of a Parliament-made law on privacy?

**Sir Christopher Meyer:** It sounds good, but it will not work, or at least it will not improve the situation. I do not have a problem with judge-made law, because that is what judges are there for. They have been part of our unwritten constitution for 1,000 years. What is wrong with that?

When I first started work in Downing Street in 1994, when John Major was Prime Minister, the first thing in my in-tray, inherited from my predecessor Gus O’Donnell, was a draft white paper on a privacy law. At the time the Prime Minister was toying with the idea of having one. It bounced around Whitehall interminably; it kept coming back to me, and out it went again. The white paper foundered on a number of rocks, one of the big ones

being complete disagreement, even before something was given to MPs to look at, about where one drew the line between public and private. Put another way, how would you define the public interest and, moving on from there, how could you have a statute that said something sensible above and beyond what was in the law on privacy? In the end, the thing was discarded and it died a death.

I do not think that problem has been resolved today. There is a new factor, which is the Human Rights Act and the two articles we talk about interminably: articles 8 and 10. The question I would throw back at you, if I may, is: if it has been beyond the courts to come up with a final, definitive definition of what constitutes the public interest, and the Press Complaints Commission, which deals with far more privacy cases than the courts, is unable to go beyond a number of illustrative examples of what might involve the public interest, I think that the last place on God's earth where this conundrum can be resolved is in the House of Commons. I mean no disrespect to the members of the House. It is just too difficult.

One would love democratic backing.

**Q407 Lord Myners:** Sir Christopher, first, I am not a member of the House of Commons.

**Sir Christopher Meyer:** Or even the House of Lords.

**Q408 Lord Myners:** Second, our task is to ask you the questions rather than for you to ask us questions. I will not speak for the PCC, but, surely, one of the reasons judges have struggled here is that Parliament has not passed a privacy law with very clear direction. I put it to you that you are so much of an insider that you are now cynical about the ability of Parliament to do very much at all.

**Sir Christopher Meyer:** My Lord, I have never been considered an insider. I do not think I am an insider, but I have a pretty good view of things. What I am saying is that, having spent six years wrestling with these issues of privacy, you have a three-tiered system, which I do not think Parliament can improve. You establish general principles as laid out in articles 8 and 10. Then you start implementing these articles case by case, and bit by bit you build up a body of jurisprudence. I do not think you can do better than that.

If this is going to become part of a statute which goes through both Houses and becomes the law of the land, you have to cater in the legislation for every possible permutation of case involving what is legitimately in the public interest and what legitimately belongs to private life. As always, the devil is in the detail and statute cannot embrace all those devils.

**Q409 Martin Horwood:** When I had a real job, I worked in marketing and advertising. We worked under the self-regulating system of the advertising code, and there was an incredibly effective sanction. If your ads or mail shots were judged to be in breach of that code, media owners and mailing houses would not touch them, because they would be in breach of the code if they did. That was incredibly strong. Is not the problem that there is no comparable sanction in the case of the PCC and not all national newspapers are even

Sir Christopher Meyer, Martin Moore, Julian Petley, and John Kampfner—Oral evidence (QQ 404–444)

members of it? Do you not need the level of enforcement that applies to the advertising industry?

**Sir Christopher Meyer:** The short answer to your question is no. Do not forget that it is almost three years since I was chairman, and things have moved on. To back up a little, it is common to say that the press is disciplined by the PCC and a system of self-regulation. That is not accurate. What disciplines the press, indeed all the media today, is a hybrid system of regulation that involves the courts, the police, the Press Complaints Commission and to a degree the Advertising Standards Authority. There are four different components in the mix and they are all linked.

If you are looking for the severely punitive element in all of this that acts as a deterrent, or should do, to bad behaviour, the ultimate is imprisonment, as happened to Clive Goodman. Then there are the courts, where every manner of financial punishment emerges in costs, damages and fines; and there is then the PCC and its rulings and sanctions.

**Q410 Martin Horwood:** I apologise that I have to leave shortly after this exchange. The reason the advertising industry tried to be legal, decent, honest and truthful—we joked about it but we tried to stick to it—was not that we feared prison, which is an extreme and, in a way, rather irrelevant sanction, but that it posed an existential threat to our profits and, in the case of mailing houses and media owners, possibly their viability. There is no comparable threat, is there, in the case of the media?

**Sir Christopher Meyer:** There are similarities between the advertising industry and newspaper industry, but they are not identical. Where do the sanctions lie against bad journalism and irresponsible editorship? It is that question I was trying to answer. There is no profession, whether it has an external regulatory system or a self-regulatory system, that is exactly the same as the press. Only the press deal with the issue of freedom of expression, and that is why the approach has to be somewhat different.

**Q411 Martin Horwood:** What about a sanction to stop publication for five days, for instance? That would have a pretty salutary effect on editors, wouldn't it?

**Sir Christopher Meyer:** If I was chairman and that was put to me as a practical proposition, I would reject it immediately. It is entirely impractical. You would be taken to court; it would probably end up in Strasbourg, and it would be struck down for being a curtailment of freedom of speech. Even if that existed, you would have a subsidiary problem of when to introduce a sanction as draconian as that.

Forgive me if I am being impertinent, but I think you underestimate the power of the sanctions already available to the Press Complaints Commission. There is a tendency in London to dismiss them as a slap on the wrist. I can tell you that when a negative adjudication is coming down the pipe for an editor, the screams and howls of outrage, and the threats to leave the PCC system if we dare do such a thing, do not reveal a kind of insouciant view of this kind of penalty. I would ask the Committee to bear that in mind.

**Julian Petley:** I think Sir Christopher has forgotten he is no longer chair of the PCC.

**Sir Christopher Meyer:** I have just reminded the Committee that I was not.

**Julian Petley:** I will remind them again. The real problem is that the PCC does not have any effective sanctions. I simply do not agree with Sir Christopher's point about



screams and howls of outrage. In my view, adjudications are regarded in a very cynical way, at least by the national press.

I think your example of the ASA is a very good one. The ASA is what we might call a body with a co-regulation back-stop. What is needed here is something like, for example, the Bar Standards Council. As long as the PCC has no effective means of enforcing its judgments and cannot apply sanctions in the way the ASA can, it seems to me to be a completely pointless operation.

**John Kampfner:** Perhaps I may return to the question posed by Lord Myners. We seem to have moved from privacy to the weakness or otherwise of the PCC. I am sure you want to talk about it, but it has been done to death and much more besides.

So much of this comes down to public interest defence. When Sir Christopher said there was a panoply of restraints on the media, I thought he was going to talk about the law rather than the PCC, of which I have been strongly critical in the past. I remain critical of the PCC. You could jot down the number of laws that are in operation to make journalism responsible or restrict journalism—not just libel, about which I could wax lyrical forever but will not. We have the Official Secrets Acts. I had an OSA slapped on me when I was editor of the *New Statesman*. It was simply to save the bacon of a minister. It was thrown out of the Old Bailey on the first day. It was an egregious act of chilling for political convenience. We have the Bribery Act, and many others besides. What they all need is a very strong public interest defence for good, robust journalism.

I think that the role of Parliament or the Joint Committee in this is to help us define, not specifically—because ultimately it will be down to the judges—but more broadly, what the parameters of the public interest defence are. My critique of journalism over many years is that it is far too weak rather than too strong; it finds out far too little about what is done, and a lot of that is down to a perception of the chill on journalism.

**Chairman:** We will have to stop while their Lordships vote.

*Sitting suspended for a Division in the House of Lords.*

*On resuming—*

**Q412 Lord Harries of Pentregarth:** Earlier Julian Petley shook his head very vigorously when Sir Christopher Meyer argued against a privacy law. You had argued in favour of one before. But we would like to hear you address the argument that judges would still be involved in balancing articles 8 and 10, or their equivalent, and would still have to pay attention to the facts of the case, so it is difficult to see what conceivable advantage a privacy law would have. Judges would still be involved in much the same way as they are now.

**Julian Petley:** I agree, and it is very good that judges do that, but I cannot see that obviates the need for a privacy law. At the moment, the problem is that, absent a privacy law, all the judges have to go on is jurisprudence from Strasbourg or the UK. The Von Hannover case has already been mentioned by John Kampfner. I think that muddies the water somewhat. Judges' lives would be made easier if there were a privacy law, with the big proviso that there is a public interest defence.

If I may say something about the public interest defence, in my written evidence to the Committee, I drew attention to the BBC's editorial guidelines. I believe they have the most detailed and elaborate outline, if you like, of what a public interest defence is. The PCC's public interest defence covers only a few lines, but the BBC's editorial guidelines, and the definition of what is in the public interest, cover quite a few internet pages.

**Q413 Lord Harries of Pentregarth:** Could that point not be met by having a strengthened PCC with, written into it, the kind of wording one has in the BBC?

**Julian Petley:** Possibly, but that would depend on how you strengthened the PCC. I am not necessarily condemning the PCC to the flames of hell, but I think it needs some form of statutory back-stop so that its adjudications and any sanctions it might impose had some kind of force. If the PCC could operate in the same way as the ASA or Bar Standards Council, with a form of statutory back-stop, to me that would resolve the issue you have just raised.

**Q414 Lord Harries of Pentregarth:** But that would be possible, many would argue absolutely necessary, even without having a separate law of privacy.

**Julian Petley:** Yes.

**Q415 Mr Bradshaw:** It may be helpful to explain that the reason we are interested in the PCC is that, if we are tossing up between the alternatives of people going to law to protect their privacy and making it cheaper for people who might not be able to afford to do that, and also to make it more effective and quicker, then an effective PCC, or son or daughter of PCC, could play an important role. Sir Christopher seems to give the impression that he thinks the PCC is fine as it is, but if that is the case why is Hugh Grant at this very moment failing to obtain any protection at all for the mother of the child he has apparently fathered in spite of the PCC issuing instructions that this woman and her child's privacy should be protected? It is simply being ignored. What is wrong with the very sensible recommendations that the Media Standards Trust have made over recent years, which are prescient in the current situation? What problem does Sir Christopher have with those recommendations? If he has not read them, perhaps he could tell us in written evidence what he thinks is wrong with them.

**Sir Christopher Meyer:** Chairman, I would be awfully grateful if people did not assume I was still chairman of the PCC. Nonetheless, in answer to Mr Bradshaw's question, I do not know the ins and outs of the Hugh Grant case with the child, pictures and all that. Do not ask me about that, because I do not know how the PCC has been dealing with it. You will have to ask somebody more contemporary than me.

As a general point, I wish that, when we talk about privacy in this kind of discussion in London, we get away from celebrities and famous people. One thing that is repeatedly ignored by those of us who live in the metropolis is that this is a people's service; it is an ordinary citizen's service. When I became chairman in 2003, 2,500 people a year came to us for help of one kind or another. When I left in 2009, the figure had gone up to 4,500. Last year I believe the figure was 7,000. Whatever criticisms can justifiably be levelled at the

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PCC—I certainly think it has to change but we have not got round to it—it is clearly enjoying significant support and popularity among people who lay no claim to celebrity.

In my last full year, 2008, we did a survey showing that 99.1% of all those who came to the PCC for help laid no claim to celebrity whatsoever. We must escape the trap of discussing this in a bubble that is heavily focused on the metropolis and on people who already have a public profile. I think the best thing the PCC can do is help ordinary people ensnared in the headlights of a media frenzy. That is where its strength lies and where it has been getting stronger year in, year out. I do not know about Hugh Grant. I do know that people come in their thousands to Halton House for help. Looking at the Ipsos MORI polls of people who have used the PCC, it gets a very good bill of health. It still needs some change, but we forget that.

**Q416 Mr Bradshaw:** Do you agree with the recommendations of Martin’s organisation as to how you could improve or change it?

**Sir Christopher Meyer:** He came out with some preliminary recommendations in early 2009, and we had a corking, scorching punch-up about that. I found myself on the “Today” programme, as one does from time to time, doing battle with the then chairman, Sir David Bell. There were ferocious fisticuffs over the airwaves. I wrote scorching letters to somebody there, Anthony Salz, saying they had got all their statistics wrong and it was a load of cobblers. Even Professor Roy Greenslade said that I was right and they were wrong. I am not quite sure where all this leads to.

**Q417 Mr Bradshaw:** What is the answer?

**Sir Christopher Meyer:** I did not accept it, but there were no recommendations.

**Q418 Mr Bradshaw:** You still think they are wrong?

**Sir Christopher Meyer:** There was a second part to the report, and I have never read it or seen it. That came out in 2010. I have not read the 2010 report. I read the early 2009 report, and basically it was a load of cobblers.

**Q419 Chairman:** We should allow Martin Moore to respond to that.

**Martin Moore:** I do not think I am here simply to talk about us; we are here to talk about more important things, but there are a few points to make about privacy and the deficiencies of the current system. One reason we wrote the two reports is the very one you have given, which is that, if the regulatory regime is working, it provides much more access and protection. There is the law and regulation, but the gap between the two is quite wide, and has been widening. One thing we tried to look at was how to bring them closer together.

Particularly in the case of privacy, reform of the regulatory regime can be extremely helpful. If you start from the basics of the law, in a way I am an idealist; I would much rather it was just the law and we did not have to worry about any of this, but the particular difficulty is access to justice. That is one reason we have regulation in the first place.

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Regulation ought to be a much sharper tool than the law from the perspective of both the journalist and a member of the public. If a journalist does not want to be hammered by the police, he would much rather there was expertise within a regulator to deal with problems early and sort them out. Similarly, most members of the public do not have the means or mechanisms to access the law, so that is what the regulator is there for.

There needs to be significant reform of the current system of press self-regulation, as we have been saying for many years, such that it gives better protection to the public and they make greater use of it. I do not want to go into details, but that is where I would start.

**Q420 Ms Stuart:** Two points have been raised, one by Lord Myners and the other by Martin Horwood, which have not yet been answered. Martin Horwood made the important point that not all newspapers are members of the PCC, so that is a real problem. As to the second point, perhaps I may say to Sir Christopher Meyer that, if he is not an insider, then who is? Clearly, there is nobody inside. You seem to say that privacy is so fiendishly difficult that it is beyond Parliament to come up with something. The problem becomes apparent when in Parliament two Members, John Hemming and Paul Farrelly, defy the law. When the law-makers become lawbreakers, that requires a decent explanation. My very primitive answer to MPs, who should be the law-makers, becoming lawbreakers is: if they do not like the way the courts interpret these things, they had better come up with a statutory framework. May I have views on that? First, are we saying it is simply beyond the intelligence of Parliament to come up with something? Second, how do we get out of some newspapers not being members of the PCC?

**Sir Christopher Meyer:** It is a real problem. We are talking about Northern & Shell, Richard Desmond's group, deciding to take itself out of the PCC system, which is a serious problem. No self-regulatory system can survive if a major group thinks it can just walk out, because it sets a precedent for others. I am absolutely against a privacy law, or any kind of statutory regulation, but how do you compel renegade groups like Desmond's to go back in? It could be you would need some kind of back-stop statute to make it obligatory, but, as John Kampfner and I discussed while you were adjourned, at the same time you have to define who should be in and who can be out. That has to take in big blog websites like Huffington Post. It is not only a question of those who have taken themselves out but who else should be required to be inside. It is a problem to which I do not have a complete answer.

I am not saying it is beyond the wit of MPs to make a distinction between privacy and the public interest, but where the line is drawn is incredibly difficult. The judges themselves cannot work it out. If I may refer to the Naomi Campbell case, she went to court because she thought her privacy had been breached because she was photographed coming out of an alcohol or drug rehabilitation centre. She won at the first instance, lost on appeal and won before the Law Lords, before the creation of the Supreme Court, on a split decision. It turned on a very small technical point, so very intelligent experts can disagree on these issues. That is why I say it would be hugely difficult to draw up an Act of Parliament that got round all these problems in a comprehensive way for all time.

**Q421 George Eustice:** In the previous session of evidence, the witnesses painted a fascinating picture of collusion between mainstream newspapers and the blogosphere,

which effectively went like this: if the story they had did not stand up legally and could not get past their own lawyers, the view was, “Let’s give it to the blogs; get it out there, and then, through the process of reportage, we can report it anyway.” The blogger is without a penny to his name and not worth suing. It felt very much like a way of circumventing the PCC code and effectively debasing your currency, and journalists were colluding in that. Do you think that has been a problem in the last few years and that may be one of the issues that has raised questions about the PCC?

**Sir Christopher Meyer:** My overall view is: let a thousand flowers bloom. If it enriches public discourse, so long as it does not offend the code of practice, let it rip. One must remember a very basic thing. If an editor of a publication that falls within the purview of the PCC takes content from a blog in the wild and woolly blogosphere, which is unregulated, the moment he or she takes that piece, whether it is from Paul Staines or somebody else, and puts it in the newspaper, be it online or in print, the editor then has responsibility for its publication. At that point the editor will be held responsible under the code of conduct for that piece of reportage, even if it is attributed to somebody else.

**John Kampfner:** And the libel law. If you think it is not worth suing “Guido Fawkes” for something because he does not have money, or he is hosting from a US domain, and, say, the *Daily Telegraph* repeats the story without having its own systems to back it up, it would then be sued. Even if the bloggers can “get away with it”, publishing it secondarily does not give you that protection. Therefore, I think the question goes away.

**Julian Petley:** The argument you hear very often from the press, particularly the popular press, is that they are badly affected because all this stuff is out there on the internet and blogosphere and they cannot publish it. Therefore, increasingly people go to the blogosphere and internet rather than to the press. Their argument seems to be that they should be allowed to do exactly what the blogosphere and internet are allowed to do. That seems to me to be a complete counsel of despair. I am a great believer that there should be different kinds of regulation for different media. Television and radio are regulated differently from the press, and the press differently from the internet. The argument we hear from the newspapers that they should be allowed to follow the blogosphere would lead to the most appalling situation.

**Q422 George Eustice:** There is an issue about the lower credibility of blogs. The number of their followers is very small. The truth is that they are able to cut through only when something they have said is reported in the mainstream media, and that drives circulation. Do you think that one of the key things with which the Joint Committee must grapple is whether, if you are to have a better standard of regulation of the print press, that is deliverable in the era of the blogosphere? You seem to be saying that it is.

**Julian Petley:** I believe it is. It seems to me that the argument the newspapers are putting forward is primarily a commercial one. One thing we have not discussed thus far is kitemarks and how we might encourage newspapers to wish to be part of a self-regulatory system, whether it is the one we have now or some other. If newspapers could be persuaded there is value in good journalism and no value in trying to go down the road of the blogosphere, that might help newspapers. I would be the first to accept that national newspapers in particular are in a serious economic state. Then you have to ask yourself: why is newspaper circulation, even among the good ones, going down and down? It is largely because many people do not like newspapers. They do not believe or trust what

they read in them, whereas we know that they believe and trust, rightly or wrongly, what they hear on the radio and the television.

**Martin Moore:** One ought to differentiate between the law and regulation. While necessarily they must interrelate, I think they are different. To come back to the question about how you create a system in the 21st century when you have people who can dodge outside and everything else, I do not hold to Mr Dacre’s view, and, by the sound of it, your view on compulsion. I do not think that is desirable or practical, because people can circumvent it more and more easily.

Rather than that, one has to think about how to create a system which people volunteer to be a part of. The way to do that is to incentivise rather strongly. To incentivise it, the two big levers are legal and financial: for example, “Come inside the tent because you will benefit from significantly greater privileges when it comes to defamation and privacy than if you are outside; come inside the tent because you might get differential VAT exemption, analyses by the Audit Bureau of Circulations, and so on; come inside the tent because it is in your self-interest to do so. Once you are inside the tent, you adhere to the rules within it. If you do not, you can go outside into the cold, and beware of that.” In that way you will get people opting in to the system rather than necessarily grappling with it.

The three nightmare questions you have to solve if you are trying to compel people are: who will be in the system; if you are not inside the system, what sanctions are there for being outside; and what are you compelling people to join up to? Those are extremely hard to answer.

**Q423 George Eustice:** Mr Moore, do you have a view on the public interest test, the argument about reportage and the law applying equally to all? I understood that the defence was that, if it is in the public domain anyway, and the PCC code even contains that, it is fair game. Is that your understanding?

**Martin Moore:** I am sorry; I do not understand. Will you repeat the question?

**Q424 George Eustice:** As to public interest, under the PCC code one of the criteria is whether it is in the public domain anyway, so they can, therefore, say, “It is in the public domain anyway, so we can report it.”

**Martin Moore:** There is a difficulty about the gaming of the system. As we heard in the last session, there appears to be evidence—I have heard it elsewhere—to suggest that when there are difficult items because of legal reasons, they are put out through other avenues. It is very difficult to stop that, and in many ways one cannot stop it through the law—hence an incentivised regulatory system.

There is a separate issue in the code. On the public interest test in the PCC code, there is public interest in freedom of expression itself. To me, that is a very difficult line, because essentially it is a get-out clause for almost anything. One can say there is a public interest in private life, which I think there is as well. You will notice that clause does not exist. As I understand the evidence submitted by a previous member of Ofcom to the Leveson Inquiry, when Ofcom was debating its definition of public interest it looked at that line and said, “We just cannot use that line because it is an escape clause for almost anything.”

**Q425 Lord Gold:** If one wanted to regulate the bloggers whom we saw earlier without changing the law, how could one make it attractive to them to come within a voluntary regulatory system?

**Martin Moore:** To return to the two particular levers I talked about—I believe there is a third one—if you are within the tent, you are granted, let’s say, particular caps on costs on particular public interest defences, and those public interest defences are easier hurdles to reach for both defamation and privacy. In terms of financial matters, people have been discussing various discounts on VAT, because of course print papers—

**Q426 Lord Gold:** They do not pay VAT.

**Martin Moore:** Currently, they are exempt—exactly.

**Q427 Lord Gold:** Bloggers are not.

**Martin Moore:** Nor are news websites.

**Q428 Lord Gold:** I would not have thought bloggers account for money in any direction at all.

**Martin Moore:** The VAT exemption would not apply to many bloggers, but certainly “Guido Fawkes” earns quite a bit of money via his blog and advertising. There are some financial levers. There are also lesser levers in terms of privileged access to information. Journalists get quite a lot of access to information at the moment through the Lobby and various mechanisms. One can open that up and say that part of the privilege of being inside the system is that there is more information and quicker access to it.

**Q429 The Lord Bishop of Chester:** Mr Moore, I mention en passant that I found the written submission by the Media Standards Trust particularly helpful. I have two questions that may be related. In previous evidence sessions I have been struck by the fact that some groups walk in or appear in the PCC and other groups do not. The regional press were particularly deferential, appreciative and rather fearful of the PCC, whereas some of the national press seemed much more dismissive. One of the key things is how you define the public interest and how people know what the public interest is, because that guides what the law of privacy is. The PCC’s code is drawn up by the editors themselves, and there are other versions. How do we get to an agreed understanding of the public interest that society as a whole can accept and which undergirds the right to privacy under article 8? At the moment, we do not seem to be there. For example, how do we draw the line between what is in the public interest and what the public are interested in, to use the cliché? Again, that is a very difficult but key line to draw. How do we make progress with this?

**Sir Christopher Meyer:** I am sure you will have had a submission from the Press Complaints Commission that will have addressed this precise matter. If I may, I would strongly advise you to look at some of the cases—you will find them on the PCC’s

website—where precisely this issue has challenged the Commission. Is it just in the public interest or because the public is interested in it? Where does private life begin and public interest end? Those are questions that I believe do not admit of a final and definitive answer.

You can look at, say, half a dozen cases where the Commission has had to rule on such an issue. Do not forget that a majority of the people are not editors; they are lay members in a ratio of 10 to seven. You will see the most meticulous consideration of issues, which very much parallels the way judges approach these matters in court. Although the system can be open to gaming if a newspaper wanted to, the people who sit on the Commission are not such fools and naïfs as to be deceived by this. That is why I think that, if you have not done it already, it would be well worth looking at the summaries of some of these cases. You can see that the arguments are very refined and have built up a substantial and valuable jurisprudence, which, whatever happens as a result of all these committees of inquiry, should not be thrown out. It would be an error of huge proportions to start from scratch.

**Martin Moore:** That is slightly problematic, because there are quite a limited number of adjudications. There were 18 adjudications in 2010, many on different questions.

**Sir Christopher Meyer:** Does it have to be adjudications? You make the old error. Rulings are the key things.

**Martin Moore:** In resolved cases there is no indication as to whether the code was breached. There is also quite a lot of inconsistency. We can take the example last year of Rod Liddle and Richard Littlejohn, both of whom expressed very trenchant views in their opinion columns based on so-called facts. Rod Liddle was found in breach of the code. He was not allowed to express his view on those facts because the facts were wrong, whereas Richard Littlejohn was, despite the fact that it was almost exactly the same instance. I just use that as an example.

To come back to your question about how one starts to establish it, the question before the Joint Committee is about whether there is a need to establish a privacy law. I do not think there is a particular need to establish a privacy law given the article 8 rights that already exist and the precedents being set around it. However, there is quite a good case for Parliament at least to deliberate on the whole question of public interest. As you have seen in many of the submissions, there are three slightly different, but all quite decent, definitions of public interest out there in the PCC code, the BBC guidelines and the Ofcom code. Were there to be a clause in the Protection of Freedoms Bill, for example, again it would need to be a principle—it could not set it out exactly—it could then be referenced in the Bribery Act, the Official Secrets Acts and the Regulation of Investigatory Powers Act, such that there were public interest defences in each of those laws. You would then start to get journalists using that as a defence, and therefore precedents would be established around it; you would start to build up a greater body of case law. At the moment, there is nothing similar to that, there is not a strong understanding of public interest within the law because there is not a body of precedent.

**Q430 The Lord Bishop of Chester:** It is too ad hoc?



**Martin Moore:** Exactly. I do not think section 12 of the Human Rights Act gets anywhere near that, but were there to be somewhere, for example in the Protection of Freedoms Bill—

**Q431 The Lord Bishop of Chester:** And a consolidation of the three codes, or whatever?

**Martin Moore:** Exactly.

**John Kampfner:** I apologise in advance that I did not submit a variant on the submission that I put to the Leveson Inquiry during the seminars, in which he specifically asked me and Index about our ongoing experience of dealing not just with black and white cases of censorship around the world but with the much more subtle—what I call shades of grey—issues, where free expression runs up against confidentiality, data protection and privacy elsewhere. With your permission, afterwards I will send in that submission.

I want to return to a couple of quick points. There is virtually nobody of sane mind who believes that the PCC is in no need of any form of reform. The issue is: what kind of reform should it be? I argued strongly this morning, and will continue to do so, that enhanced self-regulation is absolutely the right way to go. I am very pleased that yesterday Chris Patten said the same: that what pertains with regard to Ofcom and broadcasting, with its £160 million budget as opposed to the PCC's £2 million budget—which is something to think about—nevertheless with the broadcasters' requirement also to balance public interest, and so on, is a different level of regulation.

To go back to Gisela Stuart's first question, about whether we are saying Parliament is not able to deal with privacy, that is not the issue, but I beg you to think about international precedents. I am not talking about Zimbabwe and North Korea; I am asking you to think about European Union member states: Hungary has an absolutely shocking media law at the moment; Italy—it is not just about Berlusconi and what he was up to—has an appalling body of law; and, closer to home, France, has a statutory privacy law. It is perhaps a classic case of unintended consequences, but the way it is used is constantly to chill genuine, legitimate investigations. It is used as a blanket to stifle discussions about powerful people's financial interests as well as other important issues.

I give two quick examples. Last week, the media were cowed into writing nothing about the overheard conversation between Sarkozy and Obama about Netanyahu. For five days the French media, under the panoply of these laws and an atmosphere of fear, did not write it. It was only when the Americans broke the story that they piled in behind. A couple of years ago, there was the acrimonious break-up of the relationship between Francois Hollande and Ségolène Royal. That was a matter of supreme public interest. The two leading figures in the socialist party, ahead of the presidential election, were at each other's throats, and not a single mainstream French media outlet covered the story. All of this was in the atmosphere, in spirit and practice, of legislation enacted through Parliament taking on article 8. We have to deal with these public interest definitions. I agree that the PCC definition is not clear enough, but these are parameters and it must be left to judges to decide.

**Julian Petley:** I rather disagree with John. You cannot lay all the blame for the faults of the French press at the feet of their privacy law. There is a very deferential culture within the French media, of which the privacy law is an expression but not the cause. It is rather absurd when British newspapers, as they are wont to do, criticise French newspapers for not running stories about people's sex lives, because for the most part the French are much more grown up and sensible than we are and really do not care about people's sex lives, as we should cease to do.

To add to a point made by Martin, to help the Joint Committee when looking for definitions of the public interest, may I point you to what the Office of the Information Commissioner has said on this subject, and also to the Reynolds defence in defamation cases, which was created by the Law Lords, and Jameel, which developed out of that. These all have interesting things to say about the public interest, as do *The Guardian's* recent privacy guidelines. I would argue that this is less of a mystery and difficulty than it has been made out to be.

**Q432 Lord Dobbs:** Sir Christopher, I point out that the fact statistics for any particular period of the PCC show that the number of claims went up, even doubled, might suggest that the situation is getting worse rather than better.

**Sir Christopher Meyer:** I would be very happy to expatiate on that interminably.

**Q433 Lord Dobbs:** I know you would, but time presses. I turn to the PCC. For all your understandable loyalty to the PCC, the fact that an organisation could not spot the elephant of phone hacking at News International standing on two feet has left something to be desired. It is undoubtedly the case that the PCC does not have the affection it once had. Perhaps I may put a question to all of you, and perhaps Sir Christopher last. In order to avoid the many problems of restrictive legislation, self-regulation is to everybody's advantage. Would you continue with the PCC and try to reform it, or start with not necessarily a blank sheet but a different organisation altogether?

**Julian Petley:** I would start with a blank sheet of paper, but I would also go back and take a look at the Press Council, which was abolished and replaced by the PCC. I think it would be very instructive to go back and look at the Calcutt committee. I find it quite extraordinary that, at the end of the 1980s, there was much unhappiness about the state of the press, almost as much as there is now. There were private members' bills in the House almost throughout the 1980s demanding rights of reply, privacy and so on. In the end, the Calcutt committee was set up and the Press Council was abolished but, extraordinarily, it was replaced by a body with an even narrower remit. At least the Press Council, particularly under its last chair, Sir Louis Blom-Cooper, had a real interest in the question of how to preserve press freedom, or at least freedom for journalism that is in the public interest. I suggest that we start with a blank sheet of paper and that we try to construct a body which, like the Press Council, is concerned with both press freedom and regulation. I know Sir Christopher will disagree.

**John Kampfner:** It does not matter whether you start with a blank sheet of paper or you look at the existing structure; it is where you end up that is significant. I completely accept and enhance Lord Dobbs' view, that the better the self-regulation, the stronger, more effective and credible it is, the better for press standards and free expression—because I see the two things as concomitants and not at loggerheads with each other—but

the more you have public trust in outcomes. Whether you start with a blank sheet of paper or work on the existing framework, you must seek a stronger way of implementing equivalence of correction or apology, although the corrections started by the *Daily Mail*, maybe in adversity or whatever it is, have been a good start. But there should be equivalence of apology or correction separating PressBof from the much greater firewalls between press and the chairman and Commission; the funder cannot be seen to be breathing down the necks of the implementers, even if it is not but that is the perception. The chairman and the Commission must be seen to be setting media standards and commenting on the standards of their members, and there must be a right and requirement to intervene in major cases, even if there is no personal complaint from an injured party. It should simply be a regulator, not just a mediator.

**Martin Moore:** My response is similar to John's. You start with the outcomes, so what exactly do you want the regulator to achieve? You want to create a system that is accessible to members of the public and is genuinely independent, not just of people but of funding, which is a serious problem at the moment; one that can do proper investigations and reports, which it cannot do right now; one that creates a system that has meaningful and proportionate sanctions, which it does not right now; one that acts in the public interest, not just in the interests of an individual complainant as it does right now; and a system that protects press freedom, because I think that is critical and there is not a voice doing that. The key is how you do that in a digital world where it is much more difficult to bring people inside the system.

**Q434 Lord Janvrin:** You referred to an enhanced system being more effective for corrections and apologies. The problem with breaches of privacy is that once it is out it is out and apologies do not put the matter right in any way, nor would a correction. Therefore, you come to the question of prior notification. Would all of you like to give us advice on how we handle that aspect, which lies at the heart of the injunctions process?

**Sir Christopher Meyer:** May I respond to Lord Dobbs?

**Q435 Chairman:** Quickly.

**Sir Christopher Meyer:** I have just heard my three colleagues banging on all over the place. Anybody who wants to go back to the Press Council needs his head examined. If that is what you study in academe, God help us all. On the matter of the 800-pound gorilla in the room—the phone hacking at News International—it has taken one police inquiry, which failed to get to the root of it. We now have Operation Weeting involving 160 policemen; 5,489 apparent incidents of phone hacking by Mr Glenn Mulcaire; and millions of e-mails, all of which, if true, was buried in the heart of a conspiracy at News International. It is not feasible for the Press Complaints Commission, or anybody, including the Metropolitan Police, to detect this without someone blowing a whistle first. What happened was that I believe the Palace woke up to the fact that somebody was probably hacking into the Prince's phone.

**Q436 Chairman:** I do not want to recap the whole thing.

**Sir Christopher Meyer:** But a very serious matter has been raised by a member of your Committee.

**Q437 Chairman:** All I will say, Sir Christopher, is that the Culture, Media and Sport Committee concluded there was new evidence to show there was widespread involvement, and the Press Complaints Commission concluded there was no evidence.

**Sir Christopher Meyer:** No, no. I have here in a little plastic folder what the Press Complaints Commission actually concluded.

**Q438 Chairman:** Let's not revisit that because it is not the subject of this inquiry.

**Sir Christopher Meyer:** Let me make the very important point that it was not visible and obvious, and it was not for the Press Complaints Commission to implement the criminal law. That is a matter for the police. When the police investigation was concluded at the end of 2006, and the trial was held and the men were sent down, it was then constitutionally right for the PCC to make its own investigation, which it did. When published in May 2007, I seem to remember that your select committee, Chairman, greeted it warmly for its conclusions and the protocol it set out for the whole newspaper industry. The system, imperfect though it may be, worked exactly as it was meant to work: the police first and the PCC afterwards.

**Q439 Chairman:** I do not think we want to spend any more time on that. I was referring to the subsequent report by the Press Complaints Commission, at which time I agree you were no longer chairman.

**Sir Christopher Meyer:** Thank you, Chairman.

**John Kampfner:** Perhaps I may turn to the point about injunctions.

**Q440 Lord Janvrin:** Prior notification.

**John Kampfner:** One member of the Joint Committee in the previous session with the bloggers referred to the temporary nature of injunctions. There are three types of injunction: super-injunctions; anonymised injunctions; and open injunctions. Super-injunctions, which I accept are often confused with anonymised injunctions, have been used to a considerable degree. Shockingly, the Ministry of Justice keeps no record of them. I think that should change immediately. They are a sledgehammer approach. Possibly one in a million times you might want to use it; that is, mental health, suicide, danger to children or whatever, make it so stringent that the fact of the injunction even having been asked for should be withheld.

On anonymised injunctions, there is a greater potential use for them but on a very temporary basis; in other words, on a Saturday evening the lawyer for the potentially injured party finds out that a newspaper, it is usually a Sunday one, is about to run a story. He gets an anonymised injunction, which is usually granted, simply as a stay. Occasionally, it is not granted. Then, at 11 o'clock on Monday morning the lawyers come together with the judge and assess the public interest override or not, as the case may be, for that particular story.

After that point, the idea that the injunction should last in perpetuity should be based only on the determination by the judge that it is not in the public interest. What usually happens in those cases is that anonymity should be withdrawn. If I feel that a newspaper is going to write a story about me and I think it is unjustified, the public has the right to know that I have taken out that injunction. The requirement for anonymity should in most cases lapse on a fuller reading of the hearing the following week.

I go back to the fact that all of this comes down to the interpretation of public interest, and that is where Parliament has an interesting role. I think it was Martin who reinforced my point. This is not just about privacy; there are public interest overrides that are not being used, or being used in a flawed way, on libel, officials secrets, bribery, RIPA and in all kinds of areas. If we can come to a stronger public interest defence—I believe this is an interesting body of work that this Joint Committee or other parliamentary committees could undertake—that will reinforce good journalism in the right way. I do not know whether that answers your question, but that is a stab at it.

**Q441 Mr Bradshaw:** Martin made an interesting suggestion earlier about whether, if this Joint Committee did not recommend a privacy law, it should recommend some codification of the public interest. It may not be for you to answer now but perhaps in written evidence from you afterwards, or perhaps from our own lawyers, we can hear how we can recommend that and what the legislative vehicle for that would be. You may have some ideas, and we would be grateful to hear them.

**John Kampfner:** From an article 10 defence position?

**Chairman:** I think that would be helpful.

**Q442 Lord Hollick:** I put two questions that follow the discussion we have just had. First, should the same privacy rules, in particular the same public interest framework, if I may describe it that way, apply to all media, be they press, broadcasting or the blogosphere? If so, how is it best co-ordinated across those three if you have different regulators under different regulatory regimes? Second, both John Kampfner and Julian Petley have touched on the really important public interest issue, which is that the press may be currently being curtailed from doing things it should be doing in the interests of article 10. Can you explain to us what there is about how the law or regulation currently works that inhibits the press from doing what we would all expect it to do?

**Julian Petley:** To answer your first question, if we could devise a public interest defence, then the public interest is the public interest across the media. It might not be capable of being enforced within the blogosphere, but it certainly could be enforced across radio, television and newspapers. It would be very odd to have different notions of the public interest governing different kinds of media. As a member of the board of Index on Censorship, I most certainly concur with John.

**John Kampfner:** The advisory group; he is not on the board.

**Julian Petley:** I am on the advisory board.

**Q443 Chairman:** You are not a trustee?

**Julian Petley:** No. I beg your pardon. I certainly agree with John that there are many laws that need to have public defences written into them. The Official Secrets Act is clearly one example. There are lots of laws that inhibit journalists from doing a proper job. We have already mentioned the defamation laws and one can cite the monster McLibel trial as an example where the defamation laws operated against both the media and the defendants. There are 60 or 70 different laws that apply to all media content and many of these are pretty oppressive. Some would argue—although I am not sure I would—that one reason sections of the British national press are so full of tittle-tattle and trivia is that certain laws make it so difficult to take on serious issues. There may be an argument there; I am not sure.

**John Kampfner:** I agree. I have already given a list of the laws: libel; data protection; RIPA; and official secrets. There are lots of laws that prevent good strong investigative journalism. It does not mean that investigative journalism does not take place, but a lot of law chills it. The laws make it difficult, but I would also say that the economics of investigative journalism—I know you are not looking at that; another committee is doing so—make it difficult.

There is also a culture of bad journalism. Having been a journalist—I am not turning on my old profession, dare I say trade—there is a herd mentality and an inability or unwillingness—whether on the part of editors, I do not know—to find things out. I give you one anecdote, which may help to illustrate. A former colleague of mine when I was in the Lobby became head of news of a Government department. This was at a time when Tony Blair’s Government was getting a sustained kicking in the media. I cannot remember what the issue was. I asked my colleague, who was only a few days into his new job in that Government department, “What is it like—tin hats on? It must be awful with the Government getting such a kicking.” He said he found it so interesting that he did not realise that on a good day for journalists they probably found out 2% of what was going on. There is a real sense of a democratic deficit and lack of strong investigative journalism in trying to find out things that politicians, business people, sports agents, or whoever, wish them not to find out. If Parliament is really serious about reinforcing journalism, rather than just a perception of defending vested interests, perhaps after MPs’ expenses or whatever, it should be seen to be rallying investigative journalism, and a stronger form of journalism, than we have currently.

**Sir Christopher Meyer:** I want to add a very brief codicil to that. I absolutely agree with John on that. When I was John Major’s press secretary back in the mid-1990s, even for a very enfeebled administration with the Prime Minister having his back against the wall and all the advantage appearing to be with the Opposition and the press, it was still the case that the Government had an advantage over the media in the pace at which it controlled the release of information. Therefore, even an enfeebled government has that advantage. When it is a government with a huge majority, the advantage becomes even greater, so I am entirely with John on that.

**Q444 Mr Buckland:** If the PCC, or son of PCC—whatever you want to call it—has powers to impose fines or compensation, how will it be funded?

**Martin Moore:** It is a very difficult question to answer. Given the economics of the business at the moment, many people will resist if you start to charge more. Looking at the

Sir Christopher Meyer, Martin Moore, Julian Petley, and John Kampfner—Oral evidence (QQ 404–444)

current crisis, last night I totted up how much News International had already spent on the phone hacking affair. If you take into account the £700,000 paid to Gordon Taylor; the reported £1 million paid to Max Clifford; the £3 million to the Dowlers; the £20 million civil litigation fund, which will probably be considerably exceeded; and the initial £7 billion loss in terms of share value—we have not even started half of that yet—it has cost them an awful lot of money. Had it invested even a tiny proportion of that in better regulation, it might not have got into the situation in the first place.

**John Kampfner:** A lot of this comes down to corporate governance, and those organisations and their shareholders—they are all private companies—looking after their own, to use Martin’s term. This has been acutely expensive reputationally and financially. The two go hand in hand. I wrote a piece in the *The Guardian* last week in which I said the issue was corporate governance. The journalism practised by News International, particularly the *News of the World*—we may find out that it involves far more newspapers than that—was a by-product of weak corporate governance, and that is perhaps one area that this or other committees might want to look into.

**Chairman:** If there are no more questions, may I thank the four of you very

Gavin Millar QC, David Price QC, Gillian Phillips, solicitor, Director of Editorial Legal Services, The Guardian, and Reynolds Porter Chamberlain—Oral evidence (QQ 33–64)

**Gavin Millar QC, David Price QC, Gillian Phillips, solicitor, Director of Editorial Legal Services, *The Guardian*, and Reynolds Porter Chamberlain—Oral evidence (QQ 33–64)**

[Transcript to be found under David Price QC](#)



## **Ministry of Justice and Department for Culture, Media and Sport— Written evidence**

### Introduction

1. This note provides background for the Committee on the current position relating to the civil law on privacy and injunctions and on action currently being undertaken by the UK Government. Government Ministers will of course be happy to provide oral evidence to the Committee on these issues and on any other relevant matters which the Committee may wish to raise.

### Background

2. Concerns have been expressed in the media, Parliament and elsewhere about the use of injunctions to prevent confidential or private information about applicants (particularly celebrities and wealthy individuals) from entering the public domain. These are often anonymised injunctions which restrain publication of information which concerns the applicant and which do not disclose the names of either or both of the parties to the proceedings. The debate has become somewhat confused due to some media reports referring to all anonymised injunctions which restrict press reporting as “super-injunctions”. However, technically “super-injunctions” are only those forms of injunction which restrict the publication of private or confidential information and additionally forbid the press (and anyone else bound by the terms of the injunction) from revealing that such an injunction has been issued. Such injunctions are in fact very rare.
3. Concerns in this area first arose in the context of a Parliamentary question asked in late 2009 concerning a super-injunction obtained by Trafigura, a company trading in oil, base metals and other items, preventing the publication of a report on the alleged dumping of toxic waste in the Ivory Coast. Following the concerns raised in that case, in April 2010 the Master of the Rolls established a Committee including judges, representatives of the press and solicitors for claimants and defendants to examine the use of super-injunctions, the principle of open justice and other issues relating to injunctions which bind the press. The Committee published its report on 20 May 2011.
4. The issue returned to prominence in the media in March 2011 because of a reference in the House of Commons by John Hemming MP to an anonymity injunction involving Sir Fred Goodwin. In May 2011 a Scottish Newspaper and a journalist from the Times published information identifying a footballer, Ryan Giggs, who had taken out an anonymity injunction preventing information being published about his private life. In response to an Urgent Question tabled by John Whittingdale MP on 23 May, the Attorney General informed Parliament that a Joint Committee of both Houses would be established to consider the issues involved. Subsequently, concerns about the issue of phone hacking led to the separate establishment of a public inquiry into the regulation of the media which is being led by Lord Justice Leveson. This note does not address the matters that will be of direct concern to that inquiry.

### Protection of privacy prior to the coming into force of the Human Rights Act 1998

5. Prior to the entry into force of the Human Rights Act, a singular right to privacy was not recognised in the English common law. The absence of such a right was confirmed by the Court of Appeal in *Kaye v Robertson*<sup>292</sup>. Bingham LJ said that the defendants' conduct towards the claimant was a "monstrous invasion of privacy" and it was this which underlay the claimant's complaint but it alone, however gross, did not entitle him to any relief in English law. Leggatt LJ said that the right of privacy "had so long been disregarded here that it can only be recognised by the legislature."
6. When seeking to protect their privacy, claimants could rely on the protection afforded by other existing causes of action and legislative provisions. For example:
  - Breach of confidence (this has long offered protection from publication or other kinds of misuse of information on the basis that to disclose it would be a breach of confidentiality. For example, in *Prince Albert v Strange*<sup>293</sup> an injunction was granted to prevent the disclosure of private etchings; and details of sex lives have also been held to be confidential<sup>294</sup>).
  - Trespass (a tort which protects legal occupiers whose land or property is interfered with).
  - Nuisance (persistent watching, telephoning etc of an individual can be a nuisance).
  - Defamation (there can be a remedy in relation to the publication of private information where the defamation action concerns information which is discreditable and personal (e.g. sexual or financial). However, there are limitations to the extent to which defamation can be a remedy for protecting privacy: since justification is a complete defence, the publication of true but private facts is not actionable. Also, not all private information will be defamatory so there may be no cause of action in defamation).
  - Malicious falsehood (where the information published is false and published with malice).
  - The Protection from Harassment Act 1997 (which protects against conduct causing alarm, harassment or distress).

### Reviews relating to privacy law

7. A number of reviews took place in the years preceding the introduction of the Human Rights Act which considered issues relating to privacy and press regulation. These included the Younger report (1972)<sup>295</sup>, which focused primarily on the impact on privacy of technological developments such as surveillance devices; the McGregor report (1977)<sup>296</sup>, which recommended that the Press Council (which was at that time responsible for press self-regulation) should apply more stringent standards in relation to complaints about invasions of privacy by the press; the Lindop report

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<sup>292</sup> (1990) Times, 21 March (Court of Appeal)

<sup>293</sup> (1849) 2 De Gex & Sm 652.

<sup>294</sup> See for example, *Stephens v Avery* [1988] 1 Ch 449.

<sup>295</sup> *Report of the Committee on Privacy* (Cmnd 5012, 1972)

<sup>296</sup> *Fund Report of the Royal Commission on the Press* (Cmnd 6810, 1977)

(1978<sup>297</sup>), which focused on data protection issues and led to the Data Protection Act 1984; and the Calcutt report (1990)<sup>298</sup>.

8. The Calcutt report included detailed consideration of the practicalities and implications of introducing a new tort of infringement of privacy. While it considered that it would be possible to formulate such a tort, it was concerned at the potential impact on press freedom and that in practice a process of redress through the courts could be too expensive, slow and complex. Instead it recommended the establishment of the Press Complaints Commission (replacing the Press Council) to adjudicate on complaints brought by members of the public. A review of the new system of press self-regulation was then carried out by Sir David Calcutt in 1993<sup>299</sup>. This concluded, inter alia, that self-regulation had failed and that a new criminal offence of physical intrusion should be enacted and further consideration given to the introduction of a new tort of infringement of privacy. The creation of a new tort was also supported by the National Heritage Select Committee in its 1993 report on privacy and media intrusion<sup>300</sup>.
9. Following consultation on this issue, the Government concluded in its 1995 publication “Privacy and Media Intrusion”<sup>301</sup> that in the light of the press industry’s efforts to self-regulate, there was no call for criminal or civil legislation; that no workable legislation for criminal sanctions had been devised; and that the consultation exercise had not shown a consensus about the need for the introduction of a civil remedy.
10. Since the Human Rights Act came into force on 2 October 2000, there have been three further inquiries by the Culture, Media and Sport Select Committee on issues related to privacy and press regulation. The Committee’s report into Media and Press Intrusion in 2003<sup>302</sup> recommended that the Government bring forward legislative proposals to clarify the protection that individuals can expect from unwarranted intrusion by anyone, including the press, into their private lives. The then Government rejected this recommendation and indicated that existing legislation was capable of dealing adequately with questions of privacy.
11. The Committee’s report on Self Regulation and the Press in 2007<sup>303</sup> rejected statutory regulation of the press and indicated that there had been little support in evidence to the inquiry for a law setting out the boundaries for an individual’s right to privacy specifically from media intrusion, and that “to draft a law defining a right to privacy which is both specific in its guidance but also flexible enough to apply fairly to each case which would be tested against it could be almost impossible”.
12. The Committee’s 2010 report on Press Standards, Privacy and Libel<sup>304</sup> noted that as the Human Rights Act had only been in force for nine years, inevitably the number of judgments involving freedom of expression and privacy had been limited, and that this

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<sup>297</sup> *Report of the Committee on Data Protection* (Cmnd 7341, 1978)

<sup>298</sup> *Report of the Committee on Privacy and Related Matters* (Cm 1102, 1990)

<sup>299</sup> *Review of Press Self-Regulation* (Cm 2135, 1993)

<sup>300</sup> *National Heritage Committee Fourth Report: Privacy and Media Intrusion* (HMSO, 1993)

<sup>301</sup> *Privacy and Media Intrusion*, Cm 2918, 1995

<sup>302</sup> *HC Culture, Media and Sport Select Committee Fifth Report: Media and Press Intrusion* (HC (2002-2003) 458-1)

<sup>303</sup> *HC Culture, Media and Sport Select Committee Seventh Report: Self Regulation and the Press* (HC (2006-2007) 375)

<sup>304</sup> *HC Culture, Media and Sport Committee Report: Press Standards, Privacy and Libel* (HC (2009-2010) 362-1)

would become clearer as more cases were decided by the courts, although it was recognised that this could take some considerable time. It was noted that media witnesses who had given evidence were divided on the need for legislation, and concluded that “given the infinitely different circumstances which can arise in different cases, and the obligations of the Human Rights Act, judges would inevitably still exercise wide discretion. We conclude therefore that for now matters relating to privacy should continue to be determined according to common law, and the flexibility that permits, rather than be set down in statute”. In its response shortly before the 2010 General Election<sup>305</sup>, the then Government welcomed the Committee’s conclusion and indicated that it shared the view that there is no need to put the law of privacy on a statutory basis.

### Section 12 of the Human Rights Act 1998

13. The Culture, Media and Sport Select Committee recommended in its 2010 report that research should be conducted on the operation of section 12. A review of case law in this area since section 12 came into force on 2 October 2000 has been prepared by MOJ officials and is attached for the Committee’s information at Annex A. On the basis of this research it would appear that the courts are applying section 12 properly, and (subject of course to any conclusions which the Committee or the Bill of Rights Commission may reach) we are not currently minded to change it.

### Collection of statistics on privacy injunctions and super-injunctions in the High Court

14. The Culture, Media and Sport Select Committee also recommended that steps should be taken to gather data on injunctions to assist in assessing the impact of section 12, and a similar recommendation was made in the report of the Master of the Rolls’ Committee on Super-Injunctions published on 20 May 2011. In the light of these recommendations, a pilot scheme for the collection of statistics on privacy injunctions and super-injunctions by HM Courts and Tribunals Service has been developed and began on 1 August 2011. This focuses on the collection of data on injunctions issued in civil cases at the High Court Queen’s Bench Division and Chancery Division at the Royal Courts of Justice and any appeals against the granting or refusal of such injunctions in the Court of Appeal.
15. The summary statistics will cover all interim injunctions sought in civil proceedings which seek to restrain the publication of information and engage section 12 of the Human Rights Act. Statistics will include: the number of such injunctions which are applied for; the number granted and refused; and if granted, whether with notice or without notice, and what derogations from the principle of open justice were granted (including super-injunction type clauses). An exception is that if any such injunction is granted which relates to an issue of national security then the fact of its existence will be reported to statisticians but the other pieces of statistical information will not be collected. The information will be published in a form that does not enable the identification of the parties involved in the proceedings. The Practice Direction, issued by the Master of the Rolls, governing the collection of this data was published at the end of July and is attached for the Committee’s information at Annex B.

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<sup>305</sup> Cm 7851, April 2010

16. It would not be feasible to collect retrospective statistics on the number of privacy injunctions and super-injunctions sought and granted in previous years, as such statistics could only be obtained at very considerable cost. However, the statistics which are being collected will pick up instances of any privacy injunctions and super-injunctions which are already in force when collection begins and are subsequently challenged or a renewal sought at a hearing. Statistics arising from the data being collected will be published for the first time later in the year.

#### Bill of Rights Commission

17. On 17 March 2011 the Government announced the establishment of an independent Commission to investigate the creation of a UK Bill of Rights that incorporates and builds on all the UK's obligations under the European Convention on Human Rights, ensures these rights continue to be enshrined in UK law and which protects and extends our liberties. The Commission is charged with examining the operation and implementation of these obligations, and considering ways to promote a better understanding of their true scope. The Commission was asked to consult and to aim to report no later than by the end of 2012. On 5 August 2011 the Commission published a discussion paper seeking views on the need for a UK Bill of Rights and what it might contain.

#### Master of the Rolls' Committee Report on Super-Injunctions

18. In addition to the specific recommendations referred to elsewhere in this note, the Committee's report makes a series of recommendations providing guidance for the courts on procedural aspects of super-injunctions and other issues relating to injunctions which bind the press. It reaffirms that open justice is a fundamental constitutional principle and that exceptions to this are only permissible to the extent that they are strictly necessary in the interests of justice in a particular case. It also emphasises that super-injunctions are now only being granted for very short periods where secrecy is necessary to enable service of the order, and it should ensure that privacy injunctions and super-injunctions are only granted where strictly necessary.
19. The report addresses, among other things, the concern expressed by the Culture, Media and Sport Select Committee that the press should be given proper notice and opportunity to contest an injunction, and confirms that it will be a very rare case where advance notice of an application for a privacy injunction can justifiably be withheld from media organisations which are likely to be affected by any order. This is reflected in the Practice Guidance issued by the Master of the Rolls, a copy of which is attached for the Committee's information at Annex C.

#### Enforcement of court orders in foreign jurisdictions

20. When required, it has long been the practice of courts across the world to enforce judgments passed by courts in foreign jurisdictions. There are a variety of practices across the world, with differing regimes and agreements in existence.

### *European Union*

21. In European Union countries the recognition and enforcement of judgments in civil and commercial matters is governed by Council Regulation (EC) No 44/2001 (the Regulation). In general a judgment given in an EU country is to be recognised without any special procedure, unless the recognition itself is contested. Following formal checks of the relevant documents a declaration that a foreign judgment is enforceable is to be issued. The Regulation does not cover revenue, customs or administrative matters.

22. The Regulation provides the following grounds for non-enforcement:

- *Such recognition is manifestly contrary to public policy in the EU country in which recognition is sought;*
- *the defendant was not served with the document that instituted the proceedings in sufficient time and in such a way as to enable the defendant to arrange for his/her defence;*
- *it is irreconcilable with a judgment given in a dispute between the same parties in the EU country in which recognition is sought;*
- *it is irreconcilable with an earlier judgment given in another EU or non-EU country involving the same cause of action and the same parties.*

23. The Regulation notes a court may not raise these grounds of its own motion. Under no circumstance may a foreign judgment be reviewed as to its substance.

24. On 30 October, 2007, the Lugano Convention was signed by the EU, the Republic of Iceland, the Swiss Confederation, the Kingdom of Norway and the Kingdom of Denmark. This convention followed the legal framework established by the Regulation and aimed to achieve parity between the EU and other contracting states.

### *Other countries and UK provisions*

25. Reciprocal arrangements extend across the world. Generally speaking, the recognition and enforcement in one jurisdiction of judgments given in another jurisdiction will be the subject of bilateral or multilateral treaties or understandings, or can take place unilaterally without an express international agreement. In the UK these are governed by the Administration of Justice Act 1920, the Foreign Judgments (Reciprocal Enforcement) Act 1933 and the Civil Jurisdiction and Judgments Act 1982. Each of these Acts provides authority for enforcing foreign judgments within the United Kingdom. Practical guidance to the courts is provided by Part 74 of the Civil Procedure Rules.

### *Cross-border jurisdiction and enforcement within the United Kingdom*

26. Section 18 of the Civil Jurisdiction and Judgments Act 1982 sets out provisions relating to the enforcement of judgments made in one part of the UK in other parts. Section 18(5) provides that enforcement arrangements do not apply to any judgment

which “is a provisional (including protective) measure other than an order for the making of an interim payment”. This means that interim injunctions made in England and Wales are not enforceable in Scotland or Northern Ireland and that a separate order would need to be made by the Scottish or Northern Irish courts.

27. However, where the injunction is permanent in nature, it will fall within the scope of section 18 and may be enforceable by way of registration under Schedule 7 to the 1982 Act (Enforcement of UK Judgments (Non-Money Provisions)). This schedule provides for enforcement on the basis of the registration of a certified copy of the judgment. Under paragraph 5(5) of the Schedule registration is not permitted “if compliance with the non-money provisions contained in the judgment would involve a breach of the law of that part of the UK”. Paragraph 6(1) makes the following provision as to the general effect of registration: “The non-money provisions contained in a judgment registered under this schedule shall, for the purposes of their enforcement, be of the same force and effect, the registering court shall have in relation to their enforcement the same powers, and proceedings for or with respect to their enforcement may be taken, as if the judgment containing them had been originally given in the registering court and had (where relevant) been entered.”

#### Parliamentary privilege

28. The Government has indicated its intention to publish a draft Privilege Bill. Consideration is being given to this, but at this stage it is not possible to give any indication of what areas might be covered.
29. The Master of the Rolls’ Committee report sets out in detail the current provisions governing the reporting of Parliamentary proceedings. It also considered the current system of communications between the courts and Parliament in relation to injunctions and recommends that consideration be given to the feasibility of a streamlined system for answering *sub judice* queries from the Speakers’ offices based on establishing a secure database containing details of privacy injunctions and super-injunctions. However, it recognised the cost implications involved in establishing and maintaining such a database and that these would have to be balanced against the utility that would be derived from the database, given the infrequency with which such queries arise. The Ministry of Justice will give further consideration to this proposal and the Committee’s other proposals for streamlining the process for answering such queries, and will liaise with HM Courts and Tribunals Service, the Judicial Office and the House Authorities as appropriate.

#### Media regulation

30. Freedom of the press is one of the cornerstones of our democracy and the Government believes that it is important that responsible journalism should be able to flourish. Striking the right balance between press freedom and personal privacy is an on-going challenge. The right to freedom of expression and the right to privacy may be conflicting and must, therefore, be weighed up on a case by case basis.

31. The press must recognise that the freedom it enjoys must be balanced with a number of responsibilities. It must abide by the same laws as everyone else, including those on bribery, data protection and phone hacking. In addition, most newspapers continue to sign up to a Code of Practice which imposes further restrictions on them. The Code of Practice is enforced by the Press Complaints Commission (PCC), which is which is totally independent of Government.

32. The Code contains clear provisions on privacy:

*Privacy*

*i) Everyone is entitled to respect for his or her private and family life, home, health and correspondence, including digital communications.*

*ii) Editors will be expected to justify intrusions into any individual's private life without consent. Account will be taken of the complainant's own public disclosures of information.*

*iii) It is unacceptable to photograph individuals in private places without their consent.*

*Note - Private places are public or private property where there is a reasonable expectation of privacy.*

33. But there are occasions where, if the editor can justify the breach as being in the public interest, then this clause may be breached. The Code sets out a working definition of the public interest as:

*1. The public interest includes, but is not confined to:*

*i) Detecting or exposing crime or serious impropriety.*

*ii) Protecting public health and safety.*

*iii) Preventing the public from being misled by an action or statement of an individual or organisation.*

*2. There is a public interest in freedom of expression itself.*

*3. Whenever the public interest is invoked, the PCC will require editors to demonstrate fully that they reasonably believed that publication, or journalistic activity undertaken with a view to publication, would be in the public interest.*

*4. The PCC will consider the extent to which material is already in the public domain, or will become so.*

*5. In cases involving children under 16, editors must demonstrate an exceptional public interest to over-ride the normally paramount interest of the child.*

34. It seems to us that neither the privacy clause nor its public interest exemption is unreasonable. But there are serious questions about how some parts of the press have chosen to interpret this clause, and about how it is policed.

35. A clear weakness with the PCC is that membership is voluntary and not all papers are members. The Northern and Shell group (often referred to as the Express Group) of publications has withdrawn its subscription to the PCC. Consequently the Daily & Sunday Express, Scottish Daily & Sunday Express, Daily & Sunday Star, UK edition of OK!, New magazine and Star magazine are no longer bound by the PCC's code of practice, and the public no longer has recourse to making complaints through the PCC. The newspapers in this group represent around 10% of total national circulation.



36. The phone hacking scandal has also exposed a break between self-regulation and the legal systems and the Prime Minister has stated in Parliament that the PCC “is not set up in the right way, and has not worked.” The Prime Minister has announced the terms of reference for the Leveson Inquiry into phone hacking. Amongst other things, the Inquiry will inquire into the culture, practices, and ethics of the press, including the extent to which the current policy and regulatory framework has failed including in relation to data protection. It has been asked to make recommendations for a new more effective policy and regulatory regime which supports the integrity and freedom of the press, the plurality of the media, and its independence, including from Government, while encouraging the highest ethical and professional standards. By dealing decisively with the abuses of power we have seen in the press, we intend to strengthen and not diminish press freedom.
37. Broadcasters follow a different - although, in practice, not dissimilar - regulatory regime and Ofcom has a legal duty to protect members of public from unwarranted infringements of privacy in relation to the making of and the contents of licensed television and radio services.
38. The Broadcasting Code contains details of practices to be followed by broadcasters when dealing with individuals or organisations participating or otherwise directly affected by programmes, or in the making of programmes. Following these practices will not necessarily mean that broadcaster has met all their obligations, and failure to follow these practices will only constitute a breach of this section of the Code where it results in an unwarranted infringement of privacy. Importantly, the Code does not and cannot seek to set out exhaustively all the “practices to be followed” in order to avoid an unwarranted infringement of privacy.
39. The Broadcasting Act 1996 (as amended) requires Ofcom to consider complaints about unwarranted infringements of privacy in a programme or in connection with the obtaining of material included in a programme. This may call for some difficult on-the-spot judgments about whether privacy is unwarrantably infringed by filming or recording, especially when reporting on emergency situations (“practices to be followed” 8.5 to 8.8 and 8.16 to 8.19). We recognise there may be a strong public interest in reporting on an emergency situation as it occurs and we understand there may be pressures on broadcasters at the scene of a disaster or emergency that may make it difficult to judge at the time whether filming or recording is an unwarrantable infringement of privacy. These are factors Ofcom will take into account when adjudicating on complaints.
40. The Code makes clear that in relation to privacy, consent should be obtained or be otherwise warranted, ie there is always a public interest consideration to be taken into account. There is, however, no legal obligation for broadcasters always to obtain consent or always to notify before any infringement of privacy. The Code makes clear that there may be circumstances where a broadcaster may be warranted in not obtaining consent to an infringement of privacy or where it is justified not to be fair with potential contributors.

41. The Broadcasting Code defines “warranted” as follows:

*that where broadcasters wish to justify an infringement of privacy as warranted, they should be able to demonstrate why in the particular circumstances of the case, it is warranted. If the reason is that it is in the public interest, then the broadcaster should be able to demonstrate that the public interest outweighs the right to privacy. Examples of public interest would include revealing or detecting crime, protecting public health or safety, exposing misleading claims made by individuals or organisations or disclosing incompetence that affects the public.*

## **Annex A**

### Section 12 of the Human Rights Act 1998: how has it been operating?

1. This note considers how section 12 of the Human Rights Act 1998 (HRA) has been applied by the courts since it came into force on 2 October 2000. It considers the leading authorities on section 12 and gives some examples of recent decisions of the lower courts. The note is provided by way of background information to the Joint Committee.
2. Section 12 provides:

#### **12 Freedom of expression.**

(1) This section applies if a court is considering whether to grant any relief which, if granted, might affect the exercise of the Convention right to freedom of expression.

(2) If the person against whom the application for relief is made (“the respondent”) is neither present nor represented, no such relief is to be granted unless the court is satisfied—

- (a) that the applicant has taken all practicable steps to notify the respondent; or
- (b) that there are compelling reasons why the respondent should not be notified.

(3) No such relief is to be granted so as to restrain publication before trial unless the court is satisfied that the applicant is likely to establish that publication should not be allowed.

(4) The court must have particular regard to the importance of the Convention right to freedom of expression and, where the proceedings relate to material which the respondent claims, or which appears to the court, to be journalistic, literary or artistic material (or to conduct connected with such material), to—

- (a) the extent to which—
  - (i) the material has, or is about to, become available to the public; or
  - (ii) it is, or would be, in the public interest for the material to be published;
- (b) any relevant privacy code.

(5) In this section—

“court” includes a tribunal; and

“relief” includes any remedy or order (other than in criminal proceedings).

3. Indications of the intended effect of section 12 are given in the Hansard debates on the Human Rights Bill, and senior judges recently gave evidence to the Joint Committee on the Draft Defamation Bill on section 12 (Ministerial statements on the Human Rights Bill and extracts from the judges’ evidence are attached at the end of this note).

### Decisions of the appellate courts in which the effect of section 12 has been considered:

4. There is a series of cases by the senior courts which are relevant to the issue of what is meant by the need to pay “particular regard” to freedom of expression (as

required by section 12(4)) and the implications this has for the s.12(3) requirement not to restrain publication before trial unless satisfied that the applicant is likely to establish that the publication should not be allowed. These demonstrate that section 12 is not to be applied in a way which gives the right to freedom of expression an automatic priority over the privacy rights involved in Article 8, but also illustrate that the courts should intensively analyse the nature of the considerations relevant in respect of these rights in individual cases and how to balance them.

*(1) Section 12(4)*

5. *Douglas v Hello! Ltd* [2001] QB 967<sup>306</sup> was one of the first cases to consider section 12 after the coming into force of the HRA and includes a number of important conclusions as to the effect of the section. Sedley LJ reached the following conclusions:

**133** ... it is "the Convention right" to freedom of expression which both triggers the section (see section 12(1)) and to which particular regard is to be had. That Convention right, when one turns to it, is qualified in favour of the reputation and rights of others and the protection of information received in confidence. In other words, you cannot have particular regard to article 10 without having equally particular regard at the very least to article 8:

"1. Everyone has the right to respect for his private and family life, his home and his correspondence.

"2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

**134** ... A newspaper, say, intends to publish an article about an individual who learns of it and fears, on tenable grounds, that it will put his life in danger. The newspaper, also on tenable grounds, considers his fear unrealistic. First of all, it seems to me inescapable that section 12(4) makes the right to life, which is protected by article 2 and implicitly recognised by article 10(2), as relevant as the right of free expression to the court's decision; and in doing so it also makes article 17 (which prohibits the abuse of rights) relevant. But this in turn has an impact on section 12(3) which, though it does not replace the received test (or tests) for prior restraint, qualifies them by requiring a probability of success at trial. The gauging of this probability, by virtue of section 12(4), will have to take into account the full range of relevant Convention rights.

**135** How is the court to do this when the evidence—viz that there is and that there is not an appreciable risk to life—is no more than evenly balanced? A bland application of section 12(3) could deny the claimant the court's temporary

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<sup>306</sup> Michael Douglas and Catherine Zeta Jones made an agreement with *OK!* magazine giving them exclusive rights to publish photographs of their wedding. Photographs were taken surreptitiously and *Hello!* magazine proposed to publish these. The claimants applied for an interim injunction to restrain publication. This was granted and the matter came before the Court of Appeal. The appeal was allowed and the injunction discharged. The Court held that although the claimants might establish at trial that publication should not be allowed on grounds of confidentiality, the approach of the claimants to organising publicity concerning their wedding was likely to mean there would be insufficient to tilt the balance against publication and damages would be an adequate remedy.

protection, even if the potential harm to him, should the risk eventuate, was of the gravest kind and that to the newspaper and the public, should publication be restrained, minimal; and a similarly bland application of section 12(4), simply prioritising the freedom to publish over other Convention rights (save possibly freedom of religion: see section 13), might give the newspaper the edge even if the claimant's evidence were strong. I agree with Mr Tugendhat that this cannot have been Parliament's design. This is not only, as he submits, because of the inherent logic of the provision but because of the court's own obligation under section 3 of the Act to construe all legislation so far as possible compatibly with the Convention rights, an obligation which must include the interpretation of the Human Rights Act itself. The European Court of Human Rights has always recognised the high importance of free media of communication in a democracy, but its jurisprudence does not—and could not consistently with the Convention itself—give article 10(1) the presumptive priority which is given, for example, to the First Amendment in the jurisprudence of the United States' courts. Everything will ultimately depend on the proper balance between privacy and publicity in the situation facing the court.

**136** ... It will be necessary for the court, in applying the test set out in section 12(3), to bear in mind that by virtue of section 12(1)(4) the qualifications set out in article 10(2) are as relevant as the right set out in article 10(1). This means that, for example, the reputations and rights of others—not only but not least their Convention rights—are as material as the defendant's right of free expression. So is the prohibition on the use of one party's Convention rights to injure the Convention rights of others. Any other approach to section 12 would in my judgment violate section 3 of the Act. Correspondingly, as Mr Tugendhat submits, "likely" in section 12(3) cannot be read as requiring simply an evaluation of the relative strengths of the parties' evidence. If at trial, for the reasons I have given, a minor but real risk to life, or a wholly unjustifiable invasion of privacy, is entitled to no less regard, by virtue of article 10(2), than is accorded to the right to publish by article 10(1), the consequent likelihood becomes material under section 12(3). Neither element is a trump card. They will be articulated by the principles of legality and proportionality which, as always, constitute the mechanism by which the court reaches its conclusion on countervailing or qualified rights....

**137** Let me summarise. For reasons I have given, Mr Douglas and Ms Zeta-Jones have a powerful prima facie claim to redress for invasion of their privacy as a qualified right recognised and protected by English law. The case being one which affects the Convention right of freedom of expression, section 12 of the Human Rights Act 1998 requires the court to have regard to article 10 (as, in its absence, would section 6). This, however, cannot, consistently with section 3 and article 17, give the article 10(1) right of free expression a presumptive priority over other rights. What it does is require the court to consider article 10(2) along with 10(1), and by doing so to bring into the frame the conflicting right to respect for privacy. This right, contained in article 8 and reflected in English law, is in turn qualified in both contexts by the right of others to free expression. The outcome, which self-evidently has to be the same under both articles, is determined principally by considerations of proportionality.

Keene LJ also said:

**150** For my part, I do not accept that there is any need for conflict between the normal meaning to be attached to the words in section 12(3) and the Convention. The subsection does not seek to give a priority to one Convention right over another. It is simply dealing with the interlocutory stage of proceedings and with how the court is to approach matters at that stage in advance of any ultimate balance being struck between rights which may be in potential conflict. It requires the court to look at the merits of the case and not merely to apply the *American Cyanamid* test. Thus the court has to look ahead to the ultimate stage and to be satisfied that the scales are likely to come down in the applicant's favour. That does not conflict with the Convention, since it is merely requiring the court to apply its mind to how one right is to be balanced, on the merits against another right, without building in additional weight on one side. In a situation such as the one postulated by Mr Tugendhat, where the non-article 10 right is of fundamental importance to the individual, such as the article 2 right to life, the merits will include not merely the evidence about how great is the risk of that right being breached, but also a consideration of the gravity of the consequences for an applicant if the risk materialises...

**151** Certainly section 12(3) is making prior restraint (i.e. before trial) more difficult in cases where the right to freedom of expression is engaged than where it is not. That is not a novel concept in English law. As was said by Laws J in *R v Advertising Standards Authority Ltd, Ex p Vernons Organisation Ltd* [1992] 1 WLR 1289, 1293:

"there is a general principle in our law that the expression of opinion and the conveyance of information will not be restrained by the courts save on pressing grounds. Freedom of expression is as much a sine of the common law as it is of the European Convention for the Protection of Human Rights and Fundamental Freedoms."

**152** Perhaps more to the point, the jurisprudence of the European Court of Human Rights is generally hostile to prior restraint by the courts...

**153** It is impossible to accept that a statutory provision requiring a court to consider the merits of the case and to be satisfied that the balance is likely to be struck in favour of the applicant before prior restraint is to be granted is incompatible with the Convention. It follows that no strained reading of the language of section 12(3) is needed to render it compatible with Convention rights. The wording can be given its normal meaning. Consequently the test to be applied at this stage is whether this court is satisfied that the applicant is likely to establish at trial that publication should not be allowed. Even then, there remains a discretion in the court.

6. *Campbell v MGN Ltd* [2004] 2 AC 457<sup>307</sup> is an example of the Article 8 /10 balancing exercise being applied by the House of Lords in a situation which engaged section 12(4). At [111] Lord Hope noted:

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<sup>307</sup> Photographs of Naomi Campbell leaving a drug rehabilitation clinic were published. This followed public denials that she was being treated for drug addiction. Campbell brought an action for breach of confidence, challenging the wrongful disclosure of private information. She was awarded damages by the trial judge.

“...But, as Sedley LJ said in *Douglas v Hello! Ltd* [2001] QB 967, 1003, para 133, you cannot have particular regard to article 10 without having equally particular regard at the very least to article 8: see also *In re S (A Child) (Identification: Restrictions on Publication)* [2004] Fam 43, 72, para 52 where Hale LJ said that section 12(4) does not give either article pre-eminence over the other. These observations seem to me to be entirely consistent with the jurisprudence of the European court...”

7. The House of Lords held by a majority of 3 to 2 (Lords Nicholls and Hoffmann dissenting) that, *despite the weight that had to be given to freedom of expression*, there had been an unjustifiable infringement of the claimant’s privacy. It was recognised that in striking the balance between Articles 8 and 10, Article 10 required the weighing of the duty to impart information and ideas of public interest which the public had a right to receive and the editorial discretion of journalists. However, this needed to be weighed against the degree of confidence to which the claimant was entitled in relation to her medical treatment and the potential for the disclosure of information about drug treatment to do harm.

8. Similarly, in *Re S (a child)* [2005] 1 AC 593<sup>308</sup> Lord Steyn held (at [17]):

“The interplay between articles 8 and 10 has been illuminated by the opinions in the House of Lords in *Campbell v MGN Ltd* [2004] 2 AC 457. ... What does... emerge clearly from the opinions are four propositions. First, neither article has *as such* precedence over the other. Secondly, where the values under the two articles are in conflict, an intense focus on the comparative importance of the specific rights being claimed in the individual case is necessary. Thirdly, the justifications for interfering with or restricting each right must be taken into account. Finally, the proportionality test must be applied to each. For convenience I will call this the ultimate balancing test. This is how I will approach the present case.

9. The House of Lords applied those principles and ordered that there would be no injunction. It noted that the interference with the child’s Article 8 rights, though distressing, was indirect and not of the same order when compared with cases of juveniles directly involved in criminal trials whereas, by contrast, the Article 10 rights at issue concerned freedom of the press to report proceedings at criminal trials which was a valuable check on the criminal process and promoted public confidence in the administration of justice.

10. *McKennitt v Ash* [2008] QB 73<sup>309</sup> involved an appeal in which the defendant complained that the judge had not paid sufficient respect to or applied section 12(4) of the HRA (which requires ‘particular regard’ to be had to Article 10). However, Buxton LJ highlighted that the judge had clearly had regard to Lord Steyn’s judgment in *Re S (A Child)* that neither Article 8 or Article 10 as such has precedence over the other and that guidance bound him (paragraph 47).

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<sup>308</sup> S was a five year old boy in respect of whom care proceedings were in progress. His brother had died and his mother had been indicted for murder. The judge made an order prohibiting any identification of S’s name or the school he attended and, additionally, preventing any publication in a report of the criminal trial of the name or photograph of the mother or the deceased child. This order was challenged by newspaper publishers.

<sup>309</sup> The claimant was a famous musician. The defendant had been the claimant’s close friend and wrote a book containing personal and private information about her. The claimant issued proceedings for breach of privacy/confidence and sought an injunction to prevent the further publication of certain material which, she contended, she was entitled to keep private. The judge upheld the claim and granted an injunction preventing further publication of a significant part of the work.

(2) Section 12(3)

11. There is also House of Lords authority on the meaning of the test “likely to establish that the publication should not be allowed” in section 12(3). In *Cream Holdings v Bannerjee* [2005] 1 AC 253<sup>310</sup>, the House of Lords noted that the main purpose of s.12(3) was to buttress the protection afforded to freedom of speech at the interlocutory stage and to address the concern that the usual *American Cyanamid* approach (a guideline of “a serious question to be tried” or a “real prospect of success”) would mean that orders imposing prior restraint on newspapers would readily be granted by the courts to preserve the status quo until trial in cases where it was claimed a publication would infringe Article 8 rights. The effect of section 12(3) was that the court should not make an interim restraint order unless it was satisfied that the applicant’s prospects of success at trial were sufficiently favourable to justify the order being made and *in general the threshold would be that the applicant would probably (more likely than not) succeed at trial*. However, to construe ‘likely’ as meaning ‘more likely than not’ in all situations would set the bar too high –flexibility was essential.<sup>311</sup>

12. The Court of Appeal followed *Cream Holdings* in *Lord Browne of Madingley v Associated Newspapers Ltd* [2008] QB 103.<sup>312</sup> Counsel for the claimant argued that where the claimant showed that there was a real expectation of privacy but it was not possible to establish whether publication would be in the public interest before trial, the claimant’s expectation of privacy should be protected until trial. He submitted that the newspaper must show that it was more likely than not that it would be permitted to publish as a result of Article 10. The Court of Appeal rejected this argument (at paragraph 43):

“We are unable to accept that submission because it is contrary to section 12(3), which proceeds on the footing that where there is uncertainty publication should be permitted unless the claimant can show that he is likely to succeed at the trial, using the word “likely” in the flexible manner described by Lord Nicholls [in *Cream Holdings v Banerjee*]. Thus, on the facts of this case it was for the claimant to persuade the judge, in respect of each category of information, that his prospects of success at the trial are sufficiently favourable to justify such an order being made in the particular circumstances of the case, the general approach being that the courts should be “exceedingly slow” to make interim restraint orders where the applicant has not satisfied the court that he will probably (“more likely than not”) succeed at the trial. By “succeed at trial” we understand Lord Nicholls to mean that the claimant is likely to succeed after the court has carried out the relevant balance between the claimant’s rights under article 8 and the newspaper’s rights under article 10. We see no reason not to apply the general approach here.”

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<sup>310</sup> The claimants sought an interim injunction to restrain publication of confidential information obtained by a former employee and passed to a local newspaper to support the employee’s allegations of financial irregularities. The first instance judge applied s.12(3) and granted the injunction. An issue arose on appeal as to whether the judge should, when applying s.12(3) have applied a test of “a real prospect of success” or “more likely than not”.

<sup>311</sup> On the facts the claimants’ prospects of success at trial were not sufficiently likely to justify making an interim restraint order.

<sup>312</sup> The claimant was the chief executive of BP who obtained an interim injunction without notice restraining the defendant newspaper from publishing information concerning his personal life and business activities which had been disclosed by a former partner. These included that he had misused BP’s resources to support his partner and had discussed confidential matters with him. On an application to continue the interim injunction pending trial, the judge held that the claimant was entitled to an injunction in respect of private information disclosed to the partner in confidence but not corporate information.



13. The Court of Appeal held that the judge had applied the correct tests and had been entitled to conclude that the information relating to the claimant's business activities was not private and that he had not shown that, having regard to the applicant's Article 10 rights, he was likely to succeed at trial.

14. Recently in *Hutcheson v News Group and others* [2011] EWCA Civ 808<sup>313</sup> the Court of Appeal upheld a first instance decision that the claimant had failed to satisfy the test in section 12(3) HRA and therefore should not be granted an injunction. Mr Justice Eady had concluded that, when answering the question whether Mr Hutcheson was likely to succeed at trial in establishing a permanent injunction, he could not say that it would be necessary or proportionate, either in the interests of the administration of justice or for the protection of the claimant's legitimate expectations in respect of Article 8 to restrict the freedom of expression of the newspaper. Gross LJ considered that Eady J was right. In doing so he said:

“45. First, I begin with a focus on the public interest in publication of the fact of Mr. Hutcheson's second family. I have already referred to the very public dispute between Mr. Ramsay and Mr. Hutcheson, much ventilated in the media. To my mind, those who choose to conduct their quarrels in such a fashion take the risk that they may not be able to insist thereafter on clear boundary lines between what is public and what is private – regardless of whether they were, hitherto, only public personalities in a very limited sense. In the present case, as it seems to me, there is a very real risk of a distorted and partial picture being presented to the public of this dispute, were an injunction to be granted as sought by Mr. Hutcheson. ...

46. ...I turn next to the allegation of wrongdoing involving the misuse of company monies to fund the second family... I do not think it can be said at this stage where the truth ultimately lies; in those circumstances, it seems to me that there is a public interest in NGN being free to publish the fact of Mr. Hutcheson' second family to authenticate the allegation of diversion of corporate funds for private purposes.

47. Secondly and as earlier foreshadowed, assuming without deciding that Mr. Hutcheson did have a reasonable expectation of privacy as to the information in question, the claim to privacy was, at best, a claim of the borderline variety. ...

48. Thirdly, for the reasons already given, this case involved a strong claim to freedom of expression in the public interest, against which there was, in the balance and, at best, a tenuous claim to privacy. Realistically, there was, at the least, a very real likelihood that Mr. Hutcheson would fail at trial. Against this background, the manner in which Eady J struck the balance (at [42] of the judgment) is, to my mind, unexceptionable; so too was his conclusion as to s.12(3), HRA... There is an important distinction between the desire to keep information private and invoking the full panoply of the Court's jurisdiction in order to do so. It is and should remain a strong thing to impose a prior restraint on publication.”

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<sup>313</sup> Mr Hutcheson was married with four children and was the father-in-law of the celebrity chef, Gordon Ramsey. He had an extra-marital relationship and a second family. The claimant's evidence was that the two families knew of each other. Hutcheson was chief executive of Ramsey's company but was dismissed from it and Hutcheson and Ramsey had a very public dispute. The Sun wanted to run a story based on evidence from a source that Hutcheson had been dismissed for using company money to fund his second family. Hutcheson sought an injunction to stop the newspaper from publishing information about the fact of his extra-marital relationship and two children as a result of this and as to the identity of the second family.

15. In *Greene v Associated Newspapers Ltd* [2005] QB 972 the Court of Appeal confirmed that section 12(3) did not change the balance in defamation cases in a way that reduced protection for Article 10. The Court of Appeal held that section 12(3) HRA did not require a judge considering an application for an interim injunction restraining an alleged libel to ask himself whether the claimant was more likely than not to be able to establish at trial that the publication should not be allowed. Rather, in cases where the defendant pleaded justification (i.e. substantial truth), the rule remained that a claimant would not be able to obtain such an injunction before trial unless it was plain that the plea of justification was bound to fail. The Court considered that to do otherwise would be too great a restriction on freedom of expression and freedom of the press (see paragraph 78). Whittling down the right to freedom of expression was clearly not Parliament's intention in enacting section 12 and the claimant's Article 8 right to reputation could not be given great weight pre-trial. It was very difficult to assess the merits of a justification defence pre-trial and the damage which may be done by a libel can be remedied by vindicating the claimant (in contrast to the position in relation to privacy injunctions where confidential information, once disclosed loses its confidential quality).

Judgments of the lower courts in which section 12 has been applied:

16. The following are examples of recent cases in which section 12 has been applied by first instance judges.

*BKM v BBC* [2009] EWHC 3151 (Ch)<sup>314</sup>

- Mann J conducted a balancing exercise applying the principles set out in *Re S (a Child)*. In doing so, the judge paid very close regard to s.12(3) and it was a decisive factor in his judgment (see paragraphs 23 and 37):

“I therefore have to conduct such an exercise, but with a very firm eye on section 12(3). I have to determine not only how the competition between the rights is to be resolved for present purposes, but also to do so with an eye to determining whether an injunction would be granted to restrain a broadcast at a trial. An injunction should not be granted unless I am satisfied that at a trial it would be likely to be determined (in the sense of more probable than not - see *Cream Holdings v Bannerjee* [2005] 1 AC 253) that the broadcast should not be allowed.”

“So the balancing process produces some weight on each side. At present it seems to me that if the BBC lives up to its word and obscures the identity of residents, the invasion of their privacy from broadcasting is likely to be relatively slight. The greater weight lies on the public interest side of the argument. That would be my assessment on the evidence that I have. That points against granting an injunction. However, the BBC has the additional weight of sections 12(3) and 12(4) on its side of the scales. I must give special weight to free speech, and then should only grant an injunction if I

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<sup>314</sup> BKM operated a care home which was inspected by the Care and Social Services Inspectorate for Wales and was found to have shortcomings. The BBC wanted to make a documentary that had, as at least part of its theme, the point that the regulation of care homes was not working. It wanted to use BKM as an example and used undercover reporters to conduct secret filming. The defendant invited the claimant to comment on certain allegations. The claimant applied to restrain the broadcast in order to protect the Article 8 rights of its residents. The defendant undertook to obscure the identity of residents and relied on Art 10, s.12 HRA and said that it had acted in accordance with the OfCom guidelines. An interim injunction to prevent further broadcast of a trailer for the programme was granted pending the final determination of the substantive application in relation to the programme itself.

thought it were likely at a trial that publication would be restrained. The burden of the latter point is on the claimant. They have not fulfilled it. I do not think it likely that an injunction would be granted at trial, on the present state of the evidence.”

*CTB v (1) News Group Newspapers & (2) Imogen Thomas (No 1)* [2011] EWHC 1232 (QB)<sup>315</sup>

- When considering whether to continue an interim injunction, in balancing the Article 8 and Article 10 rights Eady J took account of the fact that there was no public interest in the subject matter concerned and, despite some information being in the public domain, was not satisfied that there was nothing left to protect in respect of which the applicant had a reasonable expectation of privacy. Applying s.12(3) Eady J concluded it seemed likely that the claimant would succeed at trial and accordingly an injunction should be granted. In doing so he observed at paragraph 33, in relation to the ‘ultimate balancing test’ expressed in *Re S (a Child)*, that:

“It follows that one can rarely arrive at the answer in any given case merely by reference to generalities. It must all depend upon the particular facts of the case. It follows too that there can be no automatic priority accorded to freedom of speech. The relative importance of the competing values must be weighed by reference to the individual set of circumstances confronting the court. Of course the court will pay particular regard to freedom of expression, but that does not entail giving it automatic priority. All will depend on the value to be attached to the exercise or proposed exercise of that freedom in the particular case. It will rarely be the case that the privacy rights of an individual or of his family will have to yield in priority to another's right to publish what has been described in the House of Lords as “tittle-tattle about the activities of footballers' wives and girlfriends”: see e.g. *Jameel v Wall Street Journal Europe SPRL* [2007] 1 AC 359 at [147]. It has recently been re-emphasised by the Court in Strasbourg that the reporting of “tawdry allegations about an individual's private life” does not attract the robust protection under Article 10 afforded to more serious journalism. In such cases, “freedom of expression requires a more narrow interpretation”: *Mosley v UK* (App. No. 48009/08), 10 May 2011, BAILII: [2011] ECHR 774, at [114].”

*Sir Frederick Goodwin v News Group Newspapers* [2011] EWHC 1437 (QB):

- Sir Fred Goodwin, RBS Chief Exec admitted having an affair with VBN, another RBS member of staff. A privacy injunction (not a super-injunction) was granted to protect his privacy and that of VBN.
- Tugendhat J accepted that VBN's fears of intrusion were well-founded and if her name and job description were published by News Group Newspapers, this would be likely to cause distress to her which would constitute an abuse. He varied the injunction to remove the bar on publication of VBN's job description but maintained the injunction in respect of her name. In doing so he applied section 12 and was satisfied that the significant intrusion into VBN's private life was sufficient to justify the interference with Article 10 entailed in restraining the publication of her name

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<sup>315</sup> *The Sun* published an account of a sexual relationship between Imogen Thomas and an unnamed footballer. On 14 April Eady J granted a temporary injunction with a return date of 20 April to prevent disclosure of the identity of the footballer or further details of the relationship. When it came back before him, Eady J concluded the interim injunction should be continued. There could be no doubt that CTB had a reasonable expectation of privacy in relation to the subject matter of the threatened publication as it was of an intimate and sexual nature.

but not sufficient to justify a restraint on the important part of the story constituted by her job description.

### Conclusion

17. These cases in summary seem to suggest:

- the courts are alive to the importance of section 12 of the Human Rights Act 1998 and actively consider its application when deciding whether or not to grant injunctions;
- but section 12 does not confer a “trump” status to article 10 rights; rather, these have to be weighed against any competing rights under other convention articles, notably article 8;
- it is imperative that the courts consider each case on the individual facts and merits.

**Extracts from Hansard – debates on the Human Rights Bill**

Jack Straw MP, Home Secretary:

*“we have always believed that the Bill (the HRA) would strengthen rather than weaken freedom of the press...the provision (s.12) is indeed overall to ensure ex parte injunctions are granted only in exceptional circumstances. Even where both parties are represented, we expect that injunctions will continue to be rare, as they are at present.”*  
(Hansard, HC Debates, 2 July 1998, col. 535-6).

*“[it] provides an important safeguard by emphasising the right to freedom of expression. Our intention is that that should underline the consequent need to preserve self-regulation. That effect is reinforced by highlighting in the amendment the significance of any relevant privacy code, which plainly includes the code operated by the PCC”*  
(Hansard, HC Debates, 2 July 1998, col 541).

*“[section 12] will send a powerful signal to the United Kingdom courts that they should be at least as circumspect as judgments of the European Court of Human Rights have been about any action that would give the article 8 rights any supremacy over the freedom of expression rights in article 10. I hope and believe that an amendment along those lines will deal satisfactorily with the concerns of the press.”*  
(Hansard, HC Debates, 16 February 1998, col 775)

Lord Irvine, Lord Chancellor (Hansard, HL Debates, 24 November 1997, Col 784-786):

*“I want to tackle the concerns of the press directly. They are essentially twofold. First, will the courts develop a law of privacy, and, secondly, is the PCC itself to be regarded as a public authority which should act consistently with the convention? First, as I have often said, the judges are pen-poised, regardless of incorporation of the convention, to develop a right to privacy to be protected by the common law. This is not me saying so; they have said so. It must be emphasised that the judges are free to develop the common law in their own independent judicial sphere. What I say positively is that it will be a better law if the judges develop it after incorporation because they will have regard to Articles 8 and 10, giving Article 10 its due high value, which the strenuous efforts of the noble Lord, Lord Lester of Herne Hill, in the courts of this country and of elsewhere have contributed to ensuring that it enjoys. ...*

*In my opinion, the court is not obliged to remedy the failure by legislating via the common law either where a convention right is infringed by incompatible legislation or where, because of the absence of legislation—say, privacy legislation—a convention right is left unprotected. In my view, the courts may not act as legislators and grant new remedies for infringement of convention rights unless the common law itself enables them to develop new rights or remedies. I believe that the true view is that the courts will be able to adapt and develop the common law by relying on existing domestic principles in the laws of trespass, nuisance, copyright, confidence and the like, to fashion a common law right to privacy. That was more or less what the noble and learned Lord, Lord Hoffmann, said in an important public lecture. They may have regard to the convention in developing the common law, as they do today and as the noble and learned Lord, Lord Wilberforce, says it is right that they should. ...*

*The courts may well develop a law of privacy, not because the Government require them to do so but because they will be exercising their freedom to do so in their own independent sphere. But if there were effective self-regulation a law of privacy developed by the judges would hardly ever have to be invoked against the press.*

*It is wrong for noble Lords to allow this debate to focus exclusively upon a privacy law that applies only to the media. I emphasise to the noble Lord, Lord Wakeham, that the right to privacy is a basic human right. That right can be infringed by a neighbour, an intrusive commercial agency, private investigators, the police and all manner of other people. The little man needs protection against these bodies. It is primarily these malpractices without a shred of public interest to justify them that will be in the sights of the courts if they move to develop a right to privacy as part of the common law. A well regulated press which is essential to a free society has nothing to fear and everything to gain.*

*I tend to believe that the important function of the PCC to adjudicate on complaints from the public about the press may well be held to be a function of a public nature, so that, as I said in my letter, the PCC might well be held to be a public authority under the Human Rights Bill. But I believe that this is an opportunity, not a burden on the PCC. The opportunity is that the courts would look to the PCC as the pre-eminently appropriate public authority to deliver effective self-regulation fairly balancing Articles 8 and 10. The courts therefore would have to intervene only if self-regulation did not adequately secure compliance with the convention. The message for the press is plain: strengthen self-regulation and strengthen the PCC under its eminent chairmanship.*

*I do not believe that the courts will grant temporary injunctions where there are solid grounds for the press to maintain that they have public interest grounds to publish something, just as the courts do not restrain libels where the press intends to justify them. I say to the press that its salvation as it sees it can be in its own hands....*

Lord Irvine LC:

*“The right to privacy is not absolute. I am confident that our courts, obliged by Clause 2 to take account of Strasbourg jurisprudence, will not misinterpret the law and will not grant prior restraints through interim injunctions to restrain alleged infringements of personal privacy where the defendant seeks reasonably to rely upon a public interest defence, any more than the courts now do in cases of alleged libels.”*

*(Hansard, HL Debates, 3 November 1997 vol 582 cc1242-1243)*

**Evidence of Lord Neuberger, Mr Justice Tugendhat, Lord Woolf Sir Stephen Sedley and Sir Charles Gray to the Draft Defamation Bill Committee on 6 July 2011**

**Q634 The Chairman:** It falls to me to ask the last question, as we appreciate that you have pressing demands on your time and we agreed to finish by 10 o'clock. Sir Anthony Clarke gave evidence to the Commons Culture, Media and Sport Committee in 2009. He was questioned about Articles 8 and 10 of the Human Rights Act, and particularly the importance of Section 12. This came to mind when you, Sir Michael, used the phrase freedom of expression on quite a number of occasions. In areas that may go beyond defamation, I suspect that it will not come as a huge surprise to you that you could probably find people at both ends of the corridor in this building who feel that notwithstanding the fact that we have to balance Articles 8 and 10, that we are part of the Convention and all the rest of it perhaps the courts have not given quite as much expression to the application of Section 12 as Parliament might have had in mind when bringing it forward. Does Parliament need to restate Section 12 in a new Bill to give better protection for the freedom of expression that Sir Michael referred to? Of course, I am talking primarily in the context of this legislation.

**Lord Neuberger of Abbotsbury:** For my part, I am very chary of expressing a view on this. The short answer, even if it is slightly trite, is that if Parliament comes to the conclusion that the judges have either misinterpreted or misapplied Section 12, or the section is not doing its job in the sense that the judges have got it right but it is not doing the job intended by Parliament it is for Parliament to decide what to do about it and, in particular, whether to change the law by amending Section 12 or repealing it and re-enacting it in a different form. But we then trespass into the area of policy. As a judge, I would be very chary about that. However, Sir Michael may be braver than me.

**Mr Justice Tugendhat:** My recollection is that Section 12 was much debated before it went into the Human Rights Bill and nobody knew whether it would work. It is true that in one sense it has not worked. The reason why it has not worked to the extent that it has not is that there is a tension between it and the earlier provisions of the Act. It is impossible to enact the European Convention and then include a provision that seeks to give a different emphasis to the different Convention rights from what would be given otherwise. This was foreseen at the time by many people and I do not think that it is any surprise to lawyers interested in this field of the law that Section 12 has not achieved what its promoters would have wished, but how could it?

**Sir Stephen Sedley:** ... The previous witnesses were asked about Section 12 of the Human Rights Act. Sir Michael Tugendhat made the important point that Section 12 is intended to try to stop judicial intervention at an early stage of what may well be a serious libel. The risk it takes is that it itself may be in violation of the Convention. You have to read Section 12 and Section 13 in the light of Section 3 of the Act. That may be one reason why it does not seem to be having the prophylactic effect that its movers intended it to have.

**Q638 The Chairman:** In that case, what might this Committee recommend to Government to restore what Parliament probably intended when it put in Section 12, even though we are now being educated on why that was never likely to be as effective as Parliament wanted it to be?

**Lord Woolf of Barnes:** I am afraid that the European Convention on Human Rights is there. Unless you want the very unsatisfactory situation of two systems of law, one of which applies to the citizen when he is before the courts in the Strand and a different one when he appears in Strasbourg, I am afraid that what our law at present requires the courts to do, which is take into account the European Convention on Human Rights, has to be read in the way that the European courts interpret that Convention. It is very difficult. Parliament took on an almost impossible task.

**Sir Charles Gray:** The problem goes back to the Convention itself. Article 8, the privacy right, and Article 10, the freedom of expression right, are, according to my understanding of Convention law, to be given equal status. Parliament, in its wisdom, enacted Section 12(4), which says that the courts should have particular regard to the right to freedom of expression, but how can one reconcile that with Convention law, which says that the two rights are equal, and often in conflict, as we all know?



### **Annex B: Practice Direction**

This Practice Direction is made by the Master of the Rolls under the powers delegated to him by the Lord Chief Justice under Schedule 2, Part 1, paragraph 2(2) of the Constitutional Reform Act 2005, and is approved by \_\_\_\_\_, Parliamentary Under Secretary of State, by the authority of the Lord Chancellor.

### **PRACTICE DIRECTION 51F – NON-DISCLOSURE INJUNCTIONS INFORMATION COLLECTION PILOT SCHEME**

1. This Practice Direction is made under rule 51.2. It provides for a pilot scheme for the recording, and transmission to the Ministry of Justice for analysis, of certain data in relation to injunctions prohibiting publication of private or confidential information. The purpose of the scheme is to enable the Ministry of Justice to collate and publish, in anonymised form, information about applications for injunctions where section 12 of the Human Rights Act 1998 is engaged.
2. The pilot scheme will operate from 1 August 2011 to 31 July 2012, and will apply in any civil proceedings in the High Court or Court of Appeal in which the court considers an application for an injunction prohibiting the publication of private or confidential information, the continuation of such an injunction, or an appeal against the grant or refusal of such an injunction. The scheme does not apply to proceedings to which the Family Procedure Rules 2010 apply, to immigration or asylum proceedings, to proceedings which raise issues of national security or to proceedings to which Part 21 applies.
3. An injunction to which this Practice Direction applies is called a “Non-disclosure injunction”.
4. Except where a direction under paragraph 6 is made, following the hearing of an application for a non-disclosure injunction or any appeal against the grant or refusal of any such injunction the judge will record the following information in the form attached in the Annex (the information):
  - (a) the claim or application number;
  - (b) whether the hearing was of —
    - (i) an application for an interim injunction;
    - (ii) an application for an extension or variation of an interim injunction;
    - (iii) an application for a final injunction; or
    - (iv) an appeal against the grant or refusal of an interim or final injunction.
  - (c) whether the hearing was on notice, or without notice to—
    - (i) the defendant; or
    - (ii) any third party liable to be affected by the order.
  - (d) whether the parties consented to the order;
  - (e) whether any derogations from the principle of open justice were sought, and if so—
    - (i) what they were;
    - (ii) whether they were granted;

(iii) if granted, whether with the parties' consent.

5. Derogations from the principle of open justice include, but are not limited to,—
  - (a) an order that the hearing be held wholly or partly in private;
  - (b) an order that the names of one or more of the parties not be disclosed;
  - (c) an order that access to documents on the court file be restricted (under rule 5.4C or the inherent jurisdiction);
  - (d) an order that the provision of documents to third parties be restricted (under Practice Direction 25A, paragraph 9.2); and
  - (e) an order prohibiting disclosure of the existence of the proceedings or the order.
6. Subject to any express direction to the contrary in the order, any order made by the court on an application for a non-disclosure injunction or appeal from the grant or refusal of such an injunction shall be deemed to include a provision giving permission to a court officer to transmit the information to the Chief Statistician in the Ministry of Justice in order for it to be analysed and published in such form as does not enable the public identification of the parties to any proceedings.
7. If, in exceptional circumstances, the judge makes any direction under paragraph 6, the judge shall report that fact, and the nature of any derogation from open justice contained in the non-disclosure injunction to the Master of the Rolls. The Master of the Rolls is, following consultation with the judge, entitled to transmit such information as he sees fit to the Chief Statistician to enable publication by the Ministry of Justice of the bare fact that an injunction of that type had been made.
8. Once completed the form in the Annex will be sent by a court officer to the Chief Statistician in the Ministry of Justice.

## **Annex C: Practice Guidance issued by the Master of the Rolls**

### **Practice Guidance: Interim Non-Disclosure Orders**

#### **(I) GUIDANCE**

1. This Guidance sets out recommended practice regarding any application for interim injunctive relief in civil proceedings to restrain the publication of information: an interim non-disclosure order. It is issued as guidance (not as a Practice Direction) by the Master of the Rolls, as Head of Civil Justice. Such applications may be founded on rights guaranteed by the European Convention on Human Rights (the Convention), or on grounds of privacy or confidentiality. They may also be made in respect of a threatened contempt of court, a threatened libel or malicious falsehood, harassment, or a Norwich Pharmacal application in support of such actions. All such orders will seek to restrict the exercise of the Article 10 Convention right of freedom of expression through prohibiting the disclosure of information.
2. It also provides guidance concerning the proper approach to the general principle of open justice in respect of such applications and explains the proper approach to the model interim non-disclosure order a copy of which is attached to this Guidance.
3. The law set out in this Guidance is correct as at 1 August 2011.

#### **Statutory Provisions**

4. Applications which seek to restrain publication of information engage Article 10 of the Convention and s12 of the Human Rights Act 1998 (HRA). In some, but not all, cases they will also engage Article 8 of the Convention. Articles 8 and 10 of the Convention have equal status and, when both have to be considered, neither has automatic precedence over the other. The court's approach is set out in *Re S (a child)* [2004] UKHL 47, [2005] 1 AC 593 at [17].
5. HRA s12 applies whenever the court is considering whether to grant relief which might affect the exercise of the Article 10 Convention right. HRA s12(2) requires advance notice to be given to persons against whom the application is made, except in the exceptional circumstances set out in HRA s12(2)(a) and (b).
6. HRA s12(3) requires the applicant to satisfy the court that they are likely to establish, at trial, that publication should not be allowed. Guidance on the application of s12(3) is set out in *Cream Holdings Ltd v Banerjee* [2005] 1 AC 253 at [22] – [23].
7. HRA s12(4) requires that court to have particular regard to the fundamental importance of the Article 10 Convention right of freedom of expression, where proceedings relate to material which a respondent claims, or which appears to the court, to be journalistic, literary or artistic material, or conduct connected with such material, the extent to which the material has or is about to become available to the public, or it is or would be in the public interest for it to be published. It also requires the court to have regard to any relevant privacy code. The code of the Press Complaints Commission is one such code.

### Civil Procedure Rules

8. CPR 25.3 and CPR PD25A (1) – (5) apply to all interim injunction applications, including those for interim non-disclosure orders.

### Open Justice

9. Open justice is a fundamental principle. The general rule is that hearings are carried out in, and judgments and orders, are public: see Article 6(1) of the Convention, CPR 39.2 and *Scott v Scott* [1913] AC 417. This applies to applications for interim non-disclosure orders: *Micallef v Malta* (17056/06) [2009] ECHR 1571 at [75]ff; *Ntuli v Donald* [2010] EWCA Civ 1276 (*Ntuli*) at [50].
10. Derogations from the general principle can only be justified in exceptional circumstances, when they are strictly necessary as measures to secure the proper administration of justice. They are wholly exceptional: *R v Chief Registrar of Friendly Societies, ex parte New Cross Building Society* [1984] Q.B. 227 at 235; *Nutuli* at [52] – [53]. Derogations should, where justified, be no more than strictly necessary to achieve their purpose.
11. The grant of derogations is not a question of discretion. It is a matter of obligation and the court is under a duty to either grant the derogation or refuse it when it has applied the relevant test: *AMM v HXW* [2010] EWHC 2457 (QB) at [34].
12. There is no general exception to open justice where privacy or confidentiality is in issue. Applications will only be heard in private if and to the extent that the court is satisfied that by nothing short of the exclusion of the public can justice be done. Exclusions must be no more than the minimum strictly necessary to ensure justice is done and parties are expected to consider before applying for such an exclusion whether something short of exclusion can meet their concerns, as will normally be the case: *Ambrosiadou v Coward* [2011] EWCA Civ 409 at [50] – [54]. Anonymity will only be granted where it is strictly necessary, and then only to that extent.
13. The burden of establishing any derogation from the general principle lies on the person seeking it. It must be established by clear and cogent evidence: *Scott v Scott* [1913] AC 417 at 438 – 439, 463 and 477; *Lord Browne of Madingley v Associated Newspapers Ltd* [2008] 1 QB 103 at [2] – [3]; *Secretary of State for Home Department v AP (No2)* [2010] 1 WLR 1652 at [7]; *Gray v UVW* [2010] EWHC 2367 at [6] – [8]; and *JIH v News Group Newspapers* [2011] EWCA Civ 42 (*JIH*) at [21].
14. When considering the imposition of any derogation from open justice, the court will have regard to the respective and sometimes competing Convention rights of the parties as well as the general public interest in open justice and in the public reporting of court proceedings. It will also adopt procedures which seek to ensure that any ultimate vindication of Article 8 of the Convention, where that is engaged, is not undermined by the way in which the court has processed an interim application. On the other hand, the principle of open justice requires that any restrictions are the least that can be imposed consistent with the protection to which the party relying on their Article 8 Convention right is entitled. The proper approach is set out in *JIH*.
15. It will only be in the rarest cases that an interim non-disclosure order containing a prohibition on reporting the fact of proceedings (a super-injunction) will be justified on grounds of strict necessity, i.e., anti-tipping-off situations, where short-term secrecy is

required to ensure the applicant can notify the respondent that the order is made: *DFT v TFD* [2010] EWHC 2335 (*DFT*). It is then only in truly exceptional circumstances that such an order should be granted for a longer period: *Terry v Persons Unknown* [2010] 1 FCR 659 (*Terry*) at [141].

### **Consent Orders**

16. Interim non-disclosure orders which contain derogations from the principle of open justice cannot be granted by consent of the parties. Such orders affect the Article 10 Convention rights of the public at large. Parties cannot waive or give up the rights of the public. The court's approach is set out in *JIH* at [21].

### **Application**

17. The applicant should prepare (a) the application/claim form; (b) a witness statement or statements justifying the need for an order; (c) legal submissions; (d) a draft order; and (e) an Explanatory Note (see paragraph 33 below). In the rare or urgent case where it is not possible to prepare such documentation prior to the hearing, the applicant should file a statement at the earliest practicable opportunity, setting out the information placed orally before the court.

### **Notice of Application**

18. Applicants must comply with the requirements set out in HRA s12(2), CPR 25.3(2) and (3), and CPR PD 25A 4.3(3).
19. HRA s12(2) applies in respect of both (a) respondents to the proceedings and (b) any non-parties who are to be served with or otherwise notified of the order, because they have an existing interest in the information which is to be protected by an injunction (*X & Y v Persons Unknown* [2007] EMLR 290 at [10] – [12]). Both respondents and any non-parties to be served with the order are therefore entitled to advance notice of the application hearing and should be served with a copy of the Application Notice and any supporting documentation before that hearing.
20. Applicants will need to satisfy the court that all reasonable and practical steps have been taken to provide advance notice of the application. At the hearing they should inform the court of any non-party which they intend to notify of the order as the court is required to ensure that the requirements of HRA s12(2) are fulfilled in respect of each of them. A schedule to any interim non-disclosure order granted should provide details of all such non-parties.
21. Failure to provide advance notice can only be justified, on clear and cogent evidence, by compelling reasons. Examples which may amount to compelling reasons, depending on the facts of the case, are: that there is a real prospect that were a respondent or non-party to be notified they would take steps to defeat the order's purpose (*RST v UVW* [2009] EWHC 24 at [7] and [13]), for instance, where there is convincing evidence that the respondent is seeking to blackmail the applicant (*ASG v GSA* [2009] EWCA Civ 1574 at [3]; *DFT* at [7]).
22. Where a respondent, or non-party, is a media organisation only rarely will there be compelling reasons why advance notification is or was not possible on grounds of either urgency or secrecy. It will only be in truly exceptional circumstances that failure to give a media organisation advance notice will be justifiable on the ground that it would defeat

the purpose of an interim non-disclosure order. Different considerations may however arise where a respondent or non-party is an internet-based organisation, tweeter or blogger, or where, for instance, there are allegations of blackmail.

23. Where notice of the application is to be given to a media organisation it should be effected on the organisation's legal adviser, where it has one. The court will bear in mind that such legal advisers are: (i) used to participating in hearings at short notice where necessary; and ii) able to differentiate between information provided for legal purposes and information for editorial use.

#### **Notice and Undertakings to the Court – Non-Parties**

24. In order to provide effective protection of private and/or confidential information and information contained in private and/or confidential documents provided by applicants to non-parties:

- (i) where an applicant is to provide advance notice of an application to a non-party;  
or
- (ii) where an applicant notifies a non-party of an order,

material supplied to the non-party by the applicant shall be supplied upon the applicant receiving an irrevocable written undertaking to the court that the material and the information contained within it, or derived from such material or information, will only be used for the purpose of the proceedings. A standard form of wording for the undertaking is set out in the notes to clause 13 of the Model Order, contained in the Model Order guidelines.

25. Where an applicant is to provide advance notice of an application to a non-party they should first provide the non-party with a copy of the Explanatory Note, which may where strictly necessary refer to the applicant and/or respondent by three anonymised initials. If, the non-party is willing to provide the irrevocable written undertaking, the applicant should then supply the materials, including the applicant's and respondent's names, to the non-party upon receipt of the undertaking. Where the non-party is unwilling to provide the undertaking, no further information need be supplied by the applicant. (Information concerning when and where the application is to be heard should be set out in the Explanatory Note.)
26. Where an applicant notifies a non-party of an order, which should contain the provision set out in clause 13 of the Model Order, provision of material to a non-party shall be effected promptly by the applicant upon request, and upon receipt of the irrevocable written undertaking. Prior to notifying the non-party of the order and where urgency does not preclude it, the applicant should ascertain whether the non-party will require a copy of any materials referred to in clause 13 of the Model Order. Where the non-party indicates it will do so, it should at that stage provide the applicant with the written irrevocable undertaking. The applicant will then be in a position to, and should, serve a copy of the order and the relevant materials together. Where the non-party is unwilling to give the undertaking in advance of service of the order, the applicant will not be required to supply any relevant materials to the non-party until such time as the undertaking is given or further order of the court.

27. The undertaking should be provided on behalf of the non-party by its legal adviser where it has one. It should be provided by the non-party itself where it has no legal adviser. Breach of the undertaking may be held to be a contempt of court, which would render the non-party liable to imprisonment, a fine or having their assets seized.
28. For the purpose of paragraph 24, material includes: the application and any supporting documentation; and a copy of any materials specified under CPR PD 25A 9.

### **Hearing – Scrutiny of Application**

29. The onus is on the applicant to satisfy the court that an interim non-disclosure order is justified. Where the applicant seeks derogations from open justice reference should be made to paragraphs 8 – 13 of this Guidance.
30. Particular care should be taken in every application for an interim non-disclosure order, and especially where an application is made without-notice, by applicants to comply with the high duty to make full, fair and accurate disclosure of all material information to the court and to draw the court's attention to significant factual, legal and procedural aspects of the case. The applicant's advocate, so far as it is consistent with the urgency of the application, has a particular duty to see that the correct legal procedures and forms are used; that a written skeleton argument and a properly drafted order are prepared personally by her or him and lodged with the court before the oral hearing; and that, at the hearing, the court's attention is drawn to unusual features of the evidence adduced, to the applicable law and to the formalities and procedure to be observed including how, if at all, the order submitted departs from the model order.
31. Applications, especially those which seek derogations from open justice, must be supported with clear and cogent evidence which demonstrates that without the specific exception, justice could not be done.
32. Each application shall be subject to intense scrutiny. The need for intense scrutiny is particularly acute on without-notice applications, or where non-parties are or have been served with orders containing restrictions on access to documents, because, for instance, the order contains derogations from CPR PD 25A 9.

### **Explanatory Notes**

33. It is helpful if applications and orders are accompanied by an Explanatory Note, from which persons served can (a) readily understand the nature of the case, (b) ascertain whether they wish to attend the application hearing, and/or be legally represented at it, or, (c) where the application was heard without-notice, whether they wish to challenge the order.
34. Where an interim non-disclosure order contains restrictions on access to documents it must be accompanied by an Explanatory Note when served on any non-party who was not present at the hearing of the application.
35. An example of an Explanatory Note is attached to this Guidance.

### **Applicant's Continuing Duty**

36. Where an interim non-disclosure order is granted applicants are required to keep any respondent or non-party subject to the order, informed of any developments in the

progress of proceedings which affect the status of the order. They are required to do so in order to satisfy the court that there has been compliance with the obligation imposed by CPR 1.3 and any requirements specified in any order or directions given by the court. Applicants are particularly required to inform any non-parties whom they have served with the order when it ceases to have effect.

### **Active Case Management**

37. Interim non-disclosure orders, as they restrict the exercise of the Article 10 Convention right and, whether or not they contain any derogation from the principle of open justice, require the court to take particular care to provide active case management.
38. Active case management requires the court to ensure that a return date is specified in such orders and that, as a general rule, the return date is kept. The applicant is required to inform the court at the return date which, if any, non-parties have been served with any interim non-disclosure order granted at an earlier, without-notice, hearing.
39. It will not always be necessary for any parties to attend court on the return date: the hearing could be dealt with by the court on the papers, provided that sufficient material is before the court to enable scrutiny and effective case management to take place: see *BCD v Goldsmith* [2011] EWHC 674 (QB) at [60] – [62]. Any order should however be given in public and be publicly available.
40. A return date is particularly important where an order contains derogations from the principle of open justice. It is the means by which the court ensures that those derogations are in place for no longer than strictly necessary. It is also the means by which the court ensures that the interim non-disclosure order does not become a substitute for a full and fair adjudication (*X & Y v Persons Unknown* [2007] EMLR 290 at [78]).
41. Where an interim non-disclosure order, whether or not it contains derogations from open justice, is made, and return dates are adjourned for valid reasons on one or more occasions, or it is apparent, for whatever reason, that a trial is unlikely to take place between the parties to proceedings, the court should either dismiss the substantive action, proceed to summary judgment, enter judgment by consent, substitute or add an alternative defendant, or direct that the claim and trial proceed in the absence of a third party (*XJA v News Group Newspapers* [2010] EWHC 3174 (QB) at [13]; *Gray v UVW* [2010] EWHC 2367 (QB) at [37]; *Terry* at [134] – [136]).

### **Hearing Notes and Judgments**

42. The court's approach to judgments and hearing notes is set out in: *Terry* at [4]; *JIH* at [21(9)] & [35].
43. It is of particular importance that a full and accurate note of the hearing is taken of a without-notice hearing: *G & G v Wikimedia* [2010] EMLR 14 at [28] – [32]. It is the duty of counsel and solicitors to ensure that such a note is taken during the hearing, or, if that is not possible, to prepare such a note after the hearing is over. The note should be drafted so that anyone supplied with a copy of it is properly informed of: what documents were put before the court at the hearing; which legal authorities were relied on by the applicant; and what the court was told in the course of the hearing.



44. Where, and to the extent strictly necessary hearing notes may be redacted, if they are to be supplied under CPR PD 25A 9.2, to a non-party who is served with an order but who is unwilling or unable to provide a written irrevocable undertaking.
45. The court should wherever possible give a reasoned, necessarily redacted, judgment. Where a judgment of the type given in *Terry* or *J/H* would be disproportionate in terms of time or cost a short note or judgment should be given setting out any points of general interest, the reason why those points were raised and brief reasons for the decision: see *POI v The Person known as 'Lina'* [2011] EWHC 25 (QB).

### **Appeals**

46. Any appeal from an interim non-disclosure order may be expedited: *Unilever plc v Chefaro Proprietaries Ltd (Practice Note)* [1995] 1 WLR 243 at 246 - 247. It will depend on the circumstances of each case whether, and to what extent, expedition is necessary.

## **(2) MODEL ORDER – GUIDELINES**

The following guidelines should be read in conjunction with the model interim non-disclosure order.

### **Penal Notice**

The penal notice should make clear that where the intended defendant or respondent is an individual they may be imprisoned as well as being liable to a fine or asset seizure. Where the intended defendant or respondent is a corporate defendant or respondent it should make clear that they can be fined or have their assets seized.

The penal notice should also make clear the effect it may have on non-parties who know of the order under the *Spycatcher* principle. The order will only bind non-parties who are notified of it while it is in force: *Jockey Club v Buffham* [2003] QB 462.

### **Clause 2(b)**

Reference should be made to paragraphs 18 – 28 of the Practice Guidance.

### **Clause 3 (Anonymity)**

This clause is **optional**. Reference should be made to paragraphs 9 – 14 of the Practice Guidance. Anonymity is an exception to the principle of open justice. It can only be ordered where it is strictly necessary. Guidance is set out in *JIH* at [21].

### **Clause 4(a)(ii) (Access to documents)**

The court may need to decide which documents, e.g., statements of case, should not be available for public inspection. This decision may be prospective since there may be little if any opportunity to apply to court before some documents are served. While it may be the case that the claim form could be made anodyne by reference to a confidential schedule (subject to anonymity), subsequent statements of case or other documents in a case are unlikely to be dealt with so easily given that the purpose of the action, amongst other things, will be to seek a permanent injunction relating to the material protected on an interim basis under the order, and will involve a specific explanation of the material, how it is said to engage the applicant's Article 8 Convention rights and the effect such threatened disclosure would have if it is not so restrained (*Terry* at [23]; *G & G v Wikimedia* [2010] EMLR 14 at [14], [17] and [20]; *ABC Ltd v Y* [2010] EWHC 3176 (Ch) at [8] – [10]).

*(In respect of any non-party notified or served with the order CPR PD 25A 9.2 applies: see clause 13 of the Model Order.)*

### **Clause 5(a) (Service of the claim form where defendant is not known or whereabouts unknown)**

Where the respondent or defendant's identity is not known, or their whereabouts are unknown, there may be considerable problems in locating them in order to serve the claim form. This may necessitate an extension of time for service beyond the four month period. The court, by way of active case management, is required to ensure that the action is pursued with expedition. Indefinite extensions of time for service cannot be granted: *Terry* at [143]. A long-stop date may be inserted instead.

### **Clause 6 (Injunction)**

CPR PD 25A 5 states that unless the court orders otherwise, the order must provide for a *return date* if the application was made without-notice. The need for, and importance of, a return date as a means to ensure the court can monitor the claim's progress and ensure it progresses properly was considered *G & G v Wikimedia* [2010] EMLR 14 at [21] – [27]; and in *Terry* at [134] – [136]. Reference should be made to paragraphs 37 – 41 of the Practice Guidance.

While there may be considerable practical and costs reasons which might render a return date in a claim against persons unknown unnecessary, especially given the safeguard of the liberty to vary or discharge provisions (*X & Y v Persons Unknown* [2007] EMLR 290 at [73]), the court should ensure that the order contains provision for periodical review by the court to ensure that the claim progresses, for instance, to default judgment, summary judgment, or to a trial in the absence of the persons unknown.

### **Clause 6(b)**

This clause is **optional**. See clause 3 above. This provides a possible solution to the problem which arises from a jigsaw identification of the Claimant if the fact of the injunction is not prevented from being published: *DFT* at [36] – [39]. There should be a clear delineation in the order of what information can be released as to the fact of an order having been made.

### **Clause 7 (Reporting Restriction)**

This is the super-injunction element. It is an **optional** clause. It is only likely to be necessary for example to prevent the respondent or a third party being tipped-off before the order is served, possibly precipitating disclosure of the information or destruction of evidence: see *Terry* at [138]; *G & G v Wikimedia* [2010] EMLR 14 at [41].

If the proceedings are anonymised, and an injunction is granted restraining disclosure or publication of the private information, there is generally no reason in principle to prohibit in addition any report of the fact that an order has been made: *Ntuli*. Consideration should be given to the risk of jigsaw identification if no reporting restriction is imposed: *DFT*.

### **Clause 13 (Provision of documents and information to third parties)**

CPR PD 25A 9 requires any person served with the order not present at the application hearing to be provided with the order and supporting material read by the judge, and a note of the hearing.

This is the norm. Such notice is an elementary principle of natural justice:

*Kelly v BBC* [2001] Fam. 59 at 94 – 95, ‘. . . if one party wishes to place evidence or other persuasive material before the court the other parties must have an opportunity to see that material and to address the court about it. One party may not make secret communications to the court. It follows that it is wrong for a judge to be given material at an *ex parte*, or without notice, hearing which is not at a later stage revealed to the persons affected by the result of the application.’;

*G & G v Wikimedia* [2009] EWHC 3148 (QB) at [30], ‘. . . where an order relates to freedom of expression, or may have the effect of interfering with freedom of expression, those applying for interim relief at a hearing at which the respondent or defendant is not present should generally provide the respondent with a full note, whether or not the respondent asks for it.’

Exceptions to the norm are exceptions to the principle of open justice, and natural justice, and are therefore only permissible where strictly necessary. If there is concern that information is particularly sensitive or confidential, it can be included in a separate witness statement which the court may agree should be specifically exempted from having to be provided under the CPR 25A PD 9, thus enabling as much information as possible to be provided to those, such as non-parties who request a hearing note under PD 9.2(2), not present at the application hearing.

### **Clause 13 Irrevocable written undertaking**

The following standard wording should be used by third parties in respect of the irrevocable undertaking to be given to the Court under paragraph 24 of the Practice Guidance and in respect of clause 13 of the Model Order. Breach of the undertaking may amount to contempt of court. The wording provides for a Claimant to agree to information and material subject to the undertaking provided by the third party to be supplied, by the third party, to other parties in order, for instance, to ensure that the prohibition on disclosure is not inadvertently breached by that other party.

### **Undertaking to the Claimant and to the Court**

**The title of action or intended action is .....**

*1. I, [insert name, occupation] [for and on behalf of ..... ] (hereinafter “the receiver”) promise that in consideration of the Claimant disclosing the material to the receiver, the receiver: will preserve the material in a secure place; use any material or information contained therein, or derived from such material or information, only for the purposes of the Proceedings except where:*  
*(a) the information has been read to or by the court, or referred to, at a hearing which has been held in public;*  
*(b) the court gives permission; or*  
*(c) there is agreement in writing by the Claimant and by any other person who claims to be entitled to rights of property, privacy or confidentiality in respect of the information or the documents in which it is recorded;*

*and will only copy, disclose or deliver the material, or information contained therein or derived from such material or information, to the receiver’s legal advisers, or as required by law, by order of the court or by agreement of the Claimant and by any other person who claims to be entitled to rights of property, privacy or confidentiality in respect of the information or the documents in which it is recorded.*

*2. Save as provided in para 1, this undertaking is irrevocable, and shall continue in force both before and after the conclusion of the Proceedings.*

*3. The receiver will give to the court an undertaking in writing in the same terms as herein, as soon as a judge is available to receive that undertaking.*

*4. For the purpose of this undertaking,*

*“Material” refers to: i) any claim form or application notice or statement of case (whether in draft or final form); ii) any evidence, whether in the form of witness statements or otherwise, in support of the proceedings, and any exhibits thereto; iii) and the material specified in CPR PD 25A para 9.2;*  
*“Claimant” includes an intended claimant;*

“Proceedings” means the proceedings identified above.

5. For the avoidance of doubt this promise only applies to those parts of the Material which contain the information alleged by the Claimant to be private and does not preclude the receiver (or anyone else) from making lawful use of any information that was already known to them prior to it being disclosed to the receiver pursuant to this undertaking, or of any information which is, or shall have come into, the public domain.

#### **Clause 14 (Hearing in private)**

This clause is **optional**. Reference should be made to paragraphs 9 - 14 of the Practice Guidance.

Private hearings can be reported without fear of contempt unless the material comes within the protection of the Administration of Justice Act 1960 s12. A specific order is required to prevent reporting under the Contempt of Court Act 1981 s11: *Clibbery v Allan* [2002] 2 WLR 151; *McKennitt v Ash* [2008] QB 73. Section 11 orders should only be made when strictly necessary.

This also incorporates the proviso, referred to in *JH* at [42], regarding disclosure of material etc referred to in open court or in open judgments.

#### **Clause 15 (Public Domain)**

Orders will not usually, but may sometimes in cases of private information, prohibit publication of material which is already in the public domain. See *Terry* at [50].

#### **Confidential schedule 2, paragraph 2**

See the notes to **Clause 13 (Provision of documents and information to third parties)**.

### **(3) MODEL EXPLANATORY NOTE**

**Smith v Jones**

*or*

**AAA v BBB**<sup>316</sup>

**Application for an Interim Non-Disclosure Order**

**EXPLANATORY NOTE**

1. The applicant is a well known professional sports person who has been in a long-term relationship with another person [XX]. A person [BBB/YY as appropriate] [or persons unknown] have threatened to take a story to the media about a relationship the applicant is alleged to have had with another person [YY], since the relationship with XX commenced.
2. An Interim Non-Disclosure Order has been [applied for/made] to protect the applicant's [right to privacy and/confidentiality] in respect of the information referred to in paragraph 1. This does not [will not] restrict publication of information which was in the public domain in England and Wales prior to this application being made or which is permitted by any order of the court to the extent permitted by the court
3. The [applicant applies for the application to be heard/the application was heard] in private. Judgment [will be/was] given in [public/private]. [The proceedings were anonymised.] [A private hearing/anonymity was applied for/granted on the grounds of strict necessity because . . .].
4. On [insert date] the application [will be heard by/was heard by] [Mr/Mrs Justice] in the High Court of Justice, [Queen's Bench Division/Chancery Division].

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<sup>316</sup> Where the application is made or is intended to be made in anonymised form, three initials should be used.

**Model Order**

**IN THE HIGH COURT OF JUSTICE**

**Claim No: [**

**]  
[QUEEN’S BENCH/CHANCERY] DIVISION**

**BEFORE THE HONOURABLE [MR][MRS] JUSTICE [ ] [(IN  
PRIVATE)]**

**Dated: [ ]**

**B E T W E E N :**

**“AAA”**

**Intended Claimant/Applicant**

**- and -**

**(1) “BBB”**

**(2) [ ] NEWSPAPERS LIMITED**

**(3) THE PERSON OR PERSONS UNKNOWN**

**who has or have appropriated, obtained and/or  
offered or intend to offer for sale and/or publication  
the material referred to in Confidential Schedule 2  
to this Order**

**Intended Defendant(s)/Respondent(s)**

**PENAL NOTICE**

**IF YOU THE RESPONDENT DISOBEY THIS ORDER YOU MAY BE HELD TO  
BE IN CONTEMPT OF COURT AND MAY BE IMPRISONED (IN THE CASE  
OF THE FIRST AND THIRD DEFENDANTS) OR FINED OR HAVE YOUR  
ASSETS SEIZED.**

ANY PERSON WHO KNOWS OF THIS ORDER AND DISOBEYS THIS ORDER OR  
DOES ANYTHING WHICH HELPS OR PERMITS ANY PERSON TO WHOM THIS  
ORDER APPLIES TO BREACH THE TERMS OF THIS ORDER MAY BE HELD TO BE IN  
CONTEMPT OF COURT AND MAY BE IMPRISONED, FINED OR HAVE THEIR ASSETS  
SEIZED.

**NOTICE TO ANYONE WHO KNOWS OF THIS ORDER**

**You should read the terms of the Order and the Practice Guidance on Interim  
Non-Disclosure Orders very carefully. You are advised to consult a solicitor as  
soon as possible. This Order prohibits you from doing the acts set out in  
Paragraphs 6 [, 7] and 10 of the Order and obliges you to do the acts set out in  
Paragraphs 8, 9, and 11 of the Order. You have the right to ask the Court to  
vary or discharge the Order. If you disobey this Order you may be found guilty of  
contempt of court and you may be sent to prison or fined or your assets may be  
seized.**

**THIS ORDER**

1. This is an Injunction, with other orders as set out below, made against the Defendants on [insert date] by the Judge identified above (the **Judge**) on the application (the **Application**) of the Claimant. The Judge:
  - (a) read the witness statements referred to in Schedule A at the end of this Order, as well as the witness statements referred to in Confidential Schedule 1 [or “was given information orally by Counsel on behalf of the Claimant”];
  - (b) accepted the undertakings set out in Schedule B at the end of this Order; and
  - (c) considered the provisions of the Human Rights Act 1998 (**HRA**), section 12.
2. *[This Order was made at a hearing without-notice to those affected by it, the Court having considered section 12(2) HRA and being satisfied:*
  - (a) *that the Claimant has taken all practicable steps to notify persons affected; and/or*
  - (b) *that there are compelling reasons for notice not being given, namely: [set out in full the Court’s reasons for making the order without-notice]. The Defendants (and anyone served with or notified of this Order) have a right to apply to the Court to vary or discharge the Order (or so much of it as affects them): see clause 17 below.]*

**[ONLY TO BE GRANTED IN AN EXCEPTIONAL CASE WHERE ANONYMITY IS STRICTLY NECESSARY]**  
**ANONYMITY**

3. Pursuant to section 6 HRA, and/or CPR 39.2 the Judge, being satisfied that it is strictly necessary, ordered that:
  - (a) the Claimant be permitted to issue these proceedings naming the Claimant as “AAA” and giving an address c/o the Claimant’s solicitors;
  - (b) the Claimant be permitted to issue these proceedings naming the [First] Defendant as “BBB” [and the Third Defendant as “Person or Persons Unknown” and, once it is known to the Claimant, notifying the Defendant’s home address by filing the same in a sealed letter which must remain sealed and held with the Court office subject only to the further order of a Judge or the Senior Master of the Queen’s Bench Division/Chief Chancery Master];
  - (c) there be substituted for all purposes in these proceedings in place of references to the Claimant by name, and whether orally or in writing, references to the letters “AAA”; and
  - (d) if necessary, there be substituted for all purposes in these proceedings in place of references to the Defendant[s] by name once identified and whether orally or in writing, references to the letters “BBB” [and any subsequent letters of the alphabet].



**[ONLY TO BE GRANTED IN AN EXCEPTIONAL CASE WHERE A RESTRICTION ON ACCESS TO DOCUMENTS IS STRICTLY NECESSARY]  
ACCESS TO DOCUMENTS**

4. Upon the Judge being satisfied that it is strictly necessary:

- (a) (i) *no copies of the statements of case; and*
- (ii) *no copies of the witness statements and the applications,*  
*will be provided to a non-party without further order of the Court.*
- (b) *Any non-party other than a person notified or served with this Order seeking access to, or copies of the abovementioned documents, must make an application to the Court, proper notice of which must be given to the other parties.*

**SERVICE OF CLAIM FORM WHERE DEFENDANT NOT KNOWN OR WHEREABOUTS NOT KNOWN**

5.

- (a) The Claim Form should be served as soon as reasonably practicable and in any event by [ ] at the latest, save that there shall be liberty for the Claimant to apply to the Court in the event that an extension is necessary; and
- (b) Any such application referred to in 5(a) must be supported by a witness statement. Such application may be made by letter, the Court having dispensed with the need for an application notice.

**INJUNCTION**

6. Until [ ] (the return date)/ the trial of this claim or further Order of the Court, the Defendants must not:

- (a) use, publish or communicate or disclose to any other person (other than (i) by way of disclosure to legal advisers instructed in relation to these proceedings (the **Defendants' legal advisers**) for the purpose of obtaining legal advice in relation to these proceedings or (ii) for the purpose of carrying this Order into effect) all or any part of the the information referred to in Confidential Schedule 2 to this Order (the **Information**);
- (b) publish any information which is liable to or might identify the Claimant as a party to the proceedings and/or as the subject of the Information or which otherwise contains material (including but not limited to the profession [or age or nationality of the Claimant]) which is liable to, or might lead to, the Claimant's identification in any such respect, provided that nothing in this Order shall prevent the publication, disclosure or communication of any information which is contained in [this Order other than in the Confidential Schedules] or in the public judgments of the Court in this action given on [insert date].

**[ONLY TO BE GRANTED IN AN EXCEPTIONAL CASE WHERE A REPORTING RESTRICTION IS STRICTLY NECESSARY]  
REPORTING RESTRICTION/SUPER-INJUNCTION**

7. Until service of the Order/ the return date/ [ ] the Defendants must not use, publish or communicate or disclose to any other person the fact or existence of this Order or these proceedings and the Claimant's interest in them, other than:
- (a) by way of disclosure to the Defendants' legal advisers for the purpose of obtaining legal advice in relation to these proceedings; or
  - (b) for the purpose of carrying this Order into effect.

**INFORMATION TO BE DISCLOSED**

8. The Defendants shall within [24] hours of service of this Order disclose to the Claimant's solicitors the following:
- (a) the identity of each and every journalist, press or media organisation, press agent or publicist or any other third party with a view to publication in the press or media, to whom the Defendants have disclosed all or any part of the Information [since [insert date]]; and
  - (b) the date upon which such disclosure took place and the nature of the information disclosed.
9. The Defendants shall confirm the information supplied in paragraph 8 above in a witness statement containing a statement of truth within 7 days of complying with paragraph 8 and serve the same on the Claimant's solicitors and the other parties.

**PROTECTION OF HEARING PAPERS**

10. The Defendants [, and any third party given advance notice of the Application,] must not publish or communicate or disclose or copy or cause to be published or communicated or disclosed or copied any witness statements and any exhibits thereto and information contained therein that are made, or may subsequently be made, in support of the Application or the Claimant's solicitors' notes of the hearing of the Application (the **Hearing Papers**), provided that the Defendants[, and any third party,] shall be permitted to copy, disclose and deliver the Hearing Papers to the Defendants' [and third party's/parties'] legal advisers for the purpose of these proceedings .
11. The Hearing Papers must be preserved in a secure place by the Defendants' [and third party's/parties'] legal advisers on the Defendants' [and third party's/parties'] behalf.
12. The Defendants [, and any third party given advance notice of the Application,] shall be permitted to use the Hearing Papers for the purpose of these proceedings provided that the Defendants' [third party's/parties'] legal advisers shall first inform anyone, to whom the said documents are disclosed, of the terms of this Order and,

so far as is practicable, obtain their written confirmation that they understand and accept that they are bound by the same.

### **PROVISION OF DOCUMENTS AND INFORMATION TO THIRD PARTIES**

13. The Claimant shall be required to provide the legal advisers of any third party [where unrepresented, the third party] served with advance notice of the application, or a copy of this Order promptly upon request, and receipt of their written irrevocable undertaking to the Court to use those documents and the information contained in those documents only for the purpose of these proceedings:

(a) a copy of any material read by the Judge, including material read after the hearing at the direction of the Judge or in compliance with this Order [save for the witness statements referred to in Confidential Schedule I at the end of this Order] [the witness statements]; and/or

(b) a copy of the Hearing Papers.

### **[ONLY TO BE GRANTED IN AN EXCEPTIONAL CASE WHERE HEARING THE APPLICATION IN PRIVATE IS STRICTLY NECESSARY] HEARING IN PRIVATE**

14. *The Judge considered that it was strictly necessary, pursuant to CPR 39.2(3)(a),(c) and (g), to order that the hearing of the Application be in private and there shall be no reporting of the same.*

### **PUBLIC DOMAIN**

15. For the avoidance of doubt, nothing in this Order shall prevent the Defendants from publishing, communicating or disclosing such of the Information, or any part thereof, as was already in, or that thereafter comes into, the public domain in England and Wales [as a result of publication in the national media] (other than as a result of breach of this Order [or a breach of confidence or privacy]).

### **COSTS**

16. The costs of and occasioned by the Application are reserved.

### **VARIATION OR DISCHARGE OF THIS ORDER**

17. The parties or anyone affected by any of the restrictions in this Order may apply to the Court at any time to vary or discharge this Order (or so much of it as affects that person), but they must first give written notice to the Claimant's solicitors. If any evidence is to be relied upon in support of the application, the substance of it must be communicated in writing to the Claimant's solicitors in advance. The Defendants may agree with the Claimant's solicitors and any other person who is, or may be bound by this Order, that this Order should be varied or discharged, but any agreement must be in writing.

### **INTERPRETATION OF THIS ORDER**

18. A Defendant who is an individual who is ordered not to do something must not do it himself or in any other way. He must not do it through others acting on his behalf or on his instructions or with his encouragement.

19. A Defendant which is not an individual which is ordered not to do something must not do it itself or by its directors, officers, partners, employees or agents or in any other way.

**[In the case of an Order the effect of which may extend outside the jurisdiction]  
PERSONS OUTSIDE ENGLAND AND WALES**

20. (1) Except as provided in paragraph (2) below, the terms of this Order do not affect or concern anyone outside the jurisdiction of this Court.
- (2) The terms of this Order will affect the following persons in a country or state outside the jurisdiction of this Court –
- (a) the Defendant or his officer or agent appointed by power of attorney;
  - (b) any person who –
    - (i) is subject to the jurisdiction of this Court;
    - (ii) has been given written notice of this Order at his residence or place of business within the jurisdiction of this Court; and
    - (iii) is able to prevent acts or omissions outside the jurisdiction of this Court which constitute or assist in a breach of the terms of this Order; and
  - (c) any other person, only to the extent that this Order is declared enforceable by or is enforced by a court in that country or state.

**PARTIES OTHER THAN THE CLAIMANT AND THE DEFENDANT**

**21. Effect of this Order**

It is a contempt of court for any person notified of this Order knowingly to assist in or permit a breach of this Order. Any person doing so may be imprisoned, fined or have their assets seized.

**NAME AND ADDRESS OF THE CLAIMANT'S LEGAL REPRESENTATIVES**

**22. The Claimant's solicitors are -**

*[Name, address, reference, fax and telephone numbers both in and out of office hours and e-mail]*

**COMMUNICATIONS WITH THE COURT**

**23. All communications to the Court about this Order should be sent to:**

Room WG08, Royal Courts of Justice, Strand, London, WC2A 2LL, quoting the case number. The telephone number is 020 7947 6010.

The offices are open between 10 a.m. and 4.30 p.m. Monday to Friday.

**SCHEDULE A**

The Claimant relied on the following witness statements:

- 1. ....
- 2. ....

**SCHEDULE B**

**UNDERTAKINGS GIVEN TO THE COURT BY THE CLAIMANT**

(1) If the Court later finds that this Order has caused loss to the Defendants, and decides that the Defendants should be compensated for that loss, the Claimant will comply with any order the Court may make.

(2) If the Court later finds that this Order has caused loss to any person or company (other than the Defendants) to whom the Claimant has given notice of this Order, and decides that such person should be compensated for that loss, the Claimant will comply with any Order the Court may make.

[(3) By 4.30pm on [ ] the Claimant will (a) issue a Claim Form and an Application Notice claiming the appropriate relief [and (b) cause a witness statement or witness statements to be made and filed confirming the substance of what was said to the Court by the Claimant’s Counsel and exhibiting a copy of the Hearing Papers].

[(4) The Claimant will use all reasonable endeavours to identify and serve the Defendants within four months of the date of this Order and in any event will do so by [ ] at the latest. Once identified the Claimant will serve upon the Defendant together with this Order copies of the documents provided to the Court on the making of the Application and as soon as practicable the documents referred to in (3) above.]

(5) On the return date the Claimant will inform the Court of the identity of all third parties that have been notified of this Order. The Claimant will use all reasonable endeavours to keep such third parties informed of the progress of the action [insofar as it may affect them], including, but not limited to, advance notice of any applications, the outcome of which may affect the status of the Order.

(6) If this Order ceases to have effect or is varied, the Claimant will immediately take all reasonable steps to inform in writing anyone to whom he has given notice of this Order, or whom he has reasonable grounds for supposing may act upon this Order, that it has ceased to have effect in this form.

**SCHEDULE C**

This should contain details of who the Claimant has given advance notice of the application to, including how and when and by what means this was done.

**SCHEDULE D**

The detail required by paragraph 20 of the Guidance Note should go in here.

**SCHEDULE E**

The detail required by paragraph 38 of the Guidance Note should go in here.

**CONFIDENTIAL SCHEDULE 1**

The Claimant also relied on the following confidential witness statements:

- 1. ....
- 2. ....

**CONFIDENTIAL SCHEDULE 2**

**Information referred to in the Order**

Any information or purported information concerning:

- (1) [Set out the material sought to be protected]
- (2) [Any information liable to or which might lead to the identification of the Claimant (whether directly or indirectly) as the subject of the proceedings or the material referred to above, [the fact that he has commenced these proceedings or made the application herein].]

Martin Moore, Sir Christopher Meyer, Julian Petley, and John Kampfner—Oral evidence (QQ 404–444)

**Martin Moore, Sir Christopher Meyer, Julian Petley, and John Kampfner—Oral evidence (QQ 404–444)**

[Transcript to be found under Sir Christopher Meyer](#)



## **Max Mosley—Written evidence**

### **I. How the statutory and common law on privacy and the use of anonymity injunctions and super-injunctions has operated in practice**

- a. *Have anonymous injunctions and super-injunctions been used too frequently, not enough or in the wrong circumstances?*
- b. *Are the courts making appropriate use of time limitations to injunctions and of injunctions contra mundum (i.e. injunctions which are binding on the whole world) and how are such injunctions working in practice?*
- c. *What can be done about the cost of obtaining a privacy injunction? Whilst individuals the subject of widespread and persistent media coverage often have the financial means to pursue injunctions, could a cheaper mechanism be created allowing those without similar financial resources access to the same legal protection?*

It is essential to find a cheaper mechanism, otherwise the high cost of litigation excludes almost the entire population from the courts as well as inhibiting smaller newspapers. Even when winning a privacy case it is more than likely that the 'victim' will be significantly out of pocket; in my instance to the tune of £30,000. To most individuals, including celebrities, this makes the entire process unaffordable. Access to Justice should be paramount to any proposals for reform which can be best achieved as part of a new system of press regulation having abolished the PCC.

- d. *Are injunctions and appeals regarding injunctions being dealt with by the courts sufficiently quickly to minimise either (where the injunction is granted or upheld) prolonged unjustifiable distress for the individual or (where an injunction is overturned or not granted) the risk of news losing its current topical value?*
- e. *Should steps be taken to penalise newspapers which refuse to give an undertaking not to publish private information but also make no attempt to defend an application for an injunction in respect of that information, thereby wasting the court's time?*

Given the media furore surrounding the use of privacy injunctions and the costs associated with such applications, both to the applicant and the Court, refusing to give an undertaking where no defence is to be made is clearly a waste of Court time and should be treated accordingly by way of costs sanctions.

### **2. How best to strike the balance between privacy and freedom of expression, in particular how best to determine whether there is a public interest in material concerning people's private and family life**

- a. *Have there been and are there currently any problems with the balance struck in law between freedom of expression and the right to privacy?*

- b. *Who should decide where the balance between freedom of expression and the right to privacy lies?*

If there is a dispute between the subject of the story and the newspaper, fairness requires it must be resolved by an independent body. At present the decision is made exclusively by the newspaper editor and they alone decide whether to exercise any discretion as to where the balance lies. An obligation of prior notification would allow the subject to seek redress prior to publication if they wished. It is unlikely this would have any effect on proper investigative journalism given the clear public interest defences that exist.

- c. *Should Parliament enact a statutory privacy law?*

Yes. Firstly to establish an independent regulator, secondly to make "ambushes" illegal (please see below).

- d. *Should Parliament prescribe the definition of 'public interest' in statute, or should it be left to the courts?*
- e. *Is the current definition of 'public interest' inadequate or unclear?*
- f. *Should the commercial viability of the press be a public interest consideration to be balanced against an individual's right to privacy?*

Never. The idea of breaching someone's privacy, with all the pain this can cause, for commercial gain is abhorrent and inhumane.

- g. *Should it be the case that individuals waive some or all of their right to privacy when they become a celebrity? A politician? A sportsperson?*

No. They certainly waive their right to anonymity but this is not the same as waiving their right to keep private those elements of their life which have no connection with their public life. The public have no right to know what a celebrity gets up to in his or her bedroom provided it is between adults and consensual.

*Should it depend on the degree to which that individual uses their image or private life for popularity? For money? To get elected? Does the image the individual relies on have to relate to the information published in order for there to be a public interest in publishing it (a 'hypocrisy' argument)? If so, how directly?*

The degree to which an individual uses their image is arguably irrelevant. However if they use their image in a way that is calculated to mislead the public it may be legitimate to expose them. Hypocrisy alone is not enough - most parents are hypocritical - it is the use of a false image in order to make money from the public or seek election to a role of public importance which should be exposed.

- h. *Should any or all individuals in the public eye be considered to be 'role models' such that their private lives may be subject to enhanced public scrutiny regardless of whether or not they make public their views on morality or personal conduct (i.e. in the absence of a 'hypocrisy' argument)?*

No. A famous footballer, for example, is arguably a role model when playing football but not when he's at home or in his bedroom. Also, the usual role model argument is flawed. The more admired a person is, the more undesirable to make it known that he does something he shouldn't in his private life lest others follow his example.

i. *Are the courts giving appropriate weight to the value of freedom of expression in 'celebrity gossip' and 'tittle-tattle'?*

Yes. in any event something which is "tittle-tattle" to the public can be extremely painful to the individual and to his (often entirely innocent) family.

j. *In the context of sexual conduct, should it be the case that a person's conduct in private must constitute a significant breach of the criminal law before it may be disclosed and criticised in the press?*

A significant breach of the criminal law should be reported to the police, not exposed in a newspaper. Otherwise there is a risk of pillorying someone when in fact he or she has a perfectly good defence. The newspaper should report the court proceedings. This would enable both sides to be heard.

k. *Could different remedies (other than damages) play a role in encouraging an appropriate balance?*

Damages are never a remedy if private information has been made public. They are at best a palliative. The only effective remedy is to keep the information private. The balance has to be applied in deciding whether or not to publish, not in assessing an attempt to compensate.

l. *Are damages a sufficient remedy for a breach of privacy? Would punitive financial penalties be an effective remedy? Would they adequately deter disproportionate breaches of privacy?*

Damages are only a remedy if the breach of privacy has not resulted in the information being made public - for example in a phone hacking case which did not result in anything being published. If sufficiently high, damages can be a deterrent but never a remedy.

The other problem with damages, however high, is the financial risk of a privacy trial. Very few people can afford to risk £1 million or more in costs. Also, the victim has to face repetition of his private information in open court with the full glare of publicity. As the law stands, very few people would sue no matter how high the damages.

m. *Should we introduce a prior notification requirement, requiring newspapers and other print media to notify an individual before information is published, thereby giving the individual time to seek an injunction if a court agrees the publication is more likely than not to be found a breach of privacy? If so, how would such a requirement function in terms of written content online eg blogs and other media?*

Yes. I believe the case for prior notification is unanswerable. Without it there is currently no remedy in UK law if a newspaper decides to keep secret its intention to publish and "ambush" its victim. Please see Appendix A attached. Although the law is still catching up with blogs and other media, there is no reason why publication, in whatever form, should

not obey the law. Some tweets may be *de minimis*, like pub gossip. It is a question of degree but everyone is subject to the law.

- n. *Should aggravated damages be payable if a media publisher does not give prior notification to the subject of a publication which a court finds is in breach of that individual's privacy?*

Damages, however high, are never a remedy for breach of privacy. But, also, damages which are large enough to deter a major newspaper would be an excessive windfall if paid to an individual. However there is a strong case for a penalty payable to the public purse - perhaps up to 10% of group turnover – or the banning of a number of future issues of the newspaper.

- o. *Is section 12 of the Human Rights Act 1998 appropriately balanced? Should the media's freedom of expression be protected in stronger terms? Or is there a disproportionate emphasis on the media's freedom of expression over the right to privacy? Has Section 12 of the Human Rights Act 1998 ensured a more favourable press environment than would be the case if Strasbourg jurisprudence and UK injunctions jurisprudence were applied in the absence of Section 12?*

At the time the Human Rights act was debated in Parliament the media was lobbying for greater protection with regards to freedom of expression. As a result section 12(2) was added to the draft legislation which required individuals to notify the media in the event they were to seek an injunction. This requirement should be balanced by a requirement for the newspaper to notify an individual before publishing private personal information likely to cause distress.

- p. *Is the test in section 12 for an injunction to be granted too high a threshold?*

It's probably about right, particularly if Section 12 were balanced as above. It would be wrong to allow anyone to prevent publication with no more than a balance of convenience (American Cyanamid) argument.

*Should that test depend on the type of information about to be published?*

Probably not because the courts would take into account the type of information when applying the test of "likelihood to succeed at trial". For example the courts appear to recognise that private and personal information, particularly of a sexual nature, should not be published unless there is a clear public interest in publication.

*Has the court struck the right balance in applying section 12?*

Yes, at least in the cases which have been reported.

- q. *Is there an anomaly requiring legislative attention between the tests for an injunction for breach of privacy and in defamation?*

Arguably, the rule in *Bonnard and Perryman* is obsolete and should be abolished. It is always better not to publish an unjustified libel.

### **3. Issues relating to the enforcement of anonymity injunctions and super-injunctions, including the internet, cross-border jurisdiction within the United Kingdom, parliamentary privilege and the rule of law.**

- a. *How can privacy injunctions be enforced in this age of ‘new media’? Is it practical and/or desirable to prosecute ‘tweeters’ or bloggers?*

Anyone who deliberately breaches a court order should be penalised. The only problem would be with anonymity injunctions where the print media have been informed but (for obvious reasons) not potential bloggers and tweeters. However provided the bloggers were not themselves anonymous, an alert solicitor could quickly shut down any leak. What is needed is a law requiring tweeters, bloggers etc to be identifiable analogous to Section 143 of PPERA which requires an imprint on election material identifying those responsible for the material.

*If so, for what kind of behaviour and how many people – where should or could those lines be drawn?*

Publication in breach of a court order by anyone should be the line. After all, that is the current law. The law has to apply to everyone. In practice, without publication in the national press, the problem becomes much smaller. Recent major breaches were principally due to the misuse of Parliamentary Privilege.

- b. *Is it possible, practical and/or desirable for print media to be restrained by the law when other forms of ‘new media’ will cover material subject to an injunction anyway? Does the status quo of seeking to restrict press intrusion into individual’s private lives whilst the ‘new media’ users remain unchallenged represent a good compromise?*

Publication in print media, particularly the national press, is much more serious than most on-line publication. But it is wrong to leave new media users unchallenged. They too should be subject to the law. Eventually there are bound to be international conventions but even today there is much that can and should be done to enforce the law in the new media both nationally and internationally.

- c. *Is enough being done to tackle ‘jigsaw’ identification by the press and ‘new media’ users? For example see Mr Justice King’s provisional view in NEJ v. Wood [2011] EWHC 1972 (QB) at [20] that information published in the Daily Mail breached the order of Mr Justice Blake, and the consideration by Mr Justice Tugendhat in TSE and ELP v. News Group Newspapers [2011] EWHC 1308 (QB) at [33]-[34] as to whether details about TSE published by The Sun breached the order of Mrs Justice Sharp.*

This is a matter for the courts but they should be given additional powers if current means to prevent jigsaw identification are insufficient.

- d. *Are there any concerns regarding enforcement of privacy injunctions across jurisdictional borders within the UK? If so, how should those concerns be dealt with?*

Within the UK, any such concerns can be dealt with by an Act of Parliament.

- e. *Parliamentary Privilege*

i. *With regard to the enforcement of privacy injunctions and the breaching of them during Parliamentary proceedings, is there a case for reforming the Parliamentary Papers Act 1840 and other aspects of Parliamentary privilege? Should this be addressed by a specific Parliamentary Privilege Bill or is it desirable for this Committee to consider privilege to the extent it is relevant to injunctions?*

ii. *Should Parliament consider enforcing 'proper' use of Parliamentary Privilege through penalties for 'abuse'?*

Yes.

iii. *What is 'proper' use and what is 'abuse' of Parliamentary Privilege?*

It is an abuse of Parliamentary Privilege for a member to assume the role of the Court of Appeal and, in effect, overrule a judge's anonymity order. This is not the function of a member of Parliament, moreover the member, unlike the judge, will have heard only one side of the case. Proper use of Parliamentary Privilege is the exercise of the right to speak freely on any matter in the public interest. It should never be used to interfere with the proper functioning of the courts. The separation of powers is fundamental to a modern democracy.

iv. *Is it desirable to address the situation whereby a Member of either house breaches an injunction using Parliamentary Privilege using privacy law, or is that a situation best left entirely to Parliament to deal with? Indeed, is it possible to address the situation through privacy law or is that constitutionally impermissible? Could the current position in this respect be changed in any significant way? If so, how?*

It is highly desirable to prevent members of Parliament breaching injunctions. But constitutionally, Parliamentary Privilege is a matter for Parliament alone. No doubt Parliament can deal with this abuse just as it deals with many procedural matters.

#### **4. Issues relating to media regulation in this context, including the role of the Press Complaints Commission and the Office of Communications (OFCOM)**

##### **PCC**

a. *Do the guidelines in section 3 of the Editors' Code of Practice correctly address the balance between the individual's right to privacy and press freedom of expression?*

No because the Code offers no guidance as to how an editor can "justify" an invasion of privacy. Also, sub-paragraphs i) and iii) are routinely ignored by the tabloid press.

b. *How effective has the PCC been in dealing with bad behaviour from the press in relation to injunctions and breaches of privacy?*

Wholly ineffective. It has had some success in preventing illegal publication in breach of privacy but would need a prior-notification law to do this effectively.

c. *Does the PCC have sufficient powers to provide remedies for breaches of the Editors' Code of Practice in relation to privacy complaints?*

It has no such powers and can provide no remedies.

- d. *Should the PCC be able to initiate its own investigations on behalf of someone whose privacy may have been infringed by something published in a newspaper or magazine in the UK?*

Yes. It should also not refuse to act on a complaint on the grounds that it is already the subject of litigation.

- e. *Should the PCC have the power to consider the balance between an individual's privacy and freedom of expression prior to the publication of material – or should this power remain with the Courts?*

Yes, but a new regulator is required to replace the PCC. Further any such balance can only be applied if prior notification is required as otherwise the subject would not be able to complain to the PCC as it would not know an article was to be published.

- f. *Is there sufficient awareness in the general public of the powers and responsibilities of the PCC in the context of privacy and injunctions?*

## **OFCOM**

- a. *Do the guidelines in Section 8 of the Ofcom Broadcasting Code correctly address the balance between the individual's right to privacy and freedom of expression?*

In contrast to the PCC equivalent, the Ofcom guidelines appear to be an honest attempt to find the right balance. The fact that Ofcom can apply sanctions adds to the effectiveness of Section 8.

- b. *How effective has Ofcom been in dealing with breaches of the Ofcom Broadcasting Code in relation to breaches of privacy?*

Given the lack of any significant privacy case involving broadcasters it would appear that the Ofcom broadcasting code is significantly more effective.

- c. *Is there a case that the rules on infringement of privacy should be applied equally across all media content?*

Yes. It is anomalous that the print media are not regulated in the same way as television. It is no longer true that television is in far fewer hands than the press.

## **APPENDIX A**

### **Prior Notification**

A law to compel newspapers to notify an individual before publishing his or her private information is an urgent necessity. The press case against is unarguable (see below). It relies on criticising the courts' power to prevent publication (which already exists) and ignoring the anomaly that arises in the rare cases where the victim has had no prior warning.

There is currently no remedy once a newspaper has illegally published private information, this is true no matter how blatant the wrong. The reason is simple. Even if the claimant is awarded record damages for breach of privacy (as I was in 2008), his solicitors' bill will exceed the total of damages and costs paid to him by the newspaper. He will be left with a large bill to pay.

It is impossible to pretend that paying a large bill is a remedy. And the problem is compounded by a trial in open court. Precisely that which should (in a successful claim) have been kept private, is published again, this time with the protection of absolute privilege. And, worse, once published, the information will never again be private no matter how blatantly illegal the original exposure may have been.

As a result, lawyers routinely advise victims of a breach of privacy that legal action, even if successful, is pointless. It will merely result in a large bill and further publicity. They also point out that no judge can remove the private information from the public mind. In effect, they tell the victim, once the information has been published, the law cannot help; there is effectively no remedy.

Newspapers know this. They know that if only they can get the story and pictures on to the street before the victim finds out, they will not be sued. No matter how outrageous the invasion of privacy, the victim's lawyers will tell him there is nothing useful to be done.

It follows that if a newspaper intends to publish something which it knows is illegal, its only risk is that the victim will find out and ask a judge to stop publication. So the newspaper keeps its intentions secret from all but a minimal number of staff. Sometimes (as in my case) they even publish a "spoof" first edition, the better to hide their intentions. The more egregious the illegality, the greater the secrecy. The victim is then ambushed and left with no remedy.

This is what happened to me. Although I was awarded record damages of £60,000, and the newspaper paid £420,000 towards my costs (at 82%, an unusually high proportion,) I was left £30,000 out of pocket. By suing, I had also to face massive additional publicity about an element of my life which the court eventually held should never have been made public in the first place.

It is easy to see where this leads. If a newspaper wants to publish something obviously illegal, such as medical records or pictures of private sexual activity, they can do so with impunity provided they can keep the story secret until it is published. They know they will then not be sued.



The remedy is to require newspapers to notify an individual before publishing intimate or sexual details of his private life. Then the victim can, if he so wishes, ask a judge to prohibit publication until a trial can determine whether or not publication is lawful. If a full trial shows that publication is lawful, everything can be published. But the current gap in the law, which allows a newspaper to publish information which is subsequently held to be strictly private, would cease.

In practice, bad invasions of privacy would mostly not proceed to trial. A judge will only grant an injunction if satisfied the claimant is likely to win at trial. The newspaper would then probably not want to risk the costs of a trial it was likely to lose. For the victim, the cost of seeking an injunction is a small fraction of the cost of a full post-publication trial. And, unlike a trial, it can provide an effective remedy. But a victim can only apply for an injunction if informed.

A requirement to notify is strongly opposed by newspapers, even if restricted to intimate private matters such as medical records, or sexual activity with no element of public interest. They do not accept that in marginal or difficult cases, an independent judge, not a tabloid editor, should weigh the public right to know against the individual right to privacy. They do not agree that the present loophole in the law which gives immunity to the tabloids, even when committing outrageous breaches of privacy, should cease.

Although the newspaper industry acknowledges that in the vast majority of cases the victim finds out and can seek an injunction if he wishes, they do not want to end the tabloids' ability to ambush a victim to prevent him seeking an injunction. This despite responsible journalism requiring that in all but the most exceptional cases, a comment from the subject must be sought before publication.

Recognising that until very recently, the power of the Murdoch press in the UK was such that no government would introduce legislation to make prior notification compulsory (not even in the worst cases), I brought proceedings against the UK in the European Court of Human Rights. These failed because the court thought this was a matter for the UK. Happily, Murdoch's power is no more. There is now no reason why a law which is so clearly needed should not be introduced.

Finally, I said at the beginning that the case against prior notification is unarguable. This does not stop the press making an attempt. They claim it would have "a chilling effect" and lead to endless injunctions. This is pure nonsense. Paul Dacre (Daily Mail editor and PCC code committee chairman) told the CMS Select Committee that "ninety-nine times out of 100" the subject has notice of the story (23 April 2009, Q594). So a requirement of prior notification would affect only 1% of victims. Nothing would change for the other 99% who would know already and not need notice. The newspapers normally contact the subject for a quote before publishing. They only ambush an individual if they know what they are going to write is illegal. Then they forgo the quote and rely on the futility of suing once the story is out.

October 2011

## **National Union of Journalists (NUJ)—Written evidence**

The National Union of Journalists (NUJ) is the voice for journalism and for journalists across the UK and Ireland. It was founded in 1907 and has 38,000 members. We are an affiliate of both the European Federation of Journalists and the International Federation of Journalists (IFJ). The NUJ represents 38,000 members working in all sectors of the media, including staff, students and freelancers - writers, reporters, editors, sub-editors, photographers, illustrators and people who work in public relations.

The NUJ is pleased to be able to provide evidence to the committee and is happy to answer further questions and/or take part in oral evidence sessions.

The NUJ has always been involved in the professional concerns of members introducing the first code of conduct for journalists in the UK in 1936. This was significantly amended in the early seventies to produce a code that is recognisable in the modern NUJ code and the PCC's own code of practice. The NUJ was also instrumental in driving the 1947 Royal Commission that recommended the setting up of a Press Council. It also pushed for the formation of the General Council of The Press, the forerunner of the Press Council. The NUJ became concerned about the performance of the Press Council and left it in the early eighties, setting up its own Ethics Council charged with responsibility for developing the professional life of the union and educating members about ethics as well as policing the union's Code of Conduct by taking complaints from the public. Following serious moves to reform the Press Council in 1988, the NUJ re-joined in 1989, just as David Calcutt and his Privacy Committee report recommended the scrapping of the Press Council.

Once the NUJ re-joined the Press Council in 1989, the employers were quick to seize on the opportunity presented by the Calcutt report to set up the PCC and exclude all trade union influence. The NUJ warned that setting up a body concerned only with complaints was doomed to disaster and so it proved. The PCC was obliged just a couple of years later to agree that it should also work to defend press freedom as a basis for dealing with ethical complaints but it has always done as little of this work as possible.

The problem for the PCC is that it needs to convince the public it is delivering high standards whilst at the same time it does nothing that will significantly damage the profit-making activities of its paymasters, the industry it is supposed to be regulating. For most industry self-regulatory bodies there is a vested interest in providing as high standards as the industry will bear as those who subscribe to those standards benefit from applying them by getting more customers. The PCC is not able to offer such a pact. This has led Northern and Shell (Daily Express and Star group newspapers) to withdraw funding from the PCC putting them outside the regulatory system. It is difficult to see how a regulatory system can work when there is no consequence to a newspaper for withdrawing. The Irish system for instance, offers benefits to publishers by allowing membership of the Press Council and adherence to its code to be used as a defence in law in defamation cases.

Because the PCC's hold over the industry is necessarily so weak, it was unable to properly investigate the News of the World phone-tapping scandal, despite already knowing from the Information Commissioner's Office Operation Motorman report in 2006 that hundreds of reporters had been involved in accessing confidential information.

Operation Motorman identified 3,654 incidents of illegal trade in confidential personal information by 334 reporters/clients. Shockingly, the worst offender was the Daily Mail, with the Mail on Sunday in fourth place. Both of these publications share an Editor in Chief: Paul Dacre, chair of the PCC's Code of Practice committee. Other members of the code of practice committee whose publications featured strongly in Operation Motorman's revelations were:

**Neil Benson**, Trinity Mirror Plc;

**Richard Wallace**, Daily Mirror (Sunday People and Daily Mirror came second and third with hundreds of incidents);

**Geordie Greig**, Evening Standard; and

**John Witherow**, The Sunday Times

Some members of the commission are editors of papers identified in 2006 as dealing in illegal trade on the Commission: Tina Weaver, The Sunday Mirror and Peter Wright, the Mail on Sunday.

The NUJ has sought a number of changes to the PCC over the last 20 years in order to make press self-regulation meaningful and to raise the standards of the UK press to maintain its freedom and independence whilst serving the public with the high quality news and information required of day-to-day and electoral decision making in a fast-moving, highly industrialised democratic mixed economy as well as the entertainment to which its readership is entitled.

The NUJ finally lost patience with the PCC at its recent delegate meeting earlier this year and has called for its abolition and its replacement with a more independent, effective regulatory body.

The biggest problem with the PCC is that it has only ever been a complaints body and does not attempt to improve standards of the media in the UK ensuring only modest compliance with its code.

The NUJ's specific criticisms of the PCC as presented at the recent review held by the PCC in an attempt to divert criticism were broken down into three main categories and were as follows:

Constitutional issues:

- There is no involvement of working journalists or their representatives on the commission or its Code of Practice committee;
- There is no recognition of a journalist's right to refuse an assignment on the grounds of conscience despite supporting putting code in employment contracts and despite this being identified as good practice by the 2003 CMS select committee report on Privacy;
- There are huge regulatory and ethical differences between websites run for newspapers and those run by broadcasters.

Code weaknesses:

There are severe deficiencies with the PCC's code of practice that prevent it operating as readers would like.

## National Union of Journalists (NUJ)—Written evidence

- A complaint about discrimination in a story is limited to individuals so a complaint about a racial group cannot be upheld unless it concerns a named individual;
- The accuracy clause is weak as it refers to a low threshold of inaccuracy;
- There is a very limited ability to deal with matters of harm and offence, for instance, in matters of death and suicide.

### Operational:

- There are no sanctions available for serious or deliberate breaches;
- Although the number of complaints rises year on year, the number of adjudications continues to fall both in relative and real terms;
- There should be a system of compensation for people who have been seriously damaged by stories;
- Third party complaints are usually not allowed;
- The PCC has always limited its self-investigation powers, preventing it from carrying out the kind of investigation of major issues of public significance that were one of the notable positives of the old Press Council;
- The PCC has no real role in press freedom campaigning and so is not really able to stand up to government or others with any authority.

Following the Culture, Media and Sport Select Committee Report (on Press Standards, Privacy and Libel), the NUJ broadly welcomed the report's proposals to change the costs regime for libel. In particular we welcomed recommendations to place a limitation period for actions on internet publications and proposals to bring Britain's libel laws more in line with modern global practice, removing from us the embarrassment of being the world's libel tourism capital.

The union agreed with the committee that self-regulation was the right way to defend press freedom at the same time as providing the public with an outlet for complaints. The NUJ also welcomed proposals to fine newspapers that deliberately and recklessly breach the PCC's code. We also agreed that there should be some form of incentive for publications to pay their dues to the PCC. Placing of apologies and corrections also needs to be more formalised.

The union also argued that it is vital for NUJ members to receive the protection of a conscience clause written into the code which can offer protection to journalists who face undue editorial pressure.

The NUJ also supports the Human Rights Act and therefore the European Convention and believes that its effect on the courts has been entirely beneficial. We believe it is entirely appropriate that people's human rights should be one of the first measures of the courts; and includes the right to freedom of expression and the right to both transmit and receive such expression as information or opinion.

The NUJ supports the right to privacy, although we would like to stress that this is a general right and not one limited solely to media invasions. Invasions of privacy by CCTV, the police, the intelligence services or commercial operations without the authority of the law, and therefore democratic accountability, are just as damaging to a free society as invasions of privacy by the media.

All citizens should have the right to respect for their private and family life, their home and their correspondence. Their privacy should only be invaded if there is good reason to believe it is in the public interest so to do, whether this is because they are believed to be committing a crime or social misdemeanour, misleading the public in some way or endangering the health and safety of themselves or others.

The Union's Annual Delegate Meeting discussed privacy in 2001 agreeing the following motion:

ADM recognises that it is a mark of a free and democratic society that all people have a right to respect for their private and family life, their home and their correspondence. ADM also believes that people have both a right to know what is being done in their name and a right to information on which to base their choices and that this might legitimise the revelation of information that by the earlier definition should remain private.

ADM believes the only way to determine which information should be revealed and which remain private is for a journalist to test whether the information is in the public interest - which is not the same as information that will interest or titillate the public.

ADM declares that information revealed in the public interest is that which is required for members of the public to use to determine their intentions and opinions to seek to ensure probity and honest dealings amongst the civil and military authorities, the judiciary, politicians and all those holding positions of public authority or who have courted prominence in all walks of life.

We believe that despite the fuss made by many editors desperate to justify what are often quite outrageous intrusions into the private lives of public figures, the moves made by the courts to firm up the law of confidence and apply it to privacy claims are largely justified.

The NUJ believes strongly in the right to freedom of expression and sees it as a vital freedom that underpins all other public freedoms. Without the right to publish a wide range of views, investigate and publish the activities of the powerful and what they are claiming to do in the name of the public, there can be no democracy.

However, the union is also acutely aware that the right to publish in the public interest is very different to having the right to publish what will interest the public and therefore sell newspapers. The public may want to know about the private lives of celebrities but that does not mean that they need to know in order to protect their democratic rights.

However, there are those who seek to improve their status in society as well as their earning power by courting publicity and presenting themselves to the public as a certain kind of person and the NUJ believes that it may well be in the public interest to present a true picture of those people to the public who have supported them on the basis of the image presented. When a person has entered public life and attempted to capitalise on their image or popularity, the public has a right to know the truth about them in order to make appropriate judgments about them whether political or commercial.

There is also an argument that there is a public interest in the freedom of expression itself; whilst agreeing it is better to know than to have unnecessary secrets, the union finds this an unacceptable position when people are hurt for no good reason by such exposures. Whilst freedom of expression is a human right that requires public support, the random destruction of people's reputations simply to boost a newspaper's circulation or a TV show's ratings is not in the public interest and is the point at which freedom of expression has to bow to the right of individual privacy.

### **NUJ policy – agreed at NUJ conference 2011**

At the NUJ delegate conference in April 2011 the union agreed the following policy relating to the Leveson Inquiry:

#### **The Press Complaints Commission:**

Delegate Meeting (DM) notes that the Press Complaints Commission (PCC) has conducted an internal review of its processes in the wake of a damning report from the Parliamentary media committee.

It recalls that criticisms in the report centred on the PCC's failure to investigate the allegations of disreputable editorial practices at the News of the World. DM notes that following the publication during 2010 of further allegations, the PCC again took no action.

DM believes that the practice of phone-hacking and the entrapment frequently employed by the News of the World without public interest justification are a disgrace to journalism. The disgrace is compounded when the industry's supposed self-regulatory body attempts to brush aside or cover up allegations.

It further notes that the PCC's review failed to recommend any of the proposals put forward by the NUJ, the Campaign for Press and Broadcasting Freedom (CPBF) and other organisations for such reforms as stricter penalties, a wider membership for the commission, including NUJ representatives, and a "conscience clause" for journalists.

DM believes that the PCC is incapable of performing responsibly its function of regulating newspapers and magazines. It notes that the CPBF has called for the PCC to be abolished and declares that the NUJ should cease attempting to put forward proposals for its improvement and instead support calls for its abolition.

DM therefore instructs the NEC to start a debate within the union about the future of press regulation and to that end open up discussions with the CPBF and other media reform organisations and interested parties that support calls for the abolition of the PCC and its replacement with a more independent, effective regulatory body.

#### **Phone Hacking:**

This Delegate Meeting (DM) deplores the apparently widespread use of phone hacking at the News of the World and congratulates The Guardian and Nick Davies for doggedly exposing this scandal. This DM notes that phone hacking by any journalist is illegal and instructs the NEC to campaign against this behaviour.

### **Freedom of Information:**

This delegate meeting –

- recalls that more than 25 years have passed since the NUJ helped to launch the Campaign for Freedom of Information in Britain;
- acknowledges the tenacity and expertise of the campaign and its long-serving director, Maurice Frankel, in persuading parliament to adopt such an Act;
- recognises that the first six years of operation of the Freedom of Information Act have brought about a profound change for the better in the political life of this country;
- and applauds the efforts of all those journalists who have sought to use the Act for the benefit of society.

Conference is conscious, however, that those benefits are now threatened by a government which is imposing deep and widespread cuts in public spending. If those who make such spending decisions are to be held to account, freedom of information at the national and local level is even more important than usual.

For these reasons, Conference instructs the NEC to offer all possible support - and to work jointly with, when possible - the Campaign for Freedom of Information in order to oppose:

- any attempt by the government to introduce charges for the supply of information
- changes to the Act which would impose limits on the number of requests for information
- redundancies among those currently employed to respond to requests for information.

### **Media ownership:**

This Delegate Meeting (DM) is alarmed at the continuing growth of the Murdoch media empire in the UK and Continental Europe. It notes that in November 2010 News Corporation notified the European Commission of its intention to make a takeover bid for the remaining shares in BSkyB that it does not already own. It also notes that at the same time Vince Cable, the business secretary, issued an intervention notice on News Corporation's proposals to acquire the broadcaster and that Ofcom subsequently undertook a public interest investigation into the proposed acquisition.

Conference notes that when News Corporation announced its intention to take control of BSkyB in June 2010, there was very little reaction. However, it notes that shortly after, the union, in conjunction with the internet campaigning organisation 38 Degrees and the Campaign for Press and Broadcasting Freedom, launched a high profile and extremely successful publicity campaign to ensure that the proposed acquisition was the subject of a public interest investigation.

It also notes that a number of other media companies came out against the proposed takeover and that articles in the press by Will Hutton, Henry Porter and the Lords Puttnam and Fowler also warned of some of the dangers to media plurality and press freedom if the takeover was not challenged.

Conference also notes that Hutton also made the call for media commission in an Observer article on 5<sup>th</sup> September 2010 to examine Britain's media ownership and competition rules, more especially in the light of the autumn 2010 announcement by the Culture Secretary Jeremy Hunt of the government's intension to lift ownership restrictions on local newspapers and radio.

DM congratulates those involved in the campaign to ensure that this bid was subject to a public interest test. It recognises that in such campaigns a key element is building a wide coalition in support and the use of the internet to reach a wide audience.

NUJ Conference therefore instructs the NEC to:

- Support the call by Will Hutton and others for a media commission to examine Britain's media ownership rules;
- Ensure that the call is taken up in Parliament by the NUJ group of MPs;
- Continue campaigning with organisations like 38 Degrees and the Campaign for Press and Broadcasting Freedom and to seek wide public support for tougher and clearer rules on media mergers including opposition to any proposals by the government to lift the existing ownership restrictions on local newspapers and radio.

### **The UK trade union movement response to the Murdoch scandal, phone hacking and press regulation:**

The Trade Union Congress (TUC) is the policy making body of the trade union movement in the UK. The annual Congress meets every year during September and each trade union can send delegates to Congress and 'motions' (resolutions for debate) are proposed and discussed. These form the basis of the TUC's work for the next year. This year's Congress was in London in September 2011.

The following policy was agreed and is relevant to the Leveson Inquiry:

#### **News International - TUC policy**

Twenty-five years after the Wapping dispute, Congress remembers the shameful role News International played on behalf of the Thatcher government in weakening unions throughout the print media industry.

Congress notes the failure of recognition laws to protect unions in anti-union companies, leaving workers vulnerable to the pressures of unprincipled employers.

The in-house News International Staff Association (NISA), set up and funded by News International, failed to win a certificate of independence from the Certification Officer. Yet, under UK recognition laws, Murdoch was able to use NISA to block legitimate attempts of unions seeking recognition.

Congress therefore calls for the recognition laws to be amended to remove this barrier.

Congress also calls for the introduction of a conscience clause in law to ensure that journalists standing up on a principle of journalistic ethics have protection against dismissal, and for Congress to support the broadest dissemination of the NUJ Code of Conduct.



## **Media regulation – TUC policy**

Congress is appalled at the culture of journalism fostered at News Corporation and condemns the use of illegal methods to intrude into the lives of members of the public in pursuit of profit rather than quality journalism.

Congress welcomes the inquiry into media ethics and believes that genuine investigative journalism, freedom of expression, diversity and plurality, limits on cross-media ownership and trade union recognition must be key principles underlying media regulation.

Congress agrees that the PCC be wound up and replaced with an independent body which can earn the respect of readers, the general public and journalists alike. It should have clear powers to order meaningful recompense and ensure that the right of reply is established.

Congress notes that the UK government has opened consultations on a new Communications Bill and opposes the Culture Secretary's stated aims that this legislation should further lift regulations across the media industries and weaken the institutions of public service broadcasting.

In the light of these developments, Congress calls on the General Council to work with affiliated media trades unions and the Campaign for Press and Broadcasting Freedom to:

- Organise a one-day conference by the end of February 2012 on media ownership and regulation with a view to developing TUC policy and influencing future Labour Party policy
- Establish a working group to organise policy and public interventions around the new Communications Bill
- Publicise this media policy widely amongst affiliates and the general public.

October 2011

## The Newspaper Society—Written evidence

The Newspaper Society represents the regional media industry. Our members publish some 1200 regional and local titles, 1600 websites, hundreds of niche and ultra local publications and a range of digital and broadcast channels, with an audience of 33 million print readers a week (71% of UK adults) and 42 million web users a month for its trusted news and information services.

We hope that these general comments on the questions are helpful. We would be happy to supply any further views.

### **How the statutory and common law on privacy and the use of anonymity injunctions and super-injunctions has operated in practice?**

- ***Have anonymous injunctions and super-injunctions been used too frequently, not enough or in the wrong circumstances?***
  1. The NS and its members are strongly concerned by the growth in the use and application of super-injunctions and anonymised injunctions and the development of privacy law. In practice, such injunctions have directly affected regional media coverage of issues of legitimate public interest. They have also raised issues of fundamental importance which also directly impact upon the regional press such as the development of privacy law and corresponding restrictions upon freedom of expression, including open justice, the exercise of free speech by Parliament, press and public and the reporting of Parliament and the courts.
  2. The NS therefore shares the concerns of the media organisations, editors and their lawyers, who raised this problem with the Lord Chancellor, Ministry of Justice, the House of Commons Culture, Media and Sport Committee and the Committee on Super-Injunctions. Media organisations' submissions to Parliamentary Committees and government, as well as the Report of the Committee on Super-injunctions, have outlined some of the legal, procedural and administrative grounds for questioning the development of anonymised and super-injunctions and their use at all, in addition to frequency or inappropriateness of their grant.
  3. We welcome the recent implementation of the Report of the Committee on Super-injunction's recommendations for a pilot scheme for collection of data on such injunctions and the Guidance on the procedure for application for injunctions. The media will monitor their effect with interest. However, as the Committee acknowledged, its recommendations could only address procedural matters, rather than propose reform of the substantive law.
  4. Prior restraint by way of court order, backed by sanctions of fine and imprisonment, preventing publication or investigation is obviously one of the most powerful curbs upon the media.
  5. The worrying development of privacy law has obviously also widened the scope and frequency of grant of injunctions. The media's problems are compounded when the

courts and judges fail to give due weight to the importance of freedom of expression in interpretation and application of both the substantive law, or if the judges and courts fail to enforce procedural requirements, particularly in relation to section 12 of the Human Rights Act 1998 which was intended to promote and safeguard freedom of expression and the system/jurisprudence of voluntary self regulation. It was framed to provide specific protection against prior restraint by way of injunction or other (non-criminal) order of the courts and tribunals and ensure that the grant of injunctions remained rare in freedom of expression cases (see Hansard, HC debates 2 July 1998. It was also clearly intended to prevent any increased or routine grant of interim injunctions on privacy grounds, precisely to avoid the combination of the new and existing law leading to injunctions being routinely granted to preserve privacy/status quo, without regard to the special importance of freedom of expression and press freedom, including its practical operation, and any consideration of public interest or reasonable belief therein, merits of the case, material already in the public domain, especially as pre-publication injunctions were, rightly, not granted in libel cases, where defences of truth or privilege were to be advanced).

6. Interim injunctions are often de facto permanent in practice, because news is a 'perishable commodity' and media organisations may have to make pragmatic decisions on cost grounds not to contest an injunction, nor press to full trial, however serious the subject matter or legal points at issue.
7. This in turn can have a chilling effect upon investigative journalism or straightforward reporting (e.g. court cases), to the detriment of local communities' right to know about issues of serious public interest.
8. It is important that these issues are placed in their wider context and not simply viewed as a national media v celebrities problem and problematic cases confined to the use of super-injunctions or anonymised injunctions involving such parties.
9. As demonstrated by earlier cases on pre publication restrictions affecting the regional press, which were pursued to the House of Lords, injunctions unchallenged can crucially affect local reporting and local knowledge of matters of great local importance.
10. The Liverpool Echo was ultimately able to resist injunction of the publication of the results of its investigative journalism into alleged financial irregularities because it was able to take its case through the courts to the House of Lords, because of the support and resources of Trinity Mirror Group (Cream Holdings Limited and Others v Banerjee and Others [2004] UKHL 44) - a small weekly newspaper publisher may well not have been able to do so. In re S (FC) (a Child)[2004] UKHL 47 Lord Steyn noted that The Romford Reporter which had earlier contested reporting restrictions and obtained modification of an injunction imposing restrictions upon reporting a murder trial, had to withdraw to avoid the risk of being ordered to pay costs:

'35. Fourthly, it is true that newspapers can always contest an application for an injunction. Even for national newspapers that is, however, a costly matter which may involve proceedings at different judicial levels. Moreover, time constraints of an impending trial may not always permit such proceedings. Often it will be too late and the injunction will have had its negative effect on contemporary reporting.

36. Fifthly, it is easy to fall into the trap of considering the position from the point of view of national newspapers only. Local newspapers play a huge role. In the United Kingdom according to the website of The Newspaper Society there are 1301 regional and local newspapers which serve villages, towns and cities. Apparently, again according to the website of The Newspaper Society, over 85% of all British adults read a regional or local newspaper compared to 70% who read a national newspaper. Very often a sensational or serious criminal trial will be of great interest in the community where it took place. A regional or local newspaper is likely to give prominence to it. That happens every day up and down the country. For local newspapers, who do not have the financial resources of national newspapers, the spectre of being involved in costly legal proceedings is bound to have a chilling effect. If local newspapers are threatened with the prospect of an injunction such as is now under consideration it is likely that they will often be silenced. Prudently, the Romford Recorder, which has some 116,000 readers a week, chose not to contest these proceedings. The impact of such a new development on the regional and local press in the United Kingdom strongly militates against its adoption. If permitted, it would seriously impoverish public discussion of criminal justice.'

- ***What can be done about the cost of obtaining a privacy injunction? Whilst individuals the subject of widespread and persistent media coverage often have the financial means to pursue injunctions, could a cheaper mechanism be created allowing those without similar financial resources access to the same legal protection?***
  - ***Should steps be taken to penalise newspapers which refuse to give an undertaking not to publish private information but also make no attempt to defend an application for an injunction in respect of that information, thereby wasting the court's time?***
11. In addition to the problems caused by development of the substantive law, the Report of the Committee on Super-injunctions acknowledged that bypass of procedural safeguards in the grant of injunctions, such as failure to provide notice and return dates and thereby prevent full examination and forensic testing of the law, facts, grounds and evidence by those who are at risk of being silenced by the injunction, could become inimical to freedom of expression.
  12. Given these problems, we would therefore be very wary of any new legal mechanisms, designed only to save applicants' time and costs, which might create new restraints upon freedom of expression and media reporting via the operation of any new procedures and/or the threat of new penalties, which would apparently apply irrespective of the media's actual intention to publish, or any actual publication by the media.
  13. The system of voluntary self-regulation upheld by the PCC already provides additional, fast and cost free protection for individuals, over and above the law. Regional press editors and journalists observe the Code of Practice, which incorporates protection of privacy in the majority of its clauses. The PCC provides pre-publication advice to editors and deals with complaints relating to newsgathering or investigation as well as

publication. It also assists individuals who are the subject of media attention, including by way of a system of 'desist' notices observed by all media.

**How best to strike the balance between privacy and freedom of expression, in particular how best to determine whether is a public interest in material concerning people's private and family life**

- ***Have there been and are there currently any problems with the balance struck in law between freedom of expression and the right to privacy?***
  - ***Who should decide where the balance between freedom of expression and the right to privacy lies?***
14. The questions set out under this heading have to be seen in their wider context.
  15. Publishers, editors and journalists simply exercise the citizen's right of freedom of expression and rights to official information, within the limits imposed by the civil and criminal law. Hence new restrictions upon press freedom not only affect all newspapers, whether national, regional and local, controlling investigation and reporting in print and online, but may also impact upon any individual citizen's freedom of speech and right to know.
  16. The civil and criminal law, statute and common law, already directly and indirectly restrict press investigation, reporting and publication.
  17. EU and UK legislation is often enacted and implemented without due regard for freedom of expression and freedom of information or open justice and the potentially restrictive effect upon the public's right to know, by way of media investigation or reporting or otherwise, and individual rights to freedom of expression.
  18. Indeed, statutory personal privacy protections, such as implementation of the EU data protection directive, were enacted at a time when the UK lacked freedom of information laws or any constitutional written guarantee for freedom of expression, as pre-existing restraints upon its ambit. Domestic legislation, from anti-stalking laws to counter-terrorism, plus the investigatory powers of statutory regulators and enforcement authorities, intended to control quite different targets, has been used against the media and journalists
  19. Thus, the real problem can be failure by policy makers and law makers to identify or take seriously the adverse implications that their policies or legislation may have for freedom of expression and impact upon the media. The new legal obligations of the EU lawmakers and courts to observe the ECHR and Charter of Fundamental Rights may yet lead to more restrictions upon freedom of expression in favour of privacy and data protection rights than the opposite. The pre-legislative declarations of compatibility with the Human Rights Act 1998 now required for UK lawmaking has not stopped Bills containing unnecessary and over-restrictive statutory controls on freedom of expression from being introduced into Parliament.
  20. Despite various public statements, no effective and comprehensive' freedom of expression 'audit' has yet been put in place which ensures early identification and

- consultation upon any legislative proposals, in order to avoid any unnecessary and unjustified restrictions upon Article 10 rights and lawful journalistic investigation and reporting.
21. The 'balance' in existing law has de facto to be applied wherever the relevant law demands and by whom it is exercised, with any avenue of review dependent upon the particular circumstances.
  22. The NS and the regional press share the concerns of other media organisations and other commentators that the courts and individual judges have developed de facto privacy law in ways which have failed to acknowledge the importance of freedom of expression. This includes failure to give freedom of expression due weight in the application and interpretation of public interest defences, where they exist.
  23. Government policy makers and Parliament have often failed to give due weight to freedom of expression and open justice in lawmaking and created new restrictions without adequate exemptions or defences protecting the public interest or reasonable belief in the public interest. The investigation, enforcement and regulatory authorities, courts and judges have failed to give due weight to them in exercise of their powers. Recent initiatives and guidance have sought to address some of these problems, albeit on a piecemeal basis.
  24. Nor, in our view and as media organisations' previous submissions have outlined, have the courts' 'properly applied and interpreted the mandatory stress on freedom of expression provided by HRA s12, when balancing Article 8 and 10' (Report of Committee on Super-injunctions). As outlined above, this has also led to the development of privacy law, increased grant of injunctions and development of anonymised and super-injunctions by the courts and judges, in direct contradiction of the intention of Parliament and policymakers in the framing and enactment of section 12..
  25. The NS also fears the legal blurring of the distinction between defamation and privacy and widening of the circumstances in which injunctions can be granted. Pre-publication injunctions should not be granted in defamation actions, nor the law allow libel actions to be wrapped in privacy claims in order to stop publication or silence individuals.
    - ***Should Parliament enact a statutory privacy law?***
    - ***Should Parliament prescribe the definition of 'public interest' in statute, or should it be left to the courts?***
    - ***Is the current definition of 'public interest' inadequate or unclear?***
  26. The Newspaper Society and the regional press have always strongly opposed the enactment of a statutory privacy law, through the civil or criminal law or co-regulatory systems.
  27. We would also point out that past UK proposals for privacy legislation would have created dangerously wide and uncertain restrictions, deliberately left for judges and the courts to develop. Meanwhile reporters, editors and publishers would have been expected somehow to regulate their conduct and their approach to the subject, manner and content of newsgathering, investigation and publication of any kind, by

reference to an uncertain law, deemed too difficult even by its proposers for statutory definition by Parliament and deliberately left wide open for interpretation by the courts, though too complicated and uncertain for jury trial or legal aid evaluation.

28. Privacy laws and attendant injunctive powers, or other remedies, deter and prevent disclosure, irrespective of triviality, truth or public interest. As recent events have shown, they can also be deployed to protect corporate and commercial concerns, rather than individual privacy, with restraints sought not just on the citizen's right to know matters of legitimate public interest, but also restricting the right to be informed about proceedings in the courts and Parliament. However wide statutory exemptions and defences of prior publication, public interest and reasonable belief in the public interest might be framed, codification of existing privacy developments or extension of privacy law would be open to further exploitation in favour of those seeking suppression of information. This would then widen and deepen the chilling effect upon freedom of expression and press freedom.
  29. However, the development of privacy law, conflation with libel law, introduction of prior notification, expansion of restraints upon disclosure by injunction or other penalty and any enactment raise an even more troubling prospect. Freedom of expression simply ceases to exist if communication of information – even by an individual about his/her own life and experiences - is effectively dependent upon prior permission to publish or limited to what a judge or court deems to be in the public interest to publish. There is no freedom if anyone - be they public authority, commercial media organisation or individual citizen - is subject to such restrictions upon their ability to release, receive, publish or impart information.
- **Should the commercial viability of the press be a public interest consideration to be balanced against an individual's right to privacy?**
30. The commercial impact upon the press of injunctions and other reporting bans must be taken into account. The UK press has a fierce tradition of independence from the state, buttressed by its financial independence, free of state subsidy and thereby not at risk of state control by way of privilege or penalty. Newspapers depend upon the revenues that their titles and services, print, broadcast or online, generate from sales and advertising. It is these revenues which support its journalism and maintain the industry's very existence and thereby ensure the range and choice of news media and information available in the UK.
  31. The courts have acknowledged that newspapers must publish information of interest to the public, in order to sell, in order to ensure that there are newspapers at all (*A v B and C* [2003]QB 195; *Campbell* [2004] UKHL 22).
  32. A regional newspaper would not gamble on a breach of the law or the Code or anticipate any rise in sales or advertising revenue as a result of a single story - rather the reverse. As Lord Steyn pointed out (see above) the costs of taking legal action to dispute the grounds for making any order, to obtain its variation or lifting and pursuing legal action against restraints on publication if need be to the Court of Appeal, let alone the Supreme Court or ECtHR, can be far too great for any smaller publisher or individual to risk defending an action, or challenging an injunction or other reporting restriction imposed on privacy grounds.

- **Should it be the case that individuals waive some or all of their right to privacy when they become a celebrity? A politician? A sportsperson? Should it depend on the degree to which that individual uses their image or private life for popularity? For money? To get elected? Does the image the individual relies on have to relate to the information published in order for there to be a public interest in publishing it (a ‘hypocrisy’ argument)? If so, how directly?**
  - **Should any or all individuals in the public eye be considered to be ‘role models’ such that their private lives may be subject to enhanced public scrutiny regardless of whether or not they make public their views on morality or personal conduct (i.e. in the absence of a ‘hypocrisy’ argument)?**
  - **Are the courts giving appropriate weight to the value of freedom of expression in ‘celebrity gossip’ and ‘tittle-tattle’?**
33. Lawmakers, judges and the courts should recognize more frequently, effectively and publicly that the right of freedom expression encompasses everything from the most banal to the most serious matters of great public interest. They should also recognize that day to day reporting is as important as investigative journalism and should not be subjected to incremental legal restraints. Nor should individuals or companies have the right to control all information about themselves or those associated with them and prevent its disclosure, be it banal, interesting to the public, or of public interest. Moreover, there should be nothing to prevent enhanced public scrutiny, especially of those in the public eye or where circumstance warrants it.
- **In the context of sexual conduct, should it be the case that a person’s conduct in private must constitute a significant breach of the criminal law before it may be disclosed and criticised in the press?**
34. The regional press observe the Code and the existing law. However, the introduction of such a proposition as suggested would produce absurdly wide effects: even effectively routinely outlawing the reporting of the proceedings of tribunal, criminal courts and civil courts in cases involving allegations of sexual offences, unless and until someone was convicted of a significant criminal offence in respect of such conduct. The NS has already raised its concerns about the Education Bill’s reporting restrictions on teachers’ identification in respect of alleged criminal conduct against pupils and the GMC’s proposals to end public Fitness to Practice panel hearings, including those concerning alleged criminal conduct by doctors.
- ***Could different remedies (other than damages) play a role in encouraging an appropriate balance?***
  - ***Are damages a sufficient remedy for a breach of privacy? Would punitive financial penalties be an effective remedy? Would they adequately deter disproportionate breaches of privacy?***
35. There is no need for more restrictive remedies, or widening the grounds for grant of injunction or other restrictions on publication, or punitive financial penalties, or aggravated damages, or tougher criminal or civil sanctions for any breach of privacy,



defamation or other laws impacting upon release or receipt or exchange or publication or other communication of information and free speech. Indeed, the introduction of such penalties would suggest both that the balance between freedom of expression and privacy was further skewed in favour of privacy and that new media controls were being constructed under the guise of piecemeal reform.

- ***Should we introduce a prior notification requirement, requiring newspapers and other print media to notify an individual before information is published, thereby giving the individual time to seek an injunction if a court agrees the publication is more likely than not to be found a breach of privacy? If so, how would such a requirement function in terms of written content online e.g. blogs and other media?***
- ***Should aggravated damages be payable if a media publisher does not give prior notification to the subject of a publication which a court finds is in breach of that individual's privacy?***

36. The NS strongly opposes the introduction of a prior notice requirement as suggested. This would not just increase the application, grant and normalization of injunctions, but deter the investigation and publication of matters of legitimate public interest to the detriment of freedom of expression. It would also render day to day reporting impossible. How could a local newspaper report the courts, councils, public meetings, statements by third parties referring to others, such as police comments, or quote from an individual, or information or extract contained in an official report, or reference in a letter, or produce routine news stories, features, comment, reviews, obituaries, profiles, historical references - let alone contemporaneous reporting of riots or sport matches - if it had to approach each and every individual mentioned or featured in a photograph or video report, notify them of the impending publication and postpone or abandon publication if a negative response or indication of recourse to court would ensue? It would also introduce a legal regime predicated on privacy, filtering everything through the subjective judgment of a court or individual judge, rather than giving due weight to freedom of expression. It would reduce the citizen's right to know or to communicate what they know to what a judge or court consider appropriate.

- ***Is section 12 of the Human Rights Act 1998 appropriately balanced? Should the media's freedom of expression be protected in stronger terms? Or is there a disproportionate emphasis on the media's freedom of expression over the right to privacy? Has Section 12 of the Human Rights Act 1998 ensured a more favourable press environment than would be the case if Strasbourg jurisprudence and UK injunctions jurisprudence were applied in the absence of Section 12?***
- ***Is the test in section 12 for an injunction to be granted too high a threshold? Should that test depend on the type of information about to be published? Has the court struck the right balance in applying section 12?***
- ***Is there an anomaly requiring legislative attention between the tests for an injunction for breach of privacy and in defamation?***

37. For the reasons outlined above, the NS submits that stronger protection of freedom of expression and press freedom is needed; section 12 has been interpreted and applied to enable the development of privacy law, the development of more restrictive injunctions and the growth in grant of injunctions, rather than to safeguard freedom of expression, voluntary self-regulation and press freedom –and to provide a bulwark against prior restraint- as intended.

**Issues relating to the enforcement of anonymity injunctions and super-injunctions, including the internet, cross-border jurisdiction within the United Kingdom, parliamentary privilege and the rule of law.**

- ***How can privacy injunctions be enforced in this age of ‘new media’? Is it practical and/or desirable to prosecute ‘tweeters’ or bloggers? If so, for what kind of behaviour and how many people – where should or could those lines be drawn?***
- ***Is it possible, practical and/or desirable for print media to be restrained by the law when other forms of ‘new media’ will cover material subject to an injunction anyway? Does the status quo of seeking to restrict press intrusion into individual’s private lives whilst the ‘new media’ users remain unchallenged represent a good compromise?***

38. The age of new media should encourage deregulation, rather than extension of statutory or co-regulatory controls over any publication platform. The law applies to all within the jurisdiction. The media should not be made subject to harsher laws and tougher enforcement. Voluntary self-regulation and its extent is, of course, a matter for the industry concerned but should be recognized as an effective alternative to co-regulatory and statutory controls.

- ***Is enough being done to tackle ‘jigsaw’ identification by the press and ‘new media’ users? For example see Mr Justice King’s provisional view in NEJ v. Wood [2011] EWHC 1972 (QB) at [20] that information published in the Daily Mail breached the order of Mr Justice Blake, and the consideration by Mr Justice Tugendhat in TSE and ELP v. News Group Newspapers [2011] EWHC 1308 (QB) at [33]-[34] as to whether details about TSE published by The Sun breached the order of Mrs Justice Sharp.***

39. Background Information: The regional media is used to guarding against ‘jigsaw identification’ through inadvertent combination of reports in newspapers and broadcast media, particularly in relation to court reporting restrictions, which would generally apply to all print, broadcast and online reports of cases. Media codes for press and broadcasters have been aligned for many years to avoid the risk of jigsaw identification when dealing with court reporting restrictions and, at local level, informal liaison on the approach to individual cases may take place, in practice. This has long been acknowledged by the Judicial Studies Board/Judicial Communications/media organisations’ joint guides to criminal court reporting restrictions and their benchbook checklists on issues for the criminal courts to consider before imposing any order restricting reporting.

- ***Are there any concerns regarding enforcement of privacy injunctions across jurisdictional borders within the UK? If so, how should those concerns be dealt with?***
40. In respect of freedom of expression cross-border claims and actions in general, the NS maintains both its previous support for the retention of the double actionability rule for defamation actions, preserved by the Private International Law (Miscellaneous Provisions) Act 1995 and its advocacy for the rule's extension to privacy actions of any type, as argued during the passage of the 1995 Act and advocated by Lord Lester QC. The NS also maintains its position that the publisher's country of origin rule should apply to questions of jurisdiction and applicable law in defamation and privacy actions, so that a publisher could be certain that any legal claim could only be brought against it in the court of the country in which it was established and heard under the law of the country in which it was established and where the publication originated, rather than be at risk of pursuit in numerous jurisdictions under numerous different laws in respect of the same publication. The UK's negotiating position on the current reviews of the Brussels I Regulation and Rome II Regulation must alleviate, not exacerbate, the problems faced by publishers, editors and individuals posed by the possibility of claims, threats and the chilling effect of cross-border legal actions, forum shopping or threat of multiple claims in multiple jurisdictions, each under different law, in respect of a UK publication which might also be available in other jurisdictions (e.g. because it was published online or had a limited overseas circulation). The UK's objective ought to be to secure a publisher's country of origin rule, to the benefit of the UK's publishing industry.

### ***Parliamentary Privilege***

***With regard to the enforcement of privacy injunctions and the breaching of them during Parliamentary proceedings, is there a case for reforming the Parliamentary Papers Act 1840 and other aspects of Parliamentary privilege? Should this be addressed by a specific Parliamentary Privilege Bill or is it desirable for this Committee to consider privilege to the extent it is relevant to injunctions?***

- ***Should Parliament consider enforcing 'proper' use of Parliamentary Privilege through penalties for 'abuse'?***
  - ***What is 'proper' use and what is 'abuse' of Parliamentary Privilege?***
  - ***Is it desirable to address the situation whereby a Member of either house breaches an injunction using Parliamentary Privilege using privacy law, or is that a situation best left entirely to Parliament to deal with? Indeed, is it possible to address the situation through privacy law or is that constitutionally impermissible? Could the current position in this respect be changed in any significant way? If so, how?***
41. The NS would support reforms which would ensure that the media can lawfully report all Parliamentary proceedings, Parliamentary publications and relevant work of MPs. Defences to contempt and any other relevant legal actions should be introduced, extended or strengthened in any way necessary to ensure this protection to media reports and their republication. However, any changes to the law on Parliamentary

privilege should not render the media more vulnerable to legal action brought by MPs or others, nor extend privacy law or defamation law or restrict freedom of expression.

**Issues relating to media regulation in this context, including the role of the Press Complaints Commission and the Office of Communications (OFCOM)**

**PCC**

- ***Do the guidelines in section 3 of the Editors' Code of Practice correctly address the balance between the individual's right to privacy and press freedom of expression?***
  - ***How effective has the PCC been in dealing with bad behaviour from the press in relation to injunctions and breaches of privacy?***
  - ***Does the PCC have sufficient powers to provide remedies for breaches of the Editors' Code of Practice in relation to privacy complaints?***
  - ***Should the PCC be able to initiate its own investigations on behalf of someone whose privacy may have been infringed by something published in a newspaper or magazine in the UK?***
  - ***Should the PCC have the power to consider the balance between an individual's privacy and freedom of expression prior to the publication of material – or should this power remain with the Courts?***
  - ***Is there sufficient awareness in the general public of the powers and responsibilities of the PCC in the context of privacy and injunctions?***
42. The NS and regional media strongly support the PCC and play an active role in its work.
43. The Editors' Code addresses the balance between individual's privacy and press freedom to report and publish. It is frequently reviewed and amended to address changes in technology or circumstances.
44. The industry has voluntarily agreed these restraints, which operate in addition to the civil and criminal law. They are observed and upheld through the system of voluntary self-regulation through the Editors' Code of Practice and the work of the Press Complaints Commission with its focus upon conciliation and adjudication upon complaints of breach of the Code by readers or the subjects of press attention and publication.
45. Breach of injunctions or other court orders and enforcement of the law is a matter for the prescribed enforcement authorities and the courts, as appropriate.
46. The Press Complaints Commission is primarily intended to deal with individual complaints made by readers or those directly affected by the press conduct or publication of which they complain. Thus the PCC does investigate complaints of

breach of provisions of the Code which deal with privacy issues, but it is not an agent of the courts or prosecution or police authorities.

47. The PCC will advise editors on the interpretation and application of the Code, if approached prior to publication. It has also evolved practices respected by print and broadcast media, leading to both newspapers and broadcasters drawing back from covering an event or other matter in accordance with the wishes of those who might find themselves the subjects of the media attention.

48. The PCC is well known to the public and its services are well used. Recent polling carried out on a sample of 2000 people, after results had been nationally weighted, but prior to recent events, suggested that around 80% of the population were aware of the PCC and its work. The PCC received over 7000 complaints last year; brokered amicable resolutions or made rulings in just under 1700 cases and was contacted in addition to that on many thousands of occasions. It enjoys strong satisfaction rates (around 80%) from members of the public who have approached it. Its assistance is not confined to post-publication complaint. It issued over 100 private advisory notes/desist requests, with a near 100% observance rate by newspapers and magazines, and it helped as many individuals again in raising their concerns with specific newspapers before publication. There were also around 25 occasions when it proactively contacted those involved in matters unexpectedly attracting a high level of media interest.

• ***Is there a case that the rules on infringement of privacy should be applied equally across all media content?***

49. The general law applies to all media content. The print media has also agreed that its print and online newspapers, where under its editorial control, should be included in the Press Complaints Commission's remit.

50. There may be a case for deregulation of existing legal controls over media content, but the NS and its members remain strongly opposed to the imposition of statutory or co-regulatory regulators and their codes upon newspapers and their information services, print or online.

October 2011

## Open Digital Policy Organisation—Written evidence

### Injunctions, social media and the concept of privacy

Social media has not only turned half the population<sup>317</sup> into publishers, it has also greatly increased the likelihood of ordinary people suffering intrusion or loss of privacy, albeit usually on a far smaller scale than the kind of exposure brought by national print and broadcast media.

Therefore it introduces two new problems: (i) the ability for individuals to broadcast information in contravention of a court order; and, (ii) ordinary people are now far more likely to face similar kinds of problems experienced by sports stars and other celebrities; what I will refer to as *the community problem*.

Whilst the size of any audience commanded by the typical Tweeter, blogger or Facebook user is many times smaller than a national news outlet, the relevance – the audience's relationship with the subject – is often highly focussed when one considers *the community problem*.

Embarrassment, suffering and sometimes financial loss can result from indiscretions – deliberate or otherwise – made on social media; and there's no option for prior restraint, no injunction available to ordinary people suffering privacy invasion or defamation via social media.

I write the above to help dispel two mutually contradictory assertions rising to prominence during recent furores over injunctions and super-injunctions: (a) injunctions are not the preserve of the rich and famous; or, (b) that only the rich and famous need injunctions and super-injunctions.

I feel both these assertions are wrong and unhelpful when considering privacy as a concept. We all have a need and a right to privacy, and how we can maintain privacy in a digital society without affecting another equally important right to free expression is one of the biggest challenges we face today.

Transparency brought about through the freedom to report on public events and public figures is in my opinion of at least equal benefit to society as privacy.

There is a limit to what can be achieved through the justice system, and injunctions are at the very edge of that limit. Intrusion and breaches of confidence are root causes of privacy loss and the law could do more to enforce privacy rights by focusing on both the prevention of intrusive surveillance and the profiteering from the illicit trade in personal data by those entrusted with our personal information.

Attempting to restrict information after it has been disclosed will have wider unintended consequences and threatens to aid those who wish to keep information which is genuinely in the public interest out of the public domain.

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<sup>317</sup> [Facebook 'used by half the UK population'](#), The Telegraph, 2<sup>nd</sup> March 2011

## **Five distinct problems with the injunction system in relation to the internet and social media**

1. **Injunctions restrict information, they don't protect privacy.** The justice system is not sufficiently scalable to solve every legitimate grievance when problems arise between participants of social media. There are simply not enough qualified judges to preside over every dispute; and, even if there were, the cost of court action would be a barrier to justice for many. Injunctions don't protect the privacy of ordinary people.

Moreover, they don't protect the *privacy* of those who use the injunction system:- the invasion of privacy occurs at the point a third party learns of a private action, usually through a breach of confidence or an act of surveillance – e.g. phone hacking. Injunctions attempt to limit the resulting damage following a privacy breach.

As has been shown in several recent cases, it is becoming increasingly hard in an open and democratic society to restrict the propagation of information now that the majority of the population has access to effective communications tools, therefore the injunction system is neither efficient at restricting information nor goes any way to solving the root cause of privacy breaches: breaches of confidence or acts of surveillance.

2. **Injunctions on the general public are not necessarily legally robust, in the public interest or enforceable.** Injunctions stem from an era when the number of publications available to UK readers was in the low thousands, and the penetration of overseas publications was minimal. Now there are millions of UK publishers and UK citizens have easy access to a wide range of overseas publications.

There is no robust system to reliably inform users of social media that certain information is subject to an injunction. If a user of social media is informed of certain facts by another user of social media, and separately learns that the information *is likely to be* the subject of an injunction, is the recipient “reasonably aware” that he or she could be subject to criminal penalties in publishing the information?

Any such system relying on word of mouth is both open to abuse and miscarriages of justice. If the courts punish people [not connected to a case] for passing on what is in essence gossip, this will be both highly illiberal and risks a chilling effect on free speech. A corporation, for example, wishing to cover-up details of wrongdoing could simply start a false rumour that the information is subject to injunction in order to kill a story.

3. **Judges have on occasion got the privacy balance wrong.** Whilst arguing that ordinary people's rights to privacy are overlooked, I feel that judges on occasions have granted public figures a privacy shield where there is legitimate public interest in reporting matters questioning the integrity of the individual.

Essentially all public figures, including sports stars and other celebrities, have an elevated level of influence over the general public. They can influence the brand of soft drink we choose, football boots we wear, perfume we purchase or type of razor we use. Celebrities can be seen as occupying a position of public trust, and substantial sections of the public are prepared to act on their recommendation.

It is natural for the public to be interested in those we trust and respect. It is also reasonable

to assume stars capitalising through commercial deals wish to promote a certain kind of image in order to maximise the commercial value of their endorsement. It may therefore be in the public interest to disclose to the public whenever such stars act in a manner not consistent with their public image, under Article 10 freedom of expression rights, even though the star has Article 8 rights of privacy.

Additionally, judges have issued injunctions to protect the privacy and reputation of corporations. This raises serious questions over the ability of markets to self regulate and act in the public interest if corporations have undue control over what is said about them.

Discussion, criticism, speculation and comment help drive transparency of how corporations conduct their business, and only with this transparency can consumers make informed choices relating to value, quality of goods and the ethics of the firms manufacturing the goods.

Injunctions and defamation aside, the balance of information power rests with the corporation and its spending power to mount impressive public relations offensives. Whilst corporations have a right to defend themselves against lies, there is a serious risk that suppression of information risks a greater ill, as it can be used to mask market abuses, unethical behaviour or wrongdoing. It is therefore in my view on balance correct to remove all legal remedies for corporations to protect their reputation except where malice can be proved.

Such arguments question how privacy law has been developed in the UK.

4. **The enforceability of a press injunction has not been properly tested under the European Convention on Human Rights.** The Norwegian Supreme Court ruled Norway's injunction system as it stood was a violation of Article 10 of the European Convention on Human Rights<sup>318</sup>. The case in question seemed extremely worthy of a press injunction since it concerned protecting the identity – and life – of an undercover agent/informer. But the case also concerned alleged questionable and partly illegal police methods which could not be brought to light because information was subject to injunction.

It might be worth members of the committee looking into the experience of Norway and whether it is applicable to the UK system of injunctions.

5. **Transparency of justice is at risk when information becomes subject to restrictions; speculation and gossip fills the information void.** The intention of judges has been to limit the damage from information of questionable heritage, but in attempting to keep information out of the public domain, public transparency of the judicial process is limited.

It is therefore necessary to re-evaluate whether secrecy is strictly necessary to the application of justice against the risk that the system of justice itself could be subverted through secrecy or that the public's perception of the justice system could be harmed through secrecy.

On the issue of the public perception of justice, especially in relation to injunctions, it is necessary to question whether the subject of an injunction is unintentionally harmed more

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<sup>318</sup> ['Could a little media civil disobedience kill British law's injunction monster?'](#), Journalism.co.uk, 14<sup>th</sup> October 2009



through the secrecy brought about through an injunction than the harm caused through the disclosure of the information. Public distrust of secrecy and the ability of speculation to fill the information void left by an injunction risks causing more harm than the disclosure of the original false allegation, as recent reports seem to indicate in the case of a man whom judges assert was unfairly smeared as a paedophile<sup>319</sup>. The mother was subject to a wide-ranging injunction.

The reported facts of the case coupled with my own investigation into the “illicit” world of injunction-busting blogs appear to indicate the mother then traded on public mistrust of the injunction system to continue what appears to be a campaign to smear the individual, gaining seemingly undue credibility and achieving wide coverage on several blogs set up with the specific intention of breaking injunctions. Such blogs claim to have a readership in excess of a million page impressions per month. A judge recently took the unusual step of issuing a public statement to the effect that the man was innocent of the smears.

In my opinion there now exists an environment where the public is more willing to believe conspiracy over fact, and several high profile “failures” of the injunction system are partly to blame. The solution lies in less secrecy, improved transparency and improved social responsibility amongst the online community, the latter of which needs to develop from within communities.

## **Conclusion**

The injunction system is not fit for the digital age. Any system which attempts to control the information people post on social networks and blogs risks causing greater harm to the rights of the publisher, the subject of the injunction and wider society than the harm from the publication of the original information itself.

There is a tendency to over-react to the perceived harm from information posted on the internet. Credibility of the publisher must also be considered when considering the damage from sensitive or libellous assertions. Readers do not believe everything they read, and are less likely to believe untrustworthy sources they’ve not previously encountered. The fact that anyone can set up a blog and post unfounded allegations must be viewed alongside the simple fact that very few who read the allegations will take them to be true.

Whilst it will always be necessary to keep some information secret, the identity of some victims of crime, children and vulnerable adults; the over-reach in the name of privacy or defamation has caused a public backlash and distrust of court-ordered secrecy.

Privacy rights are better asserted by enforcing surveillance and data protections laws than attempting to control information once it has been disclosed.

6 October 2011

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<sup>319</sup> [Daughter of racehorse trainer at centre of custody battle was coached to claim her father had sexually abused her](#), Daily Mail, 23<sup>rd</sup> August 2011

## **Professor Julian Petley—Written evidence**

This evidence to the Joint Committee on Privacy and Injunctions is submitted by Julian Petley, Professor of Journalism and Screen Media in the School of Arts at Brunel University. He is also Chair of the Campaign for Press and Broadcasting Freedom, a member of the editorial board of the *British Journalism Review* and a member of the advisory board of *Index on Censorship*. However, this submission is made purely in his academic capacity. In view of the breadth of the Committee's enquiry, he has addressed only questions in Sections Two and Four of the Call for Evidence.

### **SECTION TWO**

**How best to strike the balance between privacy and freedom of expression, in particular how best to determine whether there is a public interest in material concerning people's private and family life.**

**Have there been and are there currently any problems with the balance struck in law between freedom of expression and the right to privacy?**

The answer to this question depends very much on where one is standing. If one is the owner or editor of a popular newspaper then doubtless the answer will be that the latter has been allowed to predominate over the former, but if one is the victim of invasions of privacy by the press, then exactly the opposite is likely to be the case.

**Who should decide where the balance between freedom of expression and the right to privacy lies?**

Currently this decision lies with the courts, and as long as Parliament refuses to enact a specific privacy law (see below), this is where it should lie.

**Should Parliament enact a statutory privacy law?**

Yes, although it should be borne in mind that the Human Rights Act and the law pertaining to breach of confidence can be used in certain circumstances to protect privacy and punish invasions of it by the press. The clear advantages of Parliament enacting such a law are that it would have greater democratic legitimacy than the current arrangements, and that clear and specific public interest safeguards could be built into the legislation (see below).

**Should Parliament prescribe the definition of 'public interest' in statute, or should it be left to the courts?**

Parliament should prescribe the definition of the 'public interest' in a specific privacy law, and the courts should interpret it on a case-by-case basis. Contrary to the nonsense written in much of the press about judges being 'dictators in wigs, this is how our constitutional arrangements prescribe that our democracy should work.

**Is the current definition of 'public interest' inadequate or unclear?**

There are in fact various definitions of the public interest currently available, the most substantial (and satisfactory) of which is offered by the *BBC Editorial Guidelines*. These state that the public interest includes but is not confined to:

- Exposing or detecting crime

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

The *Guidelines* also add that 'there is also a public interest in freedom of expression itself'. In the specific matter of the public interest and intrusions of privacy, the *Guidelines* include the following useful points:

- When using the public interest to justify an intrusion, consideration should be given to proportionality; the greater the intrusion, the greater the public interest required to justify it
- The BBC must balance the public interest in freedom of expression with the legitimate expectation of privacy by individuals. Any infringement of a legitimate expectation of privacy in the gathering of material, including secret recording and doorstepping, must be justifiable as proportionate in the particular circumstances of the case.
- We must balance the public interest in the full and accurate reporting of stories involving human suffering and distress with an individual's privacy and respect for their human dignity.
- We must justify intrusions into an individual's private life without consent by demonstrating that the intrusion is outweighed by the public interest.
- We normally only report the private legal behaviour of public figures where broader public issues are raised either by the behaviour itself or by the consequences of its becoming widely known. The fact of publication by other media may not justify the BBC reporting it.
- Although material, especially pictures and videos, on third party social media and other websites where the public have ready access may be considered to have been placed in the public domain, re-use by the BBC will usually bring it to a much wider audience. We should consider the impact of our re-use, particularly when in connection with tragic or distressing events.

The *Ofcom Broadcasting Code* is much less expansive, noting that 'where broadcasters wish to justify an infringement of privacy as warranted, they should be able to demonstrate why in the particular circumstances of the case, it is warranted. If the reason is that it is in the public interest, then the broadcaster should be able to demonstrate that the public interest outweighs the right to privacy. Examples of public interest would include revealing or detecting crime, protecting public health or safety, exposing misleading claims made by individuals or organisations or disclosing incompetence that affects the public'. It also adds that 'legitimate expectations of privacy will vary according to the place and nature of the information, activity or condition in question, the extent to which it is in the public domain (if at all) and whether the individual concerned is already in the public eye ... People under investigation or in the public eye, and their immediate family and friends, retain a right to private life, although private behaviour can raise issues of legitimate public interest'.

Eight out of the sixteen clauses in the Press Complaints Commission's *Editors Code of Practice* are subject to exception where a story is thought to be in the public interest. Clause 3 of the *Code* concerns privacy, and is subject to this exception. This clause lays down that: i) Everyone is entitled to respect for his or her private and family life, home, health and correspondence, including digital communications.

ii) Editors will be expected to justify intrusions into any individual's private life without consent. Account will be taken of the complainant's own public disclosures of information.

iii) It is unacceptable to photograph individuals in private places without their consent. In this respect, the *Code* adds that 'private places are public or private property where there is a reasonable expectation of privacy'.

The PCC's *Editors' Codebook* unhelpfully describes the public interest as 'impossible to define', but in the *Code* itself it is nonetheless defined, albeit sketchily, as including, but not being confined to:

i) Detecting or exposing crime or serious impropriety.

ii) Protecting public health and safety.

iii) Preventing the public from being misled by an action or statement of an individual or organisation.

The PCC also notes that:

- There is a public interest in freedom of expression itself.
- Whenever the public interest is invoked, the PCC will require editors to demonstrate fully that they reasonably believed that publication, or journalistic activity undertaken with a view to publication, would be in the public interest.
- The PCC will consider the extent to which material is already in the public domain, or will become so.
- In cases involving children under 16, editors must demonstrate an exceptional public interest to over-ride the normally paramount interest of the child.

### **Should the commercial viability of the press be a public interest consideration to be balanced against an individual's right to privacy?**

The short answer to this question is 'no'. The question rests on an argument which has been advanced both by certain journalists and certain members of the judiciary. Thus *Daily Mail* editor Paul Dacre argued in a speech to the Society of Editors in 2008 that 'if mass circulation newspapers, which, of course, also devote considerable space to reporting and analysis of public affairs, don't have the freedom to write about scandal, I doubt whether they will retain their mass circulations with the obvious worrying implications for the democratic process ... If the *News of the World* can't carry such stories as the Mosley orgy, then it, and its political reportage and analysis, will eventually probably die'. Similarly Lord Woolf in *A v B and C* (the 2002 Gary Flitcroft case) noted that 'any interference with the press has to be justified because it inevitably has some effect on the ability of the press to perform its role in society. This is the position irrespective of whether a particular publication is in the public interest', and that 'the courts must not ignore the fact that if newspapers do not publish information which the public are interested in, there will be fewer newspapers published, which will not be in the public interest'. There is, however, a fundamental flaw in this argument, namely that the newspapers which devote the most space to scandal devote the least to matters of genuine public interest (as defined variously in the previous section). Furthermore, the few stories on matters of public interest which they do

contain are generally so tainted by editorialising and bias that they are largely worthless as news. Can anyone seriously argue that, now that the *News of the World* has actually died, the political life of the country is really any the poorer for it?

**Should it be the case that individuals waive some or all of their right to privacy when they become a celebrity? A politician? A sportsperson? Should it depend on the degree to which that individual uses their image or private life for popularity? For money? To get elected? Does the image the individual relies on have to relate to the information published in order for there to be a public interest in publishing it (a ‘hypocrisy’ argument)? If so, how directly?**

**Should any or all individuals in the public eye be considered to be ‘role models’ such that their private lives may be subject to enhanced public scrutiny regardless of whether or not they make public their views on morality or personal conduct (i.e. in the absence of a ‘hypocrisy’ argument)?**

These two sets of questions clearly arise from the kinds of defences frequently put forward by newspapers accused of breaching people’s privacy. Such defences, however, simply fail to take into account contemporary judicial practice in the area of privacy, so perhaps the most helpful way of addressing these questions would be briefly to outline the current legal position, which, with respect, renders the questions largely redundant.

Once again, the question of the public interest is paramount. Courts will be far less concerned with whether the person whose privacy has been or is about to be invaded is famous than with whether the breach of their privacy rights is in the public interest, in the sense discussed earlier. A key case in this respect is *Von Hannover v Germany* (2005), in which the European Court of Human Rights stated that it

Considers that a fundamental distinction needs to be made between reporting facts – even controversial ones – capable of contributing to a debate in a democratic society relating to politicians in the exercise of their functions, for example, and reporting details of the private life of an individual who, moreover, as in this case, does not exercise official functions. While in the former case the press exercises its vital role of ‘watchdog’ in a democracy by contributing to imparting information and ideas on matters of public interest ... it does not do so in the latter case.

Similarly, although the public has a right to be informed, which is an essential right in a democratic society that, in certain special circumstances, can even extend to aspects of the private life of public figures, particularly where politicians are concerned ... this is not the case here. The situation here does not come within the sphere of any political or public debate because the published photos and accompanying commentaries relate exclusively to details of the applicant’s private life.

As in other similar cases it has examined, the Court considers that the publication of the photos and articles in question, the sole purpose of which was to satisfy the curiosity of a particular readership regarding the details of the applicant’s private life, cannot be deemed to contribute to any debate of general interest to society despite the applicant being known to the public.

The Court also cited approvingly Resolution 1165 of the Parliamentary Assembly of the Council of Europe on the right to privacy which, in 1998, criticised the ‘one-sided

interpretation of the right to freedom of expression' by certain media which attempt to justify infringing the rights protected by Article 8 of the Convention by claiming that 'their readers are entitled to know everything about public figures'. In addition, the Court endorsed the principle that 'anyone, even if they are known to the general public, must be able to enjoy a "legitimate expectation" of protection of and respect for their private life'. A similar line was followed by Baroness Hale (albeit not in a case involving privacy) in *Jameel v Wall Street Journal Europe SPRL* (2006), when she argued that the public have a right to know only if there is 'a real public interest in communicating and receiving the information. This is, as we all know, very different from saying that it is information which interests the public – the most vapid tittle-tattle about the activities of footballers' wives and girlfriends interests large sections of the public but no-one could claim any real public interest in our being told all about it'. In this respect it's perhaps worth quoting Max Clifford's remark on Radio 4's *The Media Show* on 18 May 2011 to the effect that 'I've got to be honest and say I've probably broken more stories than anyone in Britain in the last 25 or 30 years, although I've stopped a lot more than I've broken. But probably [only] 20% of the stories I've broken you could justify on the grounds of public interest, a real public interest, that's all'.

Crucial to any understanding of how the courts actually deal with privacy cases (as opposed to how newspapers would like the courts to deal with them) was the judgement in 2004 by Lord Steyn in the case of *In Re S (FC) (a child) (Appellant)* to the effect that, when it comes to balancing Articles 8 (privacy) and 10 (freedom of expression) of the European Convention on Human Rights, 'first, neither article has as such precedence over the other. Secondly, where the values of the two articles are in conflict, an intense focus on the comparative importance of the specific rights being claimed in the individual case is necessary. Thirdly, the justifications for interfering with or restricting each right must be taken into account. Finally, the proportionality test must be applied to each'. In *Max Mosley v News Group Newspapers* (2008) Mr Justice Eady described this 'intense focus' on the individual facts of the specific case as a 'new methodology' which is 'obviously incompatible with making broad generalisations of the kind which the media often resorted to in the past, such as, for example, "Public figures must expect to have less privacy" or "People in positions of responsibility must be seen as 'role models' and set us all an example of how to live upstanding lives"'. Sometimes factors of this kind may have a legitimate role to play when the "ultimate balancing exercise" comes to be carried out, but generalisations can never be determinative. In every case "it all depends" (i.e. upon what is revealed by the intense focus on the individual circumstances)'. He also argued that 'one of the more striking developments over the last few years of judicial analysis, both here and in Strasbourg, is the acknowledgement that the balancing process which has to be carried out by individual judges on the facts before them necessarily involves an evaluation of the use to which the relevant defendant has put, or intends to put, his or her right to freedom of expression. This is inevitable when one is weighing up the *relative* worth of one person's right against those of another', adding that 'it is not simply a matter of personal privacy versus the public interest. The modern perception is that there is a public interest in respecting personal privacy. It is thus a question of taking account of conflicting public interest considerations and evaluating them according to increasingly well recognised criteria'. Well recognised, it would seem, by everyone involved except editors of certain newspapers, who repeatedly insist on attempting to run intrusive stories which will almost inevitably be subject to pre-publication injunction. Alternatively, of course, they are simply chancing their arm, which would certainly explain why they frequently don't even bother to turn up to contest an injunction once one has been requested.

Exactly the same line was followed by Mr Justice Eady in the much mis-reported case of *CTB and Newsgroup Newspapers + Imogen Thomas* (2011), in which he pointed out that ‘one can rarely arrive at the answer in any given case merely by reference to generalities. It must all depend upon the particular facts of the case. It follows too that there can be no *automatic* priority accorded to freedom of speech. The relative importance of the competing values must be weighed by reference to the individual set of circumstances confronting the court. Of course the court will pay particular regard to freedom of expression, but that does not entail giving it automatic priority. All will depend on the value to be attached to the exercise or proposed exercise of that freedom in a particular case. It will rarely be the case that the privacy rights of an individual or of his family will have to yield in priority to another’s right to publish what has been described in the House of Lords as “tittle-tattle about the activities of footballers’ wives and girlfriends”’.

**Are damages a sufficient remedy for a breach of privacy? Would punitive financial penalties be an effective remedy? Would they adequately deter disproportionate breaches of privacy?**

It needs to be stressed that once an individual’s privacy has been breached, no legal remedy on earth is capable of ‘un-breaching’ it. Therefore the penalty for any breach of privacy which cannot be defended by recourse to the public interest needs to be so severe as seriously to discourage newspapers from committing such a breach in the first place. A recent event such as the Christopher Jefferies case clearly demonstrates that certain newspapers are perfectly prepared to commit what they must know are flagrant breaches of the laws pertaining to both defamation and contempt, and the resulting penalties which have been imposed upon them by the courts are far too low to act as any kind of deterrent. The same is true of penalties in cases of breach of privacy. At the barest minimum, no newspaper should be allowed to benefit financially from illegally and unjustifiably breaching someone’s privacy; thus any extra sales revenue generated by such stories should be automatically forfeited as part of the penalty for publishing them. But penalties also need to be both punitive (imposing a significant and substantial penalty for breaching the law) and exemplary (discouraging such breaches in future both on the part of the defendant and of other newspapers). Since newspapers have repeatedly demonstrated that they are not in the least deterred by the relatively small fines currently levied by the courts, penalties clearly need to be greatly increased, being equivalent to the loss of at least a week’s total revenue and, in the worst cases, at least equalling the heaviest fines levied by Ofcom for breaches of its *Programme Code* (for example, the £2m levied in 2007 on GMTV for cheating viewers who entered its premium-rate phone-in competitions).

**Is Section 12 of the Human Rights Act 1998 appropriately balanced? Should the media's freedom of expression be protected in stronger terms? Or is there a disproportionate emphasis on the media's freedom of expression over the right to privacy? Has Section 12 of the Human Rights Act 1998 ensured a more favourable press environment than would be the case if Strasbourg jurisprudence and UK injunctions jurisprudence were applied in the absence of Section 12?**

Section 12 was introduced into the Human Rights Bill purely because the press saw in Article 8 of the ECHR a threat to its commercial lifeblood of kiss 'n' tell stories, and campaigned vociferously against the Bill as a whole. Solutions posed in all seriousness by the press included the complete removal of Article 8 from the HRA, or the blanket exemption of the press from it, leading Hugo Young to note with undisguised incredulity, in the *Guardian*, February 12 1998, that, 'unembarrassed by the fact that the Human Rights Bill is a general law, applying to every citizen in his or her relationship with state authority, [newspapers] demand that the press be treated differently ... They propose that the press, alone among institutions with public functions, should stand above international human rights law'. He concluded that 'the only press case against the Human Rights Bill is made by papers with a commercial interest in privacy violations that are indefensible. They will prate most loftily to defend the money they want to continue making basely'. These sentiments are as relevant now, if not more so, than on the day that they were written. Section 12 (4) was devised by Lord Wakeham (then chairman of the Press Complaints Commission) and introduced by the then Home Secretary Jack Straw in an attempt to quieten press hostility to the ECHR in general and Article 8 in particular. Not only has it manifestly failed in its purpose, but it also introduced an anomaly into the Act, and for the latter reason it needs to be removed. The whole problem with Section 12 (4) is that it simply ignores the implications of Britain having signed up to the ECHR. Thus when the master of the rolls Lord Neuberger appeared before the Joint Parliamentary Committee on the Draft Defamation Bill on 25 July 2011, he noted apropos Section 12(4) that 'it is impossible to enact the European Convention and then include a provision that seeks to give a different emphasis to the different Convention rights which would be given otherwise'. And at the same hearing, Court of Appeal judge Sir Stephen Sedley drew attention to Section 3 of the HRA, which requires that primary and subordinate legislation must be read and given effect in a way which is compatible with the rights guaranteed by the Convention, which the Act writes into English law.



## SECTION FOUR

### **Issues relating to media regulation in this context, including the role of the Press Complaints Commission and the Office of Communications (OFCOM).**

#### **PCC**

**Do the guidelines in section 3 of the Editors' Code of Practice correctly address the balance between the individual's right to privacy and press freedom of expression?**

One is tempted to ask 'what guidelines'? The paucity of Section 3, allied with the sketchiness of the Code's definition of the public interest (see above), inevitably mean that the answer to this question is 'no'.

**How effective has the PCC been in dealing with bad behaviour from the press in relation to injunctions and breaches of privacy?**

The PCC has done its best on occasion to discourage the formation of media scrums, which can be regarded as attempting to protect people's privacy. However, its record on breaches of privacy in print hardly inspires confidence, which is presumably why people such as Max Mosley, Sara Cox, Ewan McGregor and J.K. Rowling have gone straight to court when their privacy has been infringed, and simply not bothered with the PCC. Admittedly in 2007 it did find on behalf of Elle Macpherson when she was pictured in a bikini on holiday with her children on the island of Mustique, but one can only conclude that this complaint was successful where previous ones of a similar nature (for example, those brought by Anna Ford and Kate Beckinsale) failed because not to have upheld the complaint would have flown in the face of judicial opinion and practice in the wake of *Von Hannover v Germany* as outlined above. The credit for the PCC's *volte face* thus lies entirely with the European Court of Human Rights and not with the Commission itself.

As far as I am aware, the PCC has had little or nothing to do with injunctions. Again, though, the point could be made that victims of press intrusion might have been less inclined to take the drastic (and costly) step of seeking pre-publication injunctions had they had any faith in the PCC's ability to stop their privacy being invaded in the first place, or to punish miscreants after the event in any significant fashion.

**Does the PCC have sufficient powers to provide remedies for breaches of the Editors' Code of Practice in relation to privacy complaints?**

As mentioned above, once privacy has been breached, there are no effective 'remedies' which can be applied; this is the kind of breach which simply cannot be healed. Punishment can be inflicted and compensation awarded, but these are not remedies. Unfortunately, however, the PCC does not have any meaningful powers in this area (or any other) because it possesses no effective sanctions.

**Should the PCC be able to initiate its own investigations on behalf of someone whose privacy may have been infringed by something published in a newspaper or magazine in the UK?**

Yes, and it should also accept third party complaints on behalf of those who, for one reason or another, are not in a position to complain personally.

**Should the PCC have the power to consider the balance between an individual's privacy and freedom of expression prior to the publication of material – or should this power remain with the Courts?**

Not only is it impossible to imagine the PCC as currently constituted being able to wield this power effectively, but one doubts whether it is sufficiently familiar with the full body of case law relevant to this particular balancing act. In this respect it does also need to be remembered that a former chairman of the PCC, Lord Wakeham, referred to the European Convention on Human Rights as the importation of 'alien legal concepts' into the UK's 'sovereign Parliamentary and judicial system', a view of the ECHR with which the majority of British newspapers all too obviously concur. The idea that they would take the slightest notice of decisions reached by the PCC 'balancing' principles whose validity they resolutely refuse to recognise is, I'm afraid, to enter cloud cuckoo land.

September 2011

Julian Petley, Sir Christopher Meyer, Martin Moore, and John Kampfner—Oral evidence  
(QQ 404–444)

**Julian Petley, Sir Christopher Meyer, Martin Moore, and John  
Kampfner—Oral evidence (QQ 404–444)**

[Transcript to be found under Sir Christopher Meyer](#)

Professor Gavin Phillipson, The Rt Hon. Jack Straw MP, The Rt Hon. Lord Wakeham, and The Rt Hon. Sir Stephen Sedley—Oral evidence (QQ 1–32)

**Professor Gavin Phillipson, The Rt Hon. Jack Straw MP, The Rt Hon. Lord Wakeham, and The Rt Hon. Sir Stephen Sedley—Oral evidence (QQ 1–32)**

[Transcript to be found under The Rt Hon. Jack Straw MP](#)

## Professor Gavin Phillipson—Written evidence

### Introduction

1. I submit this evidence as an independent academic expert, and one of the leading writers in the UK on the development of a common law right to privacy. My work in this area dates from 1996, and has been published in leading journals, including the *Modern Law Review* and *Cambridge Law Journal* and in my book with Professor Fenwick, *Media Freedom under the Human Rights Act* (2006, OUP); it has been influential on the development of the law in this area, as evidenced by citations in judgments of the Court of Appeal (in *Douglas v Hello*<sup>320</sup> and *McKennitt v Ash*<sup>321</sup>) the former House of Lords (*Campbell v MGN*<sup>322</sup>) and the New Zealand Court of Appeal (*Hosking v Runting*<sup>323</sup>).
2. In this Memorandum I comment on a number of issues raised by the Committee's call for evidence: the intention behind section 12 HRA; injunctions and 'super-injunctions'; the issue of prior notification; role models and the public's 'right not to be misled'; the position of celebrities and self-publicists.<sup>324</sup>
3. Some of the points I make in this memo could be and have been addressed to courts deciding particular decisions. However, I also believe that even if in practice the key decisions continue to be those made by courts, informed discussion of this issue by Parliament, the media and the public can have a wider public benefit in allowing for a better understanding of the issues than that fostered by the often hugely one-sided coverage of privacy cases in the press. Such coverage not only, I believe, encourages the public to continue to consume even the most grossly invasive celebrity gossip but also to feel a sense of grievance when certain stories are withheld from them by court orders. This in turn can lead to the kind of mass defiance of such orders that we saw in the Ryan Giggs saga; it can also tend to undermine public confidence in the courts (and the judges) as the proper and fair forums for resolving such disputes. Ultimately this can undermine the rule of law itself.
4. In terms of this kind of re-balancing public discourse, I wish above all to emphasise one key point:

Without adequate protection for privacy, we risk the situation in which the rights and freedoms of individuals are sacrificed to the commercial interests of the mass media and the idle curiosity of the majority. Cases in which a media pack fuels sales by consuming an individual's life and reputation cannot without perversity be characterised as the exercise of a vital human right to free speech: or at least not without utterly surrendering the content and meaning of that rights to powerful commercial and corporate forces of a kind which John Stuart Mill, with his famous

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<sup>320</sup> *Douglas v. Hello! Ltd* (No. 3) [2005] EWCA Civ 595 [2006] Q.B. 125.

<sup>321</sup> [2008] Q.B. 73.

<sup>322</sup> [2004] 2 AC 457.

<sup>323</sup> [2005] 1 NZLR 1.

<sup>324</sup> At various places I draw on my published work, in particular *Media Freedom* (above).

defence of human liberty, never envisaged dominating the so-called marketplace of ideas.<sup>325</sup>

What the tabloid media wishes to be able to continue to do is engage in the *commodification* of the private lives – the personal information – of other people, in order to profit from it. This has very little to do with the exercise of free speech and often everything to do with its abuse. It is ironic that sections of the media often complain about the misuse or abuse of human rights concepts by the undeserving – criminals, bogus asylum seekers, terrorists; but this is precisely what much of the media do when they obtain personal information, often by surreptitious means, and then publish it for profit, under the guise of ‘the right to free speech’.

## Section 12 HRA

5. The Committee is of course to explore this issue in the oral evidence session on the 17<sup>th</sup> October; however a couple of key points may be made here. First, the existence of section 12 and its legislative history gives the lie to the misleading trope obsessively repeated by the media that the judges have introduced a privacy law ‘by the back door’, and that the issue has never been considered by Parliament. At the time of the passage of the then Human Rights Bill in 1997, there was considerable concern in the media that the Bill, as drafted, would require the courts to act compatibly with the Convention rights, including Article 8, even when both parties before it were private bodies or individuals, as when an individual sues a newspaper.<sup>326</sup> It was thought (rightly as it turns out) that this would lead to the development in the common law of a right to privacy against the media. In an attempt to prevent this, Lord Wakeham, then Chair of the Press Complaints Commission, put forward an amendment that would have had the effect of excluding the courts from the definition of ‘public authority’ when ‘the parties to the proceedings before it [did] not include any public authority.’<sup>327</sup> Put simply, this amendment would have rendered the Convention rights non-applicable in private litigation involving newspapers, thus averting the perceived threat to the media from Article 8.
6. This amendment was decisively rejected by Parliament,<sup>328</sup> something that is one of the most important legislative facts lying behind section 12 HRA. In turn this rejection gives rise to the following, clear inference: **Parliament intended the Convention rights, including Article 8, to be applicable to some extent in private litigation.** This is objectively evidenced by the rejection of the Wakeham amendment, which would have provided for the contrary result. Much is written about the intention of Parliament in particular cases, relying on speeches made by one of more members, sometimes in particular on speeches made by Government Ministers; the latter, as many have pointed out, is constitutionally suspect, since it potentially allows the intentions of members of the executive branch to determine the meaning of provisions enacted by the *legislative* branch. In contrast, the rejection by Parliament of an amendment is a legislative fact, and constitutes objective evidence of its intention on the point addressed by the amendment.

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<sup>325</sup> I draw here on an article critiquing the US ‘hands off’ approach to the media: ‘Trial by Media: the Betrayal of the First Amendment’s Purpose’ (2008) Autumn 71 *Law and Contemporary Problems* (USA) 15, 30.

<sup>326</sup> Because courts are defined as public authorities, bound to act compatibly with Convention rights: s 6(1) and (3).

<sup>327</sup> HL Deb vol 583 col 771 24 November 1997, Amendment no 32.

<sup>328</sup> *Ibid.*

7. Section 12 itself is of course the other crucial piece of evidence. It was introduced by the Government in response to Lord Wakeham's lobbying on behalf of the press, including the rejected amendment. Looking at the provisions in section 12 itself, it was plainly intended to make it harder to obtain interim injunctions against the media<sup>329</sup> than under the previous law, and to ensure that, when judges were considering granting any remedy against the media, they had 'particular regard' to freedom of expression, and a number of other matters, including the PCC Code, whether the matter published was in the public domain and so on.<sup>330</sup> The key point is that the insertion of this provision only made sense on the basis that Parliament expected that the media required additional protection from injunctions. But why was such protection needed? The only sensible answer is that Parliament was perfectly aware that the rejection of the Wakeham amendment meant that courts were likely to develop the common law, under the influence of Article 8, to further protect privacy. In other words, **section 12 was designed to balance the new potential for privacy protection under the HRA with proper protection for freedom of speech, in particular, protection against unwarranted interim injunctions.** The conclusion then is that the legislative history of section 12 showed Parliament's acceptance that the HRA would lead to the development of a right to privacy. Section 12 was Parliament's considered response to that likelihood. Thus the subsequent development of the right to privacy by the courts was fully contemplated by Parliament and indeed catered for, via section 12.
8. Finally, a word or two more may be said about section 12(4) and its instruction that judges must have 'particular regard' to freedom of expression. Could this be read as meaning that Parliament intended to make free speech the 'trump' right, given decisive priority over the right to privacy? In my view this is not a tenable reading. First, the Convention itself does not establish an order of precedence of one right over the other; both have equal status, and both have exceptions, whereby the state may restrict one in order to protect the other. Parliament must be taken to have been aware of this basic legal fact. Giving free speech a 'trump right' status would therefore have amounted to instructing courts to act in a way that was itself *incompatible* with the Convention. This would run counter to the whole point of the HRA, and to section 6 itself, which of course instructs courts to act *compatibly* with the Convention rights. But could section 12 have been seeking to change the *interpretation* of the Convention rights? Again, this seems implausible. The wording of section 12 plainly does not attempt to establish *priority* for freedom of expression. Had Parliament wished this, it could have used language such as the following: 'in any case in which Articles 8 and 10 come into conflict, the courts shall prefer Article 10'. Parliament used no such language. Therefore it makes more sense to read s 12 as requiring judges always to remember the importance of freedom of expression and to give it as much weight as the Convention itself allows.

#### **Injunctions and super-injunctions**

9. The Report of the Master of the Rolls on this issue in May this year<sup>331</sup> cut through the hype surrounding this issue, which had been generated by the often hysterical and biased reporting of it in much of the media. As the Committee will know, the report found that only two super-injunctions, properly so-called, had been granted since 2010; one of these

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<sup>329</sup> Section 12 (3). It also gave certain procedural guarantees in relation to the granting of injunctions (s 12(2)).

<sup>330</sup> Section 12 (4).

<sup>331</sup> <http://www.judiciary.gov.uk/media/media-releases/2011/committee-reports-findings-super-injunctions-20052011>

was overturned on appeal, and the other only lasted 7 days and concerned a serious blackmailing case; scarcely the great outburst of secretive bans some media coverage has suggested.

10. The perception that the courts have been sprinkling ‘super injunctions’ about like confetti has come largely from the media’s increasing tendency to report *any* injunction protecting private or confidential information as a ‘super-injunction’ and to suggest that, as a result, justice is being done in secret. The report found that nearly all these so-called ‘super-injunctions’, were in fact merely ordinary injunctions granted in privacy cases in which, for obvious reasons, the parties’ names do not appear in the court documents; moreover, the fully reasoned judgments in these cases are publicly available. The term ‘super-injunction’ is only correctly applied to injunctions the existence of which may not be reported. The report made the obviously correct point that such injunctions should only be granted when strictly necessary and only on a temporary basis – which appears to reflect current judicial practice.
11. The farrago surrounding the anonymous injunction granted to Ryan Giggs, and its eventual lifting in the face of widespread publicity on Twitter and elsewhere, was argued by some to show that laws of privacy are no longer viable in the age of the internet and social media, which can enable immediate access to publication of injuncted information outside the jurisdiction. However, in my view, that episode showed no such thing, for three reasons. First the case only showed that in some circumstances, the security of *injunctions* may be difficult to maintain; that is a question of remedies only; it does not show that the substantive right to privacy – which may also be vindicated by damages – is placed in jeopardy. Second, the incident, together with the Wikki leaks scandal, appears to show the difficulty of maintaining legal protection not just for *personal* information but for a huge range of confidential information, including government secrets and commercially confidential material, and yet no-one serious is calling for an end to all Official Secrets laws and to the entire law of confidentiality. Third, courts already have the basic legal tool they need to respond to situations in which injunctions have been overtaken by events: courts will not grant, or maintain injunctions, where the material is already widely known or where circulation has become so widespread that maintenance of the injunction would serve no further useful purpose.

### **Only a law for the rich?**

12. The media and some politicians have made much of the frankly risible argument that, because privacy injunctions are only available to the rich, they should be banned. First of all, the assumption isn’t even true, since CFA (‘no-win no fee’) arrangements allow people who couldn’t otherwise afford it access to justice. But in any event, the argument is perverse in its own terms. By this logic, we would abolish all areas of law for which legal aid is not available on the grounds that they are only available to the rich. That would mean getting rid of an awful lot of our rights, including, for example, the entire law of libel. The problem of inadequate legal aid and high legal costs giving the wealthy disproportionate legal power is a general one, and not peculiar to this area of law. The answer to it is obviously not to abolish whole areas of law, but rather to improve access to justice. CFAs are a useful tool here.

### **A prior notification requirement?**



13. One of the Committee's questions in its call for evidence asked whether we should 'introduce a prior notification requirement, requiring newspapers and other print media to notify an individual before information is published, thereby giving the individual time to seek an injunction if a court agrees the publication is more likely than not to be found a breach of privacy?' In principle, I am in favour of such a requirement, mainly because only an injunction can prevent the invasion of privacy; ordinary damages are often an unsatisfactory remedy, given that they cannot restore the claimant's privacy to him, as such damages can help restore a damaged reputation. However, I never believed that such a requirement should be imposed by criminal law. Instead, in my view, the law should deter non-notification by making aggravated damages available in cases of non-notification, unless there is a reasonable excuse. However, in my view this should only apply where the media body proceeds to publish private information that is *seriously invasive* of the individual's privacy. By 'seriously invasive', I mean that it reveals intimate or sensitive personal information. It is in these kinds of situation that publication represents the kind of irreversible loss of privacy that calls for the chance to seek an injunction to prevent it. In contrast, publication of a relatively anodyne photograph of a person in a public or semi-public place – were English law ever to go so far as to make that actionable - does not constitute such an irreversible loss. Damages are an adequate remedy in such cases and therefore notification should not be required in them.
14. I believe that the case for a notification requirement – and indeed for proper regulation of the press by a body to replace the discredited PCC - is bolstered by the failure of the press to self-restrain, even in cases in which severe damage may be expected from publication. There are a number of cases in which courts have made orders against the media to protect the identity of persons seeking rehabilitation in society after serving sentences for crimes that have attracted such notoriety that there appeared to be a well-founded fear that, were their identity and whereabouts to be revealed, they would be subject to harassment and possibly vigilante attacks involving serious violence. For example, in *Venables v News Group Newspapers*,<sup>332</sup> Butler Sloss P granted unprecedented injunctions against the whole world preventing publication of any material which might reveal the identity and whereabouts of Venables and Thompson, who many years previously, as juveniles, had murdered the toddler Jamie Bulger.<sup>333</sup> Such was the degree of public hostility to the two applicants that there was convincing evidence before the court that a failure thus to protect their anonymity could leave the court accused of failing to secure their rights to life and freedom from torture and inhuman treatment under Articles 2 and 3 of the Convention, in addition to their right to privacy under Article 8. Nevertheless, newspapers opposing the application for the injunction wished to reveal their identities.
15. An order was made in similar circumstances in *X (A woman formerly known as Mary Bell) v O'Brien*,<sup>334</sup> 'to protect the Article 8 rights of the applicant and her daughter, who had on five occasions been forced to move home following the discovery of their whereabouts and harassment by the press.'<sup>335</sup> A similar injunction was granted in *Carr v News Group Newspapers*,<sup>336</sup> to protect a woman convicted of perverting the course of justice for providing a false alibi for her partner who had killed two children in 2002, in a case that had attracted massive publicity. In each case, the court was able to hear an application

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<sup>332</sup> *Venables and another v News Group Newspapers* [2001] 1 All ER 908.

<sup>333</sup> *X (A woman formerly known as Mary Bell) v SO* [2003] EWHC 1101.

<sup>334</sup> [2003] EWHC 1101; [2003] EMLR 37.

<sup>335</sup> I. Leigh and R. Masterman, *Making Rights Real* (Hart, 2008), 284.

<sup>336</sup> *Carr v News Group Newspapers* [2005] EWHC 971 (QB).

before any disclosure was made, but without a claimant notification requirement, this is by no means guaranteed in future similar cases.

16. These cases show that newspapers are quite prepared to publish information even where there is clear evidence that doing so may lead to a serious risk to a person's physical safety or mental health. A notification requirement in English law would help ensure that the vital interests of such people, including their rights to life and protection from inhuman treatment, could be protected by a court by injunction, if necessary.

### **The general balance between free speech and privacy in practice**

17. I note that in some of the evidence recently submitted by tabloid editors to the Leveson Inquiry, it is alleged that the judges have wrongly prioritised privacy 'over' or in 'preference to' freedom of expression and that as a result, cases of major sexual misconduct by very senior politicians, like Bill Clinton or Dominique Strauss Kahn, could perhaps not have been reported in the UK. Both assertions are false, and the second is obvious nonsense. The basic approach taken in English law to balancing free speech and privacy is mandated by the fact, noted above, that the Convention does not establish an order of precedence of one right over the other. This gives rise to a method that can be termed 'contextual balancing based on presumptive equality': essentially, the rights to freedom of expression and privacy are given presumptively equal status; neither may be enforced in such a way as to disproportionately damage the other, and which claim wins out in a given case depends upon an intense focus upon how far the values underlying the right are really at stake in the particular circumstances.<sup>337</sup> As Lord Hoffman summarised the approach in *Campbell*:

There is in my view no question of automatic priority. Nor is there a presumption in favour of one rather than the other. The question is rather the extent to which it is necessary to qualify the one right in order to protect the underlying value which is protected by the other. And the extent of the qualification must be proportionate to the need.<sup>338</sup>

18. *Campbell* itself was resolved in this way: it was found that Naomi Campbell could not justify imposing liability for publishing the basic facts of her being a drug addict and receiving treatment, because of the legitimate public interest in them – something she had indeed conceded. But equally it was found that the intrusive details relating to the place and nature of her treatment in *Narcotics Anonymous*– likely to cause greater damage to Campbell's attempts to rehabilitate herself than merely reporting her drug addiction – could not be justified. *Both* sides therefore had to give some ground; the case turned upon working out a way of ensuring the minimum impairment of each person's rights. The weight of both rights was assessed in context and a measure of both privacy *and* of free expression was retained.
19. It is also of course nonsense to suggest that reportage of Bill Clinton's sexual misconduct with Monika Lewinsky could not have been carried out in this country because of our law of privacy. The courts have in practice adopted a fine balance in cases concerning sexual (mis)conduct, even though none of them have included figures of anything like the

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<sup>337</sup> See the summary of the matter in the recent decision of the Court of Appeal in *David Murray v Express Newspapers* [2008] EWCA Civ. 446, at para 24.

<sup>338</sup> *ibid* at [55].

importance of a President or other major political figure like Strauss-Kahn. Some have been won by claimants – including of course Max Mosley’s victory in the High Court,<sup>339</sup> but a number have been lost, because the court found a genuine public interest in the reportage in question: these include cases concerning a Premiership footballer (*A v plc*,<sup>340</sup>) a TV presenter<sup>341</sup>, John Terry<sup>342</sup> and most recently, Rio Ferdinand.<sup>343</sup> Quite evidently none of these cases involved figures of anything close to the public importance of Clinton or Strauss-Kahn. It is plain beyond doubt therefore that privacy cases brought by such major political figures, attempting to conceal something that many voters would see as relevant to their fitness for office would have failed.

### Role models and the public’s ‘right not to be misled’

20. A common line of argument that media bodies use to defend publication of personal information about celebrities or other public figures is the proposition that the figures in question, while not politicians, are ‘role models’ and that it is important for the public not to be misled about such people. This notion appears in the Press Complaints Commission Code to which the courts must have regard under s 12(4) (above). However, in my view it is too often advanced by media bodies, whether in particular cases or as a general argument against privacy laws, with too little clear justification. On occasions also, courts have in my view, accepted it with too little analysis. For example, in the Court of Appeal decision in *A v B plc*,<sup>344</sup> Lord Woolf said:

[A] public figure may hold a position where higher standards of conduct can be rightly expected by the public. [He] may be a role model whose conduct could well be emulated by others. He may set the fashion.<sup>345</sup>

Applying this to the facts of the case, which concerned a ‘kiss and tell’ story about a footballer’s affair with two lap dancers, his Lordship found:

...it is not self-evident that how a well-known Premiership football player chooses to spend his time off the football field does not have a modicum of public interest. Footballers are role models for young people and undesirable behaviour on their part can set an unfortunate example.<sup>346</sup>

21. First, the notion that footballers and others are ‘role models’ for young men and boys seems to be very commonly made, but very seldom actually evidenced. Public debate would benefit from an examination of evidence, instead of mere assertion, on this point. Second, even if the role model assumption is correct, the argument as it is generally made leaves it wholly unclear what actual harm to the public interest is entailed by people having incorrect impressions about the private lives of people such as pop presenters and footballers. If it is the case that those of the public who care about these things vaguely think that such and such a footballer is a faithful husband when he is not, that such and such a TV presenter would not ever visit a prostitute when in fact he has

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<sup>339</sup> *Mosley* [2008] EWHC 1777 (QB) [2008] EMLR 20.

<sup>340</sup> [2003] QB 195

<sup>341</sup> *Theakston v MGN* [2002] EMLR 22

<sup>342</sup> *Terry v Persons Unknown* [2010] 1 FCR 659.

<sup>343</sup> *Ferdinand v MGN Ltd* [2011] All ER (D) 04 (Oct)

<sup>344</sup> [2003] QB 195

<sup>345</sup> At para 11 (xiii).

<sup>346</sup> *Ibid* at para 45.

once done so, what is the clear public harm that can be identified? There may sometimes be such harm, but in my view, public debate would benefit if newspapers were required to provide a clearer explanation of this point than is often the case.

22. There is a third, more philosophical point raised by the assumption that having false impressions about celebrities is in some way intrinsically harmful. The argument that any deception of the public entitles the media to ‘put the record straight’ comes perilously close to destroying the very notion of the right to informational autonomy, or *selective disclosure*, which most commentators see as lying at the heart of the right to privacy. Such selective disclosure is something we all practice in our daily lives; arguably it is the only means of reconciling two fundamental human needs: to maintain some degree of privacy, and to communicate intimately about our lives with others in order to build and foster close relationships. Such selectivity in disclosure will, on occasions, inevitably lead to the creation of false assumptions about us in the minds of others. We may, for example, wish to give the general impression, as nearly all couples wish to, that our marriage is happy and secure, while confiding in a few trusted friends its real struggles. This undoubtedly ‘misleads’ those who receive the general impression of happiness. Indeed, such ‘misleading’ may be actively sought at times: for example someone who does not wish the fact that she is gay to be widely known outside her intimate circle of friends and family will inevitably be selective about whom she discloses this fact to. She may further, under pressure, and if asked in a public environment, actively give a deceptive impression if asked about her sexuality, knowing that a refusal to answer will often be taken to give assent and thus effectively make the very revelation she objects to. Such a person has certainly “misled the public”, but it does not seem persuasive to argue that this *per se* entitle a journalist who discovers the truth to ‘set the record straight’.
23. In short, we cannot uphold – and ourselves practice – the right to selective disclosure and, consistently with that practice, insist that any and every misleading of the public is a wrong entitling the press to intrude into privacy to correct. Rather it should be asked whether that false impression actually matters in some way: for example, if the closet homosexual was an Anglican Bishop who supported exclusion of homosexuals from the priesthood, the revelation of his own homosexual acts would directly contribute to an important political debate as well as revealing a major piece of hypocrisy in the holder of a public office that is related to that office. But such clear public benefit from like revelations often seems sorely lacking.

### **‘Waiver’ of privacy by prior publicity**

24. A related argument often raised by the media in response to privacy cases brought by celebrities is the claim that the applicant has sought publicity in the past and therefore in some way has consented, or should be deemed to have consented, to a current revelation to which he or she now objects. As the PCC has put it in the past: ‘Privacy is a right which can be compromised and those who talk about their private lives on their own terms must expect that there may be others who will do so, without their consent, in a less than agreeable way.’<sup>347</sup>

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<sup>347</sup> Quoted in D. Tambini and C. Heyward “Regulating the trade in secrets: policy options”, in Tambini and Heyward (eds) *Ruled by Recluses? Privacy, Journalism and the Media after the Human Rights Act* (London: IPPR, 2002), at 85.

25. English judges in breach of confidence/privacy cases have in the past shown some receptivity to this claim and it is constantly put forward by the media and seemingly accepted by at least some members of the public as justification for intrusive coverage of the private lives of public figures. As to the notion of ‘implied consent’, the claim that previous, voluntary revelations constitute some kind of generalised, all-purpose consent to future invasions of privacy is simply not plausible: no-one can realistically suppose that when for example a celebrity gives an interview to a newspaper about particular problems in a past or current marriage, she thereby gives *carte blanche* to the media to publish any information relating to her personal life which they can obtain in future. Thus the ‘consent’ terminology is in reality merely a cloak for a purely normative contention: that since in the past the applicant has sought publicity for personal information, she should not be *allowed* to complain about this publication.
26. It is often not recognised that this notion - that a previous voluntary disclosure of private information prevents an individual from being able to complain about an *involuntary* disclosure - is in fact wholly incompatible with the core privacy value identified above, of the individual's right to *control* over the release of personal information. All of us exercise this right to selective disclosure in our social lives: we may tell one friend an intimate secret and not another; at times be open, at others more reticent. No one denies our right to do this. A friend who is shown a personal letter on one occasion does not assume that he has thereby acquired the right to read, uninvited, all other such letters. In other words, to suggest that public figures should be treated as estopped from complaining about unwanted publicity because they had previously sought it would deny them the very *control* over personal information that is inherent in the notion of personal autonomy; previous disclosures amount not to an *abandonment* of the right to privacy, but an exercise of it.
27. It should be conceded, however, that, while this argument has considerable logical force, we cannot completely disregard an individual's own attitude to publicising their private life, particularly where they have done so for gain. If this were so, then the fear would arise that celebrities could manipulate the media and enrich themselves through selective disclosure of personal information,<sup>348</sup> using privacy rights to shut down the unwanted disclosures and thus maintaining a favourable public image. I queried above whether such false impressions really matter, but accept that in some cases prior self-publicity must be taken to be relevant, in the following way. A law of privacy cannot protect the right to selective disclosure in relation to any and all information relating to a person; only information that in some way relate to *private life*. There may be situations in which a claimant has, voluntarily, thoroughly and repeatedly placed details about the same subject matter which it is now proposed to publish to such an extent that it may be inferred that the information in question is not any longer, to that person, truly private or personal.<sup>349</sup> Where the information has been sold to a magazine by the celebrity this inference would be stronger: there is a clear difference between confiding a private fact to certain people in order to enhance one's relationship with them, and simply selling it. Thus in cases where a celebrity has, quite genuinely commodified an aspect of their personal life, it may be concluded that it has lost its private character. However such an approach would

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<sup>348</sup> See Tugendhat and Christie, *The Law of Privacy and the Media* (Oxford: OUP, 2002), at 344.

<sup>349</sup> Note that under the Data Protection Act 1998, the data controller has a defence in relation to processing of ‘sensitive personal data’ if that information has been made public as a result of steps deliberately taken by the data subject’ (Sch 3, para 5).

appear to be apposite only in cases of clear, voluntary, and extensive publicity given to ones *private life*. This appeared to be the approach adopted by Lord Nicholls in *Campbell*:

When talking to the media Miss Campbell went out of her way to say that, unlike many fashion models, she did not take drugs. By repeatedly making these assertions in public Miss Campbell could no longer have a reasonable expectation that this aspect of her life should be private. Public disclosure that, contrary to her assertions, she did in fact take drugs and had a serious drug problem for which she was being treated was not disclosure of private information.<sup>350</sup>

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<sup>350</sup> *Campbell*, at [24].

Jonathan Grun, Editor of the Press Association, Alan Rusbridger, Editor, *The Guardian*, Ian Hislop, Editor, *Private Eye*, and John Witherow, Editor, *The Sunday Times*—Oral evidence (QQ 162–209)

**Jonathan Grun, Editor of the Press Association, Alan Rusbridger, Editor, *The Guardian*, Ian Hislop, Editor, *Private Eye*, and John Witherow, Editor, *The Sunday Times*—Oral evidence (QQ 162–209)**

[Transcript to be found under Alan Rusbridger, Editor, \*The Guardian\*](#)

## Press Complaints Commission—Written evidence

### Executive summary

1. To aid the Committee, I have provided an executive summary below.
2. The role of the PCC is being looked at by several parliamentary and judge-led Inquiries at the moment. The PCC – which has always been committed to improvement and evolution - wishes to remain at the heart of the debate about press regulation and is actively examining how its role might evolve further. The benefits and strengths of the existing system should not be discarded and instead should be built upon to create an improved system. (Paragraphs 3-5)
3. The new Chair of the PCC has publicly committed the organisation to wide-ranging reform. The Commission has established a Reform Committee which is currently examining five key areas: independence; powers; remit; funding; and membership. (Paragraph 6)
4. The PCC was established in 1991 to administer a Code of Practice. Its role has evolved considerably over the past twenty years so that the PCC is now more than purely a complaints-handling body. Its role is set out in a mission statement, instituted following a recommendation by an independent Governance Review in 2010. There are 17 members of the Commission, 10 of whom are unconnected to the newspaper and magazine industry. The Secretariat comprises 16 people. Funding is arranged by a separate, industry-led body called the Press Standards Board of Finance (PressBof). The PCC's current operating budget is just under £2 million. (Paragraphs 8-11)
5. The PCC received over 7000 complaints in 2010. It either ruled or mediated on 1678 cases. 767 complaints were judged to have merit (i.e. where there was a probable breach of the Editors' Code of Practice). The most frequent cause of complaint is inaccurate or misleading reporting. (Paragraphs 12-13)
6. When investigating a complaint, PCC staff will firstly seek to resolve the dispute to the satisfaction of the complainant. This was achieved in 72.5% of cases in 2010. Means by which complaints can be resolved include: the publication of a correction, apology or clarifying letter; the removal of inaccurate information from a publication's website; amendment of a publication's internal records to prevent the publication of inaccurate information; undertakings about future behaviour; or donations to charity or *ex gratia* payments at the publication's discretion. (Paragraph 14)
7. In cases that cannot be resolved, the Commission as a whole will make a decision about whether there has been a breach of the Editors' Code and whether any remedial action offered by the publication is sufficient. Where there is an unremedied breach of the Code, the Commission will uphold the complaint and issue a public adjudication against the newspaper or magazine in question which must then publish this in full. (Paragraph 15)



8. The PCC has a number of sanctions: negotiation of an agreed remedy; publication of a critical adjudication in the offending publication, which may be followed by public criticism of a title by the Chairman of the PCC; a letter of admonishment from the Chairman to the editor; follow-up from the PCC to ensure that changes are made to avoid a repeat of the failing and to establish what steps have been taken against those responsible for serious breaches of the Code; formal referral of the editor to his or her publisher. The Commission is currently examining how these sanctions might further be improved. (Paragraphs 16-17)
9. The PCC enforces the Editors' Code of Practice. Some Clauses track the current position under English law. A key example of this is Clause 3 (Privacy) which mirrors the Human Rights Act. However, the Code's provisions on privacy are not confined to a single Clause, as other Clauses relate to privacy in a more specific way. The majority of the PCC's work in the area of privacy is in response to ordinary members of the public with no claim to celebrity. In 2010, over 90% of all complaints to the PCC were from ordinary members of the public. (Paragraphs 18-23)
10. There may be occasions when a breach of Clause 3 can be justified in the public interest, which is covered by the Code. The wording of the Code enables the PCC to balance the competing rights of personal privacy and press freedom of expression. It is not overly prescriptive, nor does the Code seek to define the boundaries between the competing rights for any imaged set of circumstances; judgements about the public interest are made on a case by case basis. Rulings act as precedents so the establishment of a considerable body of case law is vital to the PCC's ability to guide future press behaviour and set standards of journalistic practice. There are a number of notable cases where the PCC has judged privacy against public interest / freedom of expression. (Paragraphs 24-26)
11. The following principles underpin PCC rulings when considering the public interest: proportionality; editorial responsibility; recognition of freedom of expression and circulation of information. (Paragraph 27)
12. No complainant has ever been successful in obtaining permission for an Application for Judicial Review against the PCC. There has never been an instance of a newspaper or magazine refusing to publish a PCC critical adjudication. (Paragraphs 28-29)
13. There were 182 complaints in 2010 that raised a likely breach of one of the Code's privacy Clauses. Most were resolved to the satisfaction of the complainants; ten were upheld, including key rulings on the reporting of pregnancy and photographing children at the scene of a traffic accident. (Paragraph 30)
14. The Commission recognises that it has a wider role to play around standards, in addition to its primary role obtaining redress for individuals. For this reason, PCC staff and representatives oversee a programme of training for editorial staff at UK newspapers and magazines. Since the beginning of 2010, representatives of over 100 titles have benefitted from one of these sessions. (Paragraphs 31-32)
15. The Commission also organises meetings about particular topics, including privacy issues. It is vital for the PCC's effectiveness that it remains at the forefront of developments in public attitudes. It has: commissioned research into questions around online social

networking; participated in public seminars; and set up a sub-committee of the Commission to examine online issues on an ongoing basis. PCC rulings have also played a role in editorial decision-making. (Paragraphs 33-34)

16. The PCC has disseminated widely six key questions editors should ask when deciding whether to publish material that has originated from social networking sites. These include: how widely available is the information? Who uploaded the material? What settings have been used to protect privacy? what is the quality of the information (how personal is it; what is the context)?; what is the public interest? How is the material presented?
17. The PCC's non-statutory basis means that it can respond effectively to many of the challenges presented by online developments. (Paragraph 36)
18. The PCC operates its own system for dealing with pre-publication concerns. In most cases where there is a breach of the Code, the PCC's staff are able to obtain remedies to the satisfaction of the complainant. In terms of offering editorial advice, the development of the Editors' Codebook and the expansion of the PCC's training programme has led to a greater understanding of PCC rulings. (Paragraphs 38-39)
19. The PCC seeks feedback from every complainant whose complaint is ruled on or successfully resolved. The clear sense from these surveys is that those who use the complaints service believe it to be thorough and effective. More substantive feedback from complainants is included in PCC annual reports. The PCC also commissions market research to establish public attitudes towards its work. In 2010 an online attitude survey was conducted among 1000 nationally representative adults in the UK. Of the respondents who expressed an opinion, 75% thought the PCC to be effective or very effective (Paragraphs 40-42)
20. Some complainants are inevitably reluctant for the resolution of their complaint to result in further published material. Consequently, PCC staff often work towards settlements that achieve: the removal of intrusive material; assurances about no future publication; private apologies from editors directly to complainants and; in some cases, donations to charity or *ex gratia* payments to complainants in recognition of the distress caused by the intrusion. (Paragraph 44)
21. In any cases where a published apology (or correction) is published, prominence must be agreed in advance following a Code change earlier this year.<sup>351</sup> Failure to agree prominence (or publication of a correction or apology without "due prominence") could result in an adverse ruling by the Commission. (Paragraph 45)
22. In serious cases, the Commission may agree that a personal letter of admonishment from the Chairman should be sent to the editor. The PCC may also seek assurances that changes have been made to editorial practices so that mistakes are not made again. In relation to the most egregious breaches of the Code, the Commission will formally refer an editor to his or her publisher for action. (Paragraph 49)

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<sup>351</sup> The vast majority of all corrections and apologies negotiated by the Commission are published on the same page or further forward than the original transgression (or in a dedicated corrections column). The full prominence statistics are in Appendix 6.

23. An Ipsos MORI poll commissioned by the PCC in 2006 and research by Toluna in 2010 both indicated that prompt apologies were more important to respondents than fines (Paragraph 50)
24. The Commission generally takes the view that the obligation to publish a critical ruling is an effective sanction. However, it recognises that this is a key issue for debate in terms of possible reforms of the system of press regulation in the United Kingdom. A sub-Committee of the Commission was set up in July to lead a review of all aspects of press regulation in its current form and will examine this matter further as part of its work over forthcoming weeks. The committee consists of six members of the Commission (four public and two editorial). (Paragraphs 51-52)
25. The PCC does have the discretionary power to consider any complaint from “whatever source that it considers appropriate to the effective discharge of its function”. However, while it is possible for the PCC to initiate its own investigations on behalf of someone who has experienced a possible invasion of privacy, it has not done so for several common sense reasons. This policy is followed by the vast majority of non-statutory press councils around the world (Paragraphs 53-56).
26. If a third party raises apparently serious issues with the PCC, the PCC will use this as a trigger to contact the subject of the story to see whether he or she wishes to complain. The PCC also proactively contacts relevant individuals of its own volition if they appear to require assistance. Between May 2010 and September 2011, the PCC did this 56 times. (Paragraphs 57-58)
27. Based on research commissioned by the PCC in 2010, only 25% of respondents agreed that it would be proper for a regulatory body to publish its views on a possible breach of its Code without the consent of the subject affected by the breach. (Paragraph 59)
28. Although the PCC does not have the legal authority to prevent publication of contentious material, it is very regularly asked (by both editors and complainants) to consider questions concerning the appropriate balance between privacy and freedom of expression in advance of publication. The result is that stories which might otherwise have been published do not appear. There are a number of advantages to complainants, including the fact that there is no cost involved. (Paragraphs 60-64)
29. In the month of August 2011, PCC records show that PCC staff gave advice to editors on 16 occasions. PCC staffs also assist complainants prior to publication on a 24 hour basis. This is now a considerable proportion of the PCC’s work and there are several advantages for complainants. Ofcom does not have any role in pre-publication matters such as these, so broadcasters have voluntarily fallen within the PCC’s ambit in this area. No other non-statutory press council offers a similar service. (Paragraph 68-69)
30. The Commission has commissioned several polls to gauge public awareness of its service. They reveal that around four in five people have heard of the PCC. The Commission recognises that there is room for raising awareness of its work even further. In 2010, a new advertising campaign was developed. Space was donated by the industry and the adverts have appeared across the national and regional press, and in magazines. (Paragraphs 71-73)

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31. The Commission regularly hosts 'Open Days' across the UK in order to communicate directly with the public. They have been held in 14 towns and cities since 2003. (Paragraph 76)
32. Increasingly, the Commission's efforts to raise awareness and understanding of its services are directed at those who may be well-placed to act as conduits for the flow of information to people who find themselves in a vulnerable position and at the centre of media attention. Most notably, this means working with police (particularly family liaison officers), Members of Parliament, central government departments, local government authorities, NHS Trusts and charities (e.g. Samaritans). (Paragraph 77)
33. The Commission publishes key literature for the bereaved about how to deal with media attention following a death. It also publishes guides about the Code of Practice's provisions in specific areas, including journalistic harassment, children and reporting about hospitals. (Paragraph 78)

## Introduction

1. In response to the call for evidence made by the Joint Committee on Privacy and Injunctions, I make the following submission in my role as Director of the Press Complaints Commission. I am authorised by the Commission to make the submission on its behalf.
2. In this paper I will give a brief overview of the Commission's work. I will also answer those specific questions laid down in the Joint Committee's call for evidence which relate to the Press Complaints Commission. Bearing in mind that the Joint Committee has expressed a preference for short submissions I intend not to include excessive information. But if members of the Committee believe that further details about any point relating to the work of the PCC are required, I would be happy to provide them.
3. As Committee members will know, the Commission's role is being looked at in connection with several parliamentary or judge-led Inquiries at the moment. In particular, I have recently submitted on behalf of the Commission a 400-page statement to the Leveson Inquiry; a second statement about possible reform of the PCC will be submitted to that Inquiry in due course once a sub-committee of the Commission (the "Reform Committee of the Commission") has examined and discussed proposals internally. I say this to emphasise the fact that the Commission wishes to remain at the heart of the debate about press regulation in this country; and is in the process of actively examining how its role might evolve further.
4. Indeed, the PCC has always been committed to improvement and evolution – the Commission's history shows very clearly that renewal and reform are not areas from which it has shied. That said, finding the 'perfect' mode of regulation for the media is not as straightforward as has occasionally been presented and the positive aspects of the current model are often overlooked. I believe it important that the existing benefits should not be discarded and instead should be built upon to create an improved system. The new Chair, Lord Hunt of Wirral, has publicly declared that he is arriving at the PCC with a "blank sheet of paper" in the area of structural reform.
5. In my submission to the Leveson inquiry I summarised some of the key strengths of the existing system. I hope the Committee will forgive me if I repeat the bulk of that summary here:
  - i. The PCC offers a complaints service that is free, and accessible to all. There is no financial burden on complainants or tax-payers. There is no need to retain a lawyer to make a PCC complaint.
  - ii. The service is fast. Investigations take an average of 33 working days. Some complaints are resolved within hours of receipt. Complainants, especially those with concerns about inaccuracy, want swift and public redress. Corrections, apologies and rights of reply are promptly negotiated on their behalf. The prominence of correction and apologies is now a matter agreed in advance with the PCC and the complainant, something not available to those who issue High Court proceedings.
  - iii. The system aims so far as possible to be non-adversarial, and can be used by vulnerable or distressed people without exacerbating the possible harm to them.

- iv. The PCC actively reaches out to the public and interest groups, to involve them in the process of self-regulation. It has strong relationships with the police, health care authorities, charities, MPs and community organisations. It has a well-functioning protocol for dealing with the media fallout of major incidents.
  - v. The system is non-bureaucratic. It is designed to be personal and human, and user-friendly.
  - vi. The PCC has a greater public membership than other analogous bodies. It has the highest ratio of public to press members of any comparable press council in the world. People are aware of the PCC.
  - vii. It has a high recognition rate (although this could always be improved). The PCC has established a large body of case law (the largest in Europe). This case law has led to changes in industry practice. It is reinforced by continual training programmes.
  - viii. The PCC is more proactive than analogous bodies, both in the UK and abroad. The PCC seeks to contact those in need, and makes itself available to them often at times of maximum vulnerability.
  - ix. The PCC is flexible, and can accommodate cultural or technological change. The PCC's remit has expanded first to include newspaper and magazine websites, then their blogs, and then audio-visual material. It is seeking to expand its remit into some Twitter accounts, where appropriate. No statutory regulator could readily grow by accretion in this way.
  - x. The PCC runs a 24-hour service to help ordinary members of the public. At any time of the day or night, a complainant can speak to a senior member of staff.
  - xi. The Commission prevents harassment by journalists (including broadcasters) by circulating requests on behalf of concerned individuals. This has led to media scrums being dispersed in a matter of minutes.
  - xii. The PCC regularly can intervene pre-publication, without compromising freedom of expression or generating legal or public expense. The Commission's pre-publication work often results in the non-appearance of inaccurate or intrusive material.
  - xiii. The PCC receives co-operation from editors, because it is part of a system that broadly enjoys industry confidence. Every critical ruling has been published by the publication concerned. Editors call the PCC for advice, and accept guidance, which helps to promote consistent standards and protocols.
  - xiv. The PCC has a UK-wide remit. Its ability to operate across all three of the legal jurisdictions in the country (and across the various sectors within the newspaper and magazine industry) means that it can set consistent British standards.
  - xv. The Editors' Code of Practice is well-regarded as a concise collation of ethical principles.
6. Nevertheless, I have already identified publicly five particular issues that I believe need to be addressed during discussions about possible PCC reform. It is these areas (and related questions) that the Reform Committee of the Commission will be focussing on:
- a. Independence: what should the industry role be in regard to the membership of the Commission, the construction of the Code of Practice, and the funding of the PCC?
  - b. Powers: how could the sanctions of the PCC be improved without negatively affecting the speed and constructive nature of its dispute resolution service?

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- c. Remit: how can a broader standards role sit alongside the PCC's complaints function?
  - d. Funding: how can any improved PCC be funded adequately without compromising its independence?
  - e. Membership: how do you encourage or compel membership of a system, especially in a world where anyone can be a publisher online?
7. On 3 May this year the Prime Minister noted that: “actually the Press Complaints Commission has come on a lot in recent years, and we should be working with that organisation to make sure that people get the protection that they need... while still having a free and vibrant press.”<sup>352</sup> There is indeed more yet to do. I trust that this submission will be of interest and assistance to the Committee. I look forward to meeting members of the Committee when I give evidence in person.

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<sup>352</sup> The Prime Minister, the Rt Hon David Cameron MP, speaking on the *Today* programme, BBC Radio 4.

## The PCC – an overview

8. The Press Complaints Commission was established in 1991 to administer a Code of Practice to which newspapers and magazines in the UK had agreed to adhere<sup>353</sup>; and to examine complaints from members of the public who believed that Code had been breached. Its role has evolved considerably over two decades so that the PCC is now more than purely a complaints-handling body.
9. Following the implementation of recommendations made by an independent Governance Review in 2010, the Commission published the following mission statement, which encapsulates its role and purpose:

*The PCC is an independent body which administers the system of self-regulation for the press. It does so primarily by dealing with complaints, framed within the terms of the Editors' Code of Practice, about the editorial content of newspapers and magazines (and their websites, including editorial audio-visual material) and the conduct of journalists. It can also assist individuals by representing their interests to editors in advance of an article about them being published.*

*The purpose of the PCC is to serve the public by holding editors to account. We strive to protect the rights of individuals, while at the same time preserving appropriate freedom of expression for the press. We proactively advertise our services and reach out to people who may be in need of our help. We aim to promote high standards by developing clear guidance and practical principles through our rulings, and offering training and advice to editors and journalists<sup>354</sup>.*

10. The board of the Commission comprises seventeen members (ten, including the Chairman, are unconnected to the newspaper and magazine industry; the remaining seven are serving editors, representing a range of publications). The Commission is served by a secretariat of sixteen people.
11. Funding for the work of the Commission is arranged by a separate, industry-led body called the Press Standards Board of Finance (Pressbof). Pressbof collects a subscription from member publications in order to meet the PCC's budgetary requirements. The Commission's current annual operating budget is just under £2million.
12. In 2010, the PCC received over 7,000 complaints, either by letter or email – the vast majority came from ordinary members of the public. Many initial complaints fall outside the Commission's remit or are not pursued by complainants after an initial contact. Last year, the Commission ruled on or successfully mediated 1,687 cases (accounting for just over 2,300 complaints, bearing in mind that one ruling might be made on several complaints about the same issue). The PCC's staff also answer thousands of helpline calls from people wishing to express an opinion about the press or who wish to learn more about the complaints process. There is an emergency 24-

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<sup>353</sup> The Editors' Code of Practice is written by a separate, industry-led body called the Editors' Code of Practice Committee. The Chairman and Director of the PCC are *ex-officio* members of the Committee and changes to the Code require ratification by the PCC. The Code is audited annually, and there is public consultation on this. A copy of the latest edition of the Code, as ratified in January 2011, is set out in Appendix I.

<sup>354</sup> See <http://pcc.org.uk/AboutthePCC/WhatisthePCC.html>



hour helpline for those with urgent concerns. This leads to the PCC being active in successfully addressing pre-publication concerns, which is a major area of interest to this Committee.

13. The most frequent cause of complaint throughout the PCC's history is inaccurate or misleading reporting. Looking only at the 767 complaints in 2010 which had merit (i.e. those where there was a probable breach of the Code of Practice), 87% raised concerns under Clause 1 (Accuracy) or 2 (Opportunity to reply) of the Code. 23.7% raised concerns about alleged invasion of privacy under one or more of the following Clauses of the Code: 3 (Privacy), 4 (Harassment), 5 (Intrusion into grief or shock), 6 (Children), 7 (Children in sex cases), 8 (Hospitals), 9 (Reporting of crime), 11 (Victims of sexual assault).<sup>355</sup>
14. When investigating a complaint which has merit, the PCC's staff act firstly to resolve the dispute, seeking an amicable settlement which is to the satisfaction of the complainant. This was achieved in 72.5% of cases last year. Means by which complaints can be settled (or, to use regular PCC terminology, 'resolved') might include:
  - publication of corrections or apologies;
  - publication of clarifying letters;
  - removal of inaccurate information from a publication's website (and from third party websites);
  - amendment of a publication's internal records to ensure information is not republished;
  - undertakings about future behaviour; or
  - donations to charity or *ex gratia* payments (which are offered at the publication's discretion).
15. In cases where an amicable settlement cannot be achieved, the Commission as a whole will make a decision about whether the Code of Practice has been breached and whether any remedial action offered by the offending publication is sufficient. Where there remains an unremedied breach of the Code, the Commission will uphold the complaint and issue a public adjudication against the newspaper or magazine in question, which must then publish the adjudication in full.
16. The sanctions of the PCC might, then, be summarised as follows:
  - negotiation of an agreed remedy (such as a published apology, published correction, clarification or explanatory letter, private letter of apology, amendment or removal of online information, amendment of a publication's internal records, *ex gratia* payments);
  - publication of a critical adjudication in the offending publication, which may be followed by public criticism of a title by the Chairman of the PCC;
  - a letter of admonishment from the Chairman to the editor;

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<sup>355</sup> Since complaints can raise concerns about various issues covered by the Editors' Code, these figures will total more than 100%. In addition to concerns about inaccuracy and invasion of privacy, 0.9% of complaints with merit in 2010 related to Clause 10 (Subterfuge and clandestine devices) of the Code, 3.3% to Clause 12 (Discrimination) and 0.4% to Clauses 13-16 (Financial journalism, Confidential sources, Witness payments in criminal trials, Payment to criminals).

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- follow-up from the PCC to ensure that changes are made to avoid a repeat of the failing and to establish what steps (which may include disciplinary action, where appropriate) have been taken against those responsible for serious breaches of the Code;
- formal referral of an editor to his or her publisher for action. Adherence to the Code is written into the majority of journalists' contracts.

17. The Commission is examining how these sanctions might be further improved.

### **Do the guidelines in section 3 of the Editors' Code of practice correctly address the balance between the individual's right to privacy and press freedom of expression?**

18. The Editors' Code of Practice enforced by the PCC represents a layer of rules adopted by the press to govern its behaviour which are in addition to those set down in law. Yet some parts of the Code essentially track the current position under English law. A key example of this is Clause 3 (Privacy) of the Code, which essentially mirrors the Human Rights Act. Other Clauses of the Code – such as Clause 8 (Hospitals) – extend existing legal protection.

19. The requirements set out in Clause 3 of the Code are as follows:

*i) Everyone is entitled to respect for his or her private and family life, home, health and correspondence, including digital communications.*

*ii) Editors will be expected to justify intrusions into any individual's private life without consent. Account will be taken of the complainant's own public disclosures of information.*

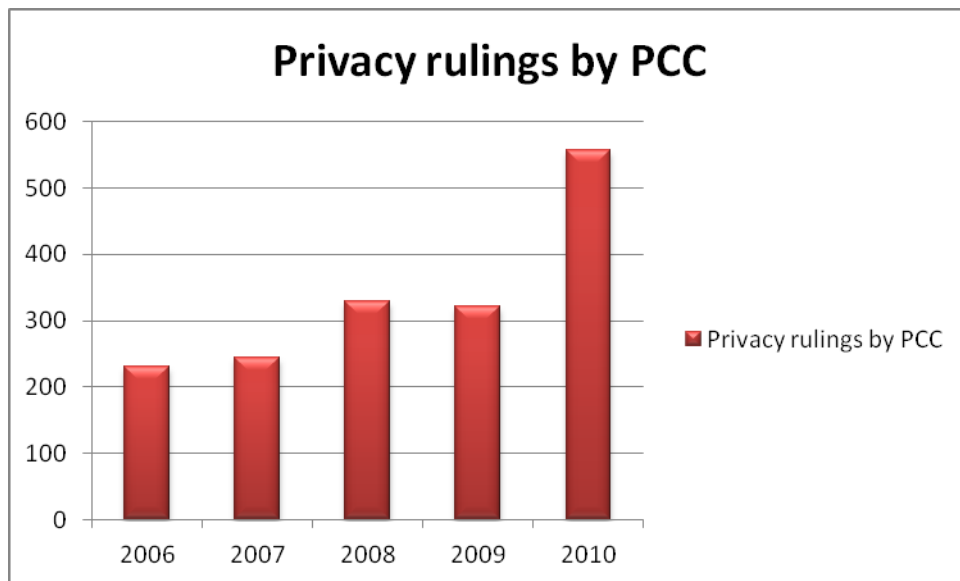
*iii) It is unacceptable to photograph individuals in private places without their consent.*

*Note - Private places are public or private property where there is a reasonable expectation of privacy.*

20. It is important to recognise, however, that several of the Code of Practice's other Clauses also relate to privacy (see paragraph 9 above). While Clause 3 sets out the general requirements on the subject, others are more specific, for instance about taking photographs of children, publishing material at times of grief, approaching patients in hospitals and reporting crime. In any examination of the PCC's role in balancing rights of privacy and freedom of expression it is vital to bear in mind that the Code's provisions on the subject are by no means confined to a single Clause.

21. The graph below shows the number of complaints ruled on (or successfully mediated) by the PCC where one of the privacy Clauses of the Code were cited:

### Privacy rulings by PCC



22. It should also be remembered that, while high-profile privacy cases in the courts often involve celebrities or public figures, the bulk of the PCC's work in this area (which comes at no cost to its service-users) is in response to complaints from ordinary members of the public. Last year, well over 90% of all complaints to the PCC were from people who laid no claim to celebrity. Their concerns relate to reports about the death of a loved one; to heavy-handed journalistic approaches; to coverage of incidents involving their children. These are the complaints of ordinary citizens who find the press at their door, having courted neither attention nor publicity. It is invariably to the PCC that such people turn for help.
23. There may be occasions when a breach of Clause 3 (and some, but not all, of the other privacy Clauses) can be justified in the public interest<sup>356</sup>. The Code includes the following section about the public interest to assist editors, journalists and the public determine what factors the Commission is likely to consider in cases where a public interest defence is raised:
1. *The public interest includes, but is not confined to:*
    - i) *Detecting or exposing crime or serious impropriety.*
    - ii) *Protecting public health and safety.*
    - iii) *Preventing the public from being misled by an action or statement of an individual or organisation.*
  2. *There is a public interest in freedom of expression itself.*
  3. *Whenever the public interest is invoked, the PCC will require editors to demonstrate fully that they reasonably believed that publication, or journalistic activity undertaken with a view to publication, would be in the public interest.*

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<sup>356</sup> Of the Code's sixteen Clauses, ten allow for the possibility that breaches can be justified by reference to the public interest.

4. *The PCC will consider the extent to which material is already in the public domain, or will become so.*

5. *In cases involving children under 16, editors must demonstrate an exceptional public interest to over-ride the normally paramount interest of the child.*

24. The wording of the Code demonstrably enables the PCC to balance the competing rights of personal privacy and press freedom of expression. It is not overly prescriptive, nor does the Code seek to define the boundaries between the competing rights for any imagined set of circumstances. Such a task would be at worst impossible and at best make for a desperately unwieldy Code.
25. Judgements about the public interest are, therefore, made on a case by case basis, taking into account the particular merits of the complaint and the newspaper or magazine's defence. Rulings act as precedents so the establishment of a considerable body of case law is vital to the PCC's ability to guide future press behaviour and set standards of journalistic practice. A guide to PCC case law, known as the Editors' Codebook, was first published in 2005 by the Editors' Code of Practice Committee<sup>357</sup> and has been revised twice since then to take account of new developments.
26. It would not be possible to set out details of every case in which the PCC has judged privacy against public interest (or against freedom of expression). However, some notable cases include<sup>358</sup>:
- *A Woman v News of the World* – the Commission judged that, while the newspaper was at liberty to report the existence of an extra-marital relationship (from the point of view of the man involved and without the consent of the woman), the right to freedom of expression did not extend to reporting intimate details of the affair.
  - *Mullan et al v Scottish Sunday Express* – the newspaper published material from three teenagers' online social networking profiles, arguing that it was at liberty to do so since the material was publicly available. The Commission ruled that, since the teenagers had done nothing to warrant media scrutiny (aside from surviving a school massacre thirteen years before) and because the material had been presented in a way designed to humiliate them, their right to privacy had been compromised. The complaint was upheld.
  - *Turner v Birmingham Mail* – a photograph showing three patients at a hospital unit that was shortly to close (taken by a GP, apparently with the consent of the patients, who suffered mental health problems) was the subject of a complaint by the responsible NHS Trust. The PCC ruled that the newspaper's right to report the story and the level of distress likely to be caused by the closure justified the use of the image (noting that the identities of the subjects had been largely protected by pixellation).
27. There are a number of principles in particular that underpin Commission rulings when the public interest test is considered:

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<sup>357</sup> The Editors' Codebook can be seen in full at [www.editorscode.org.uk](http://www.editorscode.org.uk).

<sup>358</sup> The full rulings referred to here are included in Appendix Two.

i. Proportionality

The greater the intrusion, the greater the public interest justification has to be. Recently, the Commission upheld a complaint against the Daily Telegraph, for undercover recording of journalists posing as constituents in conversation with Liberal Democrat ministers, making clear that “*secretly recording a public servant pursuing legitimate public business was without question a serious matter*” and “*the Commission was not convinced that the public interest was such as to justify proportionately this level of subterfuge*”<sup>359</sup>.

ii. Editorial Responsibility

The PCC requires “*editors to demonstrate fully that they reasonably believed that publication, or journalistic activity undertaken with a view to publication, would be in the public interest*”. This means that editors must be able to explain the process by which they reached the decision that their actions would serve the public interest. It also means that this process must take place at an early stage of their consideration.

As a result, “fishing expeditions” (such as that undertaken by The Daily Telegraph in the case referred to above) have been outlawed by the PCC. The onus is on the editor to show the PCC the steps that have been taken to assess the public interest during the whole process of an article being researched and published. There must be proper authority for decision making.

iii. Recognition of Freedom of Expression and Circulation of Information

The public interest is served by a system that allows responsible freedom of expression. The Commission recognises (in common with the courts) the right of individuals to express themselves.

English common law and the European Court of Human Rights are clear that this is not an absolute right, and many privacy cases rest on the need to balance the competing rights of an individual to a private life and another to free expression. The Commission does not consider free expression (of either an individual or a newspaper) to be an over-riding principle. Otherwise the “public interest” would simply equate to the free expression of what an editor believed the public was interested in.

The PCC is also required to consider “*the extent to which material is already in the public domain, or will become so*”. This is important in privacy cases where the question arises: at what point does information become publicly known and, therefore, not private?

The Commission starts from the principle that, just because something is accessible in the public domain, it does not mean that newspapers and magazines can publish it. To say otherwise would allow editors to publish anything that is available on the internet (see paragraph 27 (ii) above).

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<sup>359</sup> In response to the PCC’s ruling, the Rt Hon Vince Cable MP, said: “I’m delighted with the findings which fully vindicates the complaints I and my colleagues made to the PCC...It was important this was established by an independent, respected and reputable body.” (*Richmond & Twickenham Times*, 10<sup>th</sup> May 2011). The full ruling can be seen in Appendix Two.

However, in one case the Commission did rule that a magazine had not breached the Code by republishing photographs of a girl in circumstances where there were over a million pages came up in a Google search for her name<sup>360</sup>.

28. As to whether the Code of Practice or the PCC in its judgements “correctly” balances the rights of privacy and freedom of expression, it is notable that no complainant has ever been successful in obtaining permission for an Application for Judicial Review against the PCC (on the basis, for instance, of a PCC ruling being perverse). The question of whether the PCC is amenable to Judicial Review remains open, although the PCC has not challenged being amenable in cases where Applications for permission have been made. The Commission has resisted legal challenge in recent weeks.
29. While newspapers may have been disappointed by rulings against them, there has never been an instance of a newspaper or magazine refusing to publish a critical adjudication as their punishment for being found in breach of the Code of Practice.

**How effective has the PCC been in dealing with bad behaviour from the press in relation to injunctions and breaches of privacy?**

30. Overall, there were 182 complaints in 2010 that raised a likely breach of one of the Code’s privacy Clauses. Most were resolved to the satisfaction of the complainants, often by means of non-public remedial action (such as the removal of material from newspaper websites) but sometimes also by way of published apologies. A total of ten privacy complaints were upheld at adjudication, including key rulings on reporting of pregnancy (*Minogue v Daily Mirror/Daily Record*) and photographing children at the scene of a traffic accident (*A Woman v Nottingham Evening Post/Leicester Mercury*).<sup>361</sup>
31. While the PCC’s primary role is still to obtain redress for those who have been on the receiving end of a breach of the Code, the Commission recognises that it has a wider standards role. If its rulings are to have meaning beyond providing relief or vindication for complainants and acting as a punishment for errant publications, they must be widely known among journalists in order that they can inform future actions and decision making.
32. To this end, the Commission’s staff and representatives oversee a programme of update training for editorial staff at newspapers and magazines across the UK. Since the beginning of 2010 representatives of over 100 titles have benefited from one of these sessions, including:
- The Sunday Times
  - Belfast Telegraph
  - Newcastle Evening Chronicle
  - News of the World
  - Southern Daily Echo
  - Cambridge Student
  - The Sun
  - The Guardian

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<sup>360</sup> The full ruling in the case of *A woman v Loaded* is set out in Appendix Two.

<sup>361</sup> These rulings are set out in Appendix Two.

## Press Complaints Commission—Written evidence

- The Observer
- Daily Mail
- The Mail on Sunday
- Evening Standard
- Metro
- Press Association
- Daily Record
- Sunday Mail
- Dumfries & Galloway Standard
- Galloway News
- Ayrshire Post
- Irvine Herald
- Kilmarnock Standard
- Paisley Daily Express
- Lennox Herald
- Stirling Observer
- Perthshire Advertiser
- Strathearn Herald
- Blairgowrie Advertiser
- Airdrie & Coatbridge Advertiser
- Wishaw Press
- West Lothian Courier
- Hamilton Advertiser
- Rutherglen Reformer
- East Kilbride News
- Cumberland News
- News & Star (Carlisle)
- Times & Star
- Whitehaven News; and Hexham Courant
- Take a Break
- Chat
- Pick Me Up
- Southern Daily Echo
- Daily Echo (Bournemouth)
- Salisbury Journal
- Andover Advertiser
- Basingstoke Gazette Series
- Inverness Courier
- Highland News
- North Star
- Lochaber News
- Ross-Shire Journal
- John O'Groats Journal
- Caithness Courier
- Northern Times
- Northern Scot
- Banffshire Journal

- Forres Gazette
- Strathspey and Badenoch Herald
- Newsquest North and East London

33. In addition to bespoke training seminars for individual titles or groups, the Commission organises meetings from time to time about particular topics, including privacy issues. Earlier this year the PCC, in conjunction with the Office of the Information Commissioner, held a session with senior, national newspaper executives to discuss the requirements of the Code of Practice and the Data Protection Act.
34. Since debates about privacy are fast-moving, particularly in light of technological changes in the last decade, it is vital for the PCC's effectiveness that it remains at the forefront of developments in public attitude (often going beyond its primary complaints-handling role). A good example is the work carried out by the Commission into questions connected to online social networking, which included commissioning an Ipsos MORI poll<sup>362</sup> (2008) and participating in public seminars (with the Westminster Media Forum in 2008 and the LSE-based think tank Polis in 2010<sup>363</sup>), as well as setting up a sub-committee of the Commission to examine online issues on an ongoing basis<sup>364</sup>. This work has helped to inform PCC thinking in connection to complaints about the use of material from social networking sites. Its subsequent rulings have in turn, via PCC training sessions, dissemination of the Editors' Codebook and other means, played a role in editorial decision-making.
35. Indeed, the Commission has disseminated widely the key questions editors should consider when deciding whether to publish material that has originated from social networking sites. These questions include:
- How widely available is the information?
  - Who uploaded the material?
  - What settings have been used to protect privacy?
  - What is the quality of the information (how personal is it; what is the context)?
  - What is the public interest?
  - How is the material presented?
36. The PCC's non-statutory basis means it has had the flexibility to respond effectively to many of the challenges thrown up by online developments, both in terms of examining complaints about newspaper websites (where remedies will often be different to those traditionally appropriate for printed errors) and in respect of setting guidelines for the handling by journalists of material that has originated on the internet.
37. As members of the Committee will know, the PCC plays no role in the granting or enforcement of injunctions. Nonetheless, in light of concerns about a variety of contempt of court issues, the Commission has recently held a seminar for senior,

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<sup>362</sup> Results of all polls commissioned by the Press Complaints Commission are available at <http://www.pcc.org.uk/externalrelations/research.html>.

<sup>363</sup> A report of the event co-hosted by the PCC and Polis can be read at [blogs.lse.ac.uk/polis/2010](http://blogs.lse.ac.uk/polis/2010).

<sup>364</sup> The Commission's Online Working Group was set up in 2009; its members are Ian Walden, Simon Sapper, Anthony Longden and Ian MacGregor.



national newspaper representatives at which PCC executives and the Attorney-General will speak about aspects of reporting legal proceedings.

38. The Commission also operates its own system for dealing with pre-publication concerns – both from the point of view of complainants who believe they are likely to be the subject of a story and from the perspective of editors who are uncertain about the Code’s requirements. I deal with this in more detail in paragraph 60 (*et seq.*) below but it is important to recognise that many stories are not published because the requirements of the Code (and past PCC rulings) clearly argue against publication or because specific action by the PCC encourages restraint by newspapers and magazines. This is one of the PCC’s great success stories yet it is a difficult one to tell since the Commission cannot, of course, go into detail about the material it has helped to keep private. As has been noted before, our success in this area is inevitably measured by the invisible.
39. Measuring the PCC’s effectiveness in dealing with “bad behaviour” can be difficult, not least because judging the Commission’s impact fully would necessarily require an assessment of how often intrusive stories do not appear (and how often newspapers repeat – or do not repeat – errors of judgment which led to an intrusion). It is clear, however, that:
- in most cases where there is a breach of the Code of Practice, the PCC’s staff are able to obtain remedies to the satisfaction of complainant;
  - the development of the Editors’ Codebook and an expansion of the PCC’s training programme for in-post journalists have considerably widened knowledge and understanding of key rulings among editorial staff at newspapers and magazines around the country.
40. The PCC seeks feedback from every complainant whose complaint is ruled on or successfully resolved<sup>365</sup>. Because the survey is conducted anonymously, it is not possible to distinguish the results by Clause cited in the complaint, but looking at the overall results (which includes feedback from those whose complaints are rejected), the following points emerge:

- of those who rated our helpline staff gave them at least 7 out of 10 and the most popular score was the maximum 10;
- 78% of respondents said the time it took to deal with their complaints was “about right”;
- 73% said their complaint had been dealt with thoroughly or very thoroughly.

The clear sense from our feedback surveys is that those who use the PCC’s complaints service believe it to be thorough and effective.

41. Some complainants send substantive comments to us about their experiences. Some are set out in a document called ‘Perspectives’, which was produced as part of the

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<sup>365</sup> Many complaints out of the overall total do not fall within the PCC’s remit (for example because they are about adverts or TV programmes) or are not pursued beyond an initial approach by the complainant (usually because information requested by the Commission is not forthcoming). Further information is available in the PCC’s online Annual Review for 2010 - [www.pcc.org.uk/review10](http://www.pcc.org.uk/review10).

Commission's 2010 Annual Report. Also in that document, a copy of which I enclose, were statements from a wide variety of people whose work has involved the building of a relationship with the PCC – complainants, public representatives and editors. Some of the comments are reproduced here:

- i. "Thanks again, if only all the other complaint bodies I have been dealing with were as speedy and efficient as yourselves! Thanks for resolving this so quickly." (*a complainant*)
- ii. "Refreshing to communicate with people clearly intent on being honest and reaching a balanced [resolution] to issues." (*a complainant*)
- iii. "Many thanks for your help in this matter, I am very pleased about [the newspaper's decision not to publish] and can now give a sigh of relief - for now." (*a user of the PCC's pre-publication service*)
- iv. "Thank you for your help. I feel better now I know I can be left alone to give my husband all the support he deserves to get him out of hospital and home to his family where he belongs." (*a user of the PCC's pre-publication service*)
- v. "It is a big step to take on a major newspaper in such a public way but Scott Langham [PCC Head of Complaints], with whom I dealt directly, seemed very aware of the vulnerability felt by all complainants. I did not employ a lawyer and am very glad of that, both in terms of expense spared but also it meant I could remain personally involved every step of the way." (*TV presenter Clare Balding, who made a complaint against The Sunday Times*)
- vi. "The impact and pressure of the media on the families and the communities of West Cumbria [following a series of shootings in the summer of 2010] was completely overwhelming for many, and understandably so. In such high-profile situations I would urge the public - and organisations which represent the public - to make early contact with the PCC to help in trying to balance the right of journalists to report and the right of the shocked and the bereaved to avoid intrusion." (*Gill Shearer, Cumbria Police*)
- vii. "Our relationship with the PCC means that we can pick up the phone to them on an informal basis and seek guidance on the best way to work with the press. PCC staff will always answer honestly, so we can avoid taking forward unnecessary complaints. We value the experience the PCC has in dealing with complaints against newspapers, because it gives us access to their excellent judgement and sound advice." (*Nicola Peckett, Samaritans*)
- viii. "It is all too easy to criticise self-regulation by the media which is the task of the Press Complaints Commission. Nobody would pretend that it doesn't have shortcomings or that mistakes have not been made - and they get plenty of publicity. But it is in fact remarkably successful." (*Rod Dadak, partner, Lewis Silkin*)
- ix. "Receiving a PCC complaint always sends a slight shiver down my spine. Often much more so than a lawyer's letter. To have a complaint upheld for failing to abide by the Code would be a personal failure for myself as an editor and one I certainly don't want to share with my readers through a published adjudication. And that personal motivation is one of the key strengths of the PCC. It puts pressure on newspapers to go that extra mile to resolve a complaint, often pragmatically conceding ground and taking a more conciliatory tone than we would in a legal dispute." (*Donald Martin, Editor, Sunday Post*)

- x. “...every aspect of the PCC Code affects us. But rather than limiting us, it encourages us to raise our standards of responsibility and accuracy. When it comes to real life, the guidelines provide a framework of common sense and respectful behaviour. In the celebrity arena the area of privacy is notoriously tricky to navigate. Celebs rely on our titles for self-promotion but can cite privacy issues when less flattering stories circulate. On the rare occasions that Closer receives a complaint, the PCC maintains neutrality whilst attempting to broker resolutions that ensure the often precarious - but symbiotic - working relationship between agents and publications can continue.” (Lisa Burrow, Editor, *Closer magazine*)

42. More generally, the Commission regularly commissions market research to establish public attitudes towards its work. In 2010 an online attitude survey was conducted among 1,000 nationally representative adults in the UK by Toluna<sup>366</sup>. Of respondents who expressed an opinion, 75% thought the PCC to be effective or very effective.

**Does the PCC have sufficient powers to provide remedies for breaches of the Editors’ Code of Practice in relation to privacy complaints?**

43. As noted in paragraph 10 above, there are a variety of ways in which complaints to the Press Complaints Commission can be remedied. Indeed, it is the primary aim of the PCC to seek remedies to the satisfaction of complainant whenever possible – except in rare cases when a breach of the Code is so serious that no remedy can realistically be sufficient<sup>367</sup>. All of the remedies listed in paragraph 10 can be employed in respect of privacy cases, depending on the view of the complainants as to what action may be appropriate in their particular circumstances.
44. Some complainants are inevitably reluctant for the resolution of their complaint to result in further published material. Consequently, PCC staff often work towards settlements that achieve:
- the removal of intrusive material;
  - assurances about no future publication;
  - private apologies from editors directly to complainants and;
  - in some cases, donations to charity or *ex gratia* payments to complainants in recognition of the distress caused by the intrusion.
45. In any cases where a published apology (or correction) is published, prominence must be agreed in advance following a Code change earlier this year.<sup>368</sup> This is not a facility

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<sup>366</sup> The sample was drawn from Toluna's online panel. Toluna is a global organisation running communities of 4 million members across 34 markets. Over 1,500 of the world's brands, market research firms and advertising networks use Toluna's online panels and technology to power their research activities. Many of these clients are global media organisations such as the BBC, ITV, Condé Nast, Canal Plus and Gruppo24ORE. Toluna are members of the The Market Research Society and Esomar. Quotas were set to ensure the total sample reflected the latest census data in terms of age, gender, region and marital status.

<sup>367</sup> Breaches of the Code in relation to the identification of victims of sexual assault are rare; they are also so serious that they are not generally open to a mediated settlement. The PCC has tended always to uphold such complaints.

<sup>368</sup> The vast majority of all corrections and apologies negotiated by the Commission are published on the same page or further forward than the original transgression (or in a dedicated corrections column). The full prominence statistics are in Appendix 6.

available to the courts. Failure to agree prominence (or publication of a correction or apology without “due prominence”) could result in an adverse ruling by the Commission.<sup>369</sup>

46. Summaries of all resolved complaints are published by the PCC on its website. This is intended to inform future journalistic practice and to provide public vindication of the concerns raised. In any case the complainant may choose to remain anonymous.
47. If a sufficient remedy to the complaint is not forthcoming (and if a public interest defence put forward by the offending title is considered by the PCC to be inadequate) the Commission will issue a public ruling in favour of the complainant. The complainant may remain anonymous if they so wish – and the PCC will not repeat intrusive information in its ruling without consent. As well as publishing the ruling itself, the Commission will then require the newspaper or magazine it has criticised to publish the adjudication in full (without edition or omission), with a headline reference to the PCC and with “due prominence”. Failure to publish in line with these requirements may result in a further adverse ruling.<sup>370</sup>
48. The fact that the large majority of complaints are resolved by agreement is one indication that editors wish to avoid public censure by the Commission. The fact that PCC staff are so regularly contacted by editors for advice in advance of publication is another. The dismay with which editors often greet the news that an adjudication has been made against them is a third.
49. In serious cases, the Commission may agree that a personal letter of admonishment from the Chairman should be sent to the editor. The PCC may also seek assurances that changes have been made to editorial practices so that mistakes are not made again. In relation to the most egregious breaches of the Code, the Commission will formally refer an editor to his or her publisher for action. (Since many journalists are required by their contracts of employment to adhere to the Code of Practice, failure to do so can lead to internal disciplinary proceedings.)
50. As noted above (paragraph 40), feedback from those whose complaints have been ruled on or mediated by the Commission is largely positive. In relation to the question of sanctions, it be worth noting that an Ipsos MORI poll commissioned by the PCC in 2006 and the Toluna research of 2010 both indicated that prompt apologies were more important to respondents than fines (particularly if monetary punishments were preceded by lengthy legal wrangling).<sup>371</sup>
51. The Commission generally takes the view that the obligation to publish a critical ruling is an effective sanction. However, it recognises that this is a key issue for debate in terms of possible reforms of the system of press regulation in the United Kingdom. A sub-committee of the Commission was set up in July to lead a review of all aspects of press regulation in its current form and will examine this matter further as part of its work over forthcoming weeks.

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<sup>369</sup> See for example *Boswell-Harper v Daily Express*: [www.pcc.org.uk/news/index.html?article=NDYwNA](http://www.pcc.org.uk/news/index.html?article=NDYwNA).

<sup>370</sup> See *Natalie Cassidy, the PCC and Woman*: [www.pcc.org.uk/news/index.html?article=NTY4MQ](http://www.pcc.org.uk/news/index.html?article=NTY4MQ)

<sup>371</sup> The results of all polling and research commissioned by the PCC since 2006 can be seen in full at [www.pcc.org.uk/externalrelations/research.html](http://www.pcc.org.uk/externalrelations/research.html)

52. The Reform sub-committee comprises six members of the Commission (four public and two editorial):

- i. Michael Smyth, Chairman, public member;
- ii. Simon Sapper, public member;
- iii. Jeremy Roberts QC, public member;
- iv. Professor Ian Walden, public member;
- v. Peter Wright, editorial member; and
- vi. Anthony Longden, editorial member.

**Should the PCC be able to initiate its own investigations on behalf of someone whose privacy may have been infringed by something published in a newspaper or magazine in the UK?**

53. The PCC's Articles of Association<sup>372</sup> state the following at paragraph 53.3:

*“A complaint may be made by an individual or by a body of persons (whether incorporated or not) but, in addition to the requirements of Article 53.1, shall only be entertained or its consideration proceeded with if it appears to the Commission that:  
(a) the complaint is made by the person affected or by a person authorised by him to make the complaint...”*

54. However, at paragraph 53.4, the Articles of Association make clear that:

*“Notwithstanding the provisions of Article 53.3, the Commission shall have discretion to consider any complaint from whatever source that it considers appropriate to the effective discharge of its function.”*

55. In relation to some Clauses of the Code (the so-called “victimless Clauses” such as those relating to Financial Journalism or Payments to Criminals) the PCC has investigated concerns of its own volition. However, while it is possible for the PCC also to initiate its own investigations on behalf of someone who has experienced a possible invasion of privacy, it has not done so for a number of reasons:

- i. it would be impossible (and discourteous) to assess whether someone has had their privacy intruded upon without that person's cooperation;
- ii. the Commission respects that people have an absolute right not to complain, which might be for any number of reasons. In fact, the Commission could arguably breach someone's privacy under the Human Rights Act by insisting on investigating an article about them without their consent;
- iii. publication of a PCC ruling or statement without the consent of the apparent victim might lead to a further invasion of their privacy.

56. This general policy is followed by the vast majority of non-statutory press councils around the world.

57. Notwithstanding these principles, if a third party has raised an apparently significant issue, the PCC proactively uses this as a trigger to contact the subject of the story to see

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<sup>372</sup> Available at [www.pcc.org.uk/assets/111/PCC\\_Articles\\_of\\_Association.pdf](http://www.pcc.org.uk/assets/111/PCC_Articles_of_Association.pdf).

whether he or she might wish to complain, through a number of different means: police; coroners; hospitals; PRs etc. The PCC also proactively contacts relevant individuals of its own volition, if they appear to require assistance, especially in instances where they may be the subject of insistent media approaches (see also paragraph 66-70).

58. In this way the Commission seeks to ensure that those who wish to complain (even if they did not initially know about the PCC's role) are equipped to do so, without compromising individuals' ability to decide for themselves whether to request a PCC investigation. A record of our proactive approaches from May 2010 (when records began to be kept) to September 2011 appears as Appendix 3.
59. Research commissioned by the PCC in 2010, carried out by Toluna, asked respondents whether they believed it would be proper for a regulatory body to publish its views on a possible breach of its Code without the consent of the subject affected by the breach. Only 25% agreed that such actions by the regulatory body would be "proper".<sup>373</sup>

**Should the PCC have the power to consider the balance between an individual's privacy and freedom of expression prior to publication of material – or should this power remain with the courts?**

60. The PCC does not have the legal authority to prevent publication of contentious material and to invest it with such powers may create certain practical difficulties.
61. However, it is also important to emphasise that the Commission (and its staff) are very regularly asked to consider questions concerning the appropriate balance between privacy and freedom of expression in advance of publication. This can happen in one of two ways:
- i. an editor will contact the PCC and indicate that he or she is considering the possible publication of a story. They will ask PCC staff for advice about how the requirements of the Code may impact on the proposed material and about whether there are precedent rulings of which they should be aware. PCC staff will offer advice but the final decision about whether to proceed with publication remains with the editor. (The involvement of the PCC office pre-publication does not affect the consideration of any formal complaint later. The advice comes from the staff of the PCC, not the Commission. The Commission is not informed of the content of the advice. Should material be published, and a complaint be made, the Commission reaches a judgement on the merits of the case.);
  - ii. a complainant will contact the Commission with concerns about material they believe is to be published about them (or about contact by journalists which they wish to cease). If appropriate, the PCC's staff will circulate requests on behalf of individuals with such concerns to ensure that editors are informed in their decision-making about possible publication.

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<sup>373</sup> See [http://www.pcc.org.uk/assets/111/PCC\\_Survey\\_2010.pdf](http://www.pcc.org.uk/assets/111/PCC_Survey_2010.pdf)

62. The result of this work is that stories, which might otherwise have been published, do not appear. The Committee may be aware of comments by the former News of the World David Wooding to the effect that stories were regularly not pursued because of concerns that to proceed would lead to a possible breach of the Code of Practice.
63. All pre-publication contacts with editors are now logged (and have been since August of this year – see Appendix 5). We also log all instances where PCC staff assisted complainants prior to publication. This is a considerable proportion of our work now, as the tables in Appendix 4 – setting out activity since the beginning of 2010 – demonstrate.
64. The advantages for individuals in using the PCC’s pre-publication services may be summarised as follows:
- i. there is no cost involved;
  - ii. the antagonism sometimes associated with legal proceedings is generally not present;
  - iii. because of the voluntary and flexible nature of the PCC’s operation, its pre-publication work can be light-touch and personal;
  - iv. ultimately, the Commission can – by dint of persuasion and sound advice – prevent intrusions from taking place.
65. While the Commission remains open-minded about the possibility of formalising its pre-publication services, it would be reluctant to become simply a replica of a court, offering precisely the same outcomes as legal processes.
66. Indeed, the Commission arguably goes further already than a court would in the sense that it deals not only with concerns about material that may be published, it works to prevent what can be an even more distressing type of intrusion – unwanted journalistic contact. Invasions of privacy by physical harassment cause immense distress and yet are sometimes neglected in discussions about the balance between privacy and journalistic freedom.
67. The PCC first initiated its ‘anti-harassment’ service in 2004, in response to discussions about how best ‘media scrums’ could be dispersed. The system works along the lines set out in paragraph 53(i): a person finding themselves at the centre of unwanted media attention can make clear to the PCC that they do not wish or intend to speak to journalists and that they would like the attention to cease; the PCC will (if appropriate) pass on this ‘desist request’ to its database of senior editorial and legal contacts at relevant media outlets. Editors ignoring the request run a very clear of breaching the requirements of Clause 4 (Harassment) of the Code. Indeed, our experience is that requests are not complied with only on very rare occasions when an editor believes there is a genuine public interest in making a further approach to the individual concerned.
68. Because Ofcom does not have any role in pre-publication matters such as these, broadcasters have voluntarily fallen within the PCC’s ambit in this area, recognising of course that a media scrum without print journalists is still a media scrum.
69. This system, which is available to complainants 24 hours a days and which can have an impact on the ground within minutes, brings genuine relief to people who find

themselves caught up in a media whirlwind, often through no fault of their own. Every case necessitates consideration by PCC staff of the balance between an individual's privacy and freedom of expression prior to publication of material. As far as I know, no other non-statutory press council in the world offers such a service.

70. Writing about the PCC's assistance to those who find themselves at the centre of a media storm, Madeleine Moon, the MP for Bridgend said:

*“From experience I can say that the best insurance policy to have is the telephone number of the Press Complaints Commission. When disaster strikes and the media circus comes to town an impartial referee to help control the show is essential. I found the PCC advice, support and guidance invaluable. Its staff helped weather the torrent of stories which varied from the inaccurate to the hurtful and distressing.”<sup>374</sup>*

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<sup>374</sup> PCC Annual Review, 2010. Available at <http://pcc.org.uk/review10/perspectives/public-madeleine.php>



**Is there sufficient awareness in the general public of the powers and responsibilities of the PCC in the context of privacy and injunctions?**

71. The Commission has commissioned several polls to gauge public awareness of its services:
- i. in 2006 an Ipsos MORI poll found that 72% of respondents had “at least heard of” the PCC;
  - i. a 2008 survey of online users (also by Ipsos MORI) found that 85% of respondents were aware of the PCC, with nearly a quarter saying they knew the Commission either “very well” or a “fair amount”;
  - ii. Most recently, research by Toluna in 2011 found over half of the respondents knew something about the PCC and nearly 80% had heard of PCC.<sup>375</sup>
72. While it is encouraging that around four in five people have heard about the PCC (and while information about its services is likely to be quite easily accessible to anybody who suddenly finds themselves at the centre of media attention), the Commission recognises there is room for raising awareness of its work even further.
73. In 2010, the PCC developed a new advertising campaign, designed to increase awareness and inform the public about how the PCC can serve them. Space has been donated free of charge by the newspaper and magazine industry, and the adverts have regularly appeared across the national and regional press, and magazines.
74. This is an example of the message contained in the advertisement:
- “If you believe that something inaccurate or intrusive has been published about you, then you can come to the Press Complaints Commission for help. We’ll listen to your concerns and deal with your complaint at no cost.  
The PCC is the independent self-regulatory body for the UK newspaper and magazine industry. We enforce a Code of Practice and work to raise standards in the press. We offer a service that is fast, free and fair.  
We can also advise on concerns about material that hasn’t yet been published, or if you’re feeling harassed by journalists. For emergencies, we can be contact at any time of the day or night.  
Call us on 0845 800 2757 or visit [www.pcc.org.uk](http://www.pcc.org.uk) to find out more about the PCC and how we can help you.”*
75. The differing taglines on the adverts are: “We will look into your concerns”; “We will ensure your voice is heard”; and “We will listen to your concerns”.
76. As another way to communicate directly with the public the Commission hosts regularly Open Days around the United Kingdom and has done since 2003. The events allow members of the public to question representatives of the PCC and the local press about any matters they wish to raise. Open Days have been held in the following towns and cities: Manchester, Edinburgh, Cardiff, Belfast, Newcastle,

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<sup>375</sup> The results of these polls can be seen at <http://www.pcc.org.uk/externalrelations/research.html>.

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Liverpool, Glasgow, Birmingham, Oxford, Leeds, Ipswich, Nottingham, Southampton and Carlisle.

77. Increasingly, the Commission's efforts to raise awareness and understanding of its services are directed at those who may be well-placed to act as conduits for the flow of information to people who find themselves in a vulnerable position and at the centre of media attention. Most notably, this means working with police (particularly family liaison officers), Members of Parliament, central government departments, local government authorities, NHS Trusts and charities (e.g. Samaritans).
78. The Commission publishes key literature for the bereaved about how to deal with media attention following a death. It also publishes guides about the Code of Practice's provisions in specific areas, including journalistic harassment, children and reporting about hospitals.

## **Appendix One** **The Editors' Code of Practice**

The Press Complaints Commission is charged with enforcing the following Code of Practice which was framed by the newspaper and periodical industry and was ratified by the PCC in January 2011.

### **The Editors' Code of Practice**

All members of the press have a duty to maintain the highest professional standards. The Code, which includes this preamble and the public interest exceptions below, sets the benchmark for those ethical standards, protecting both the rights of the individual and the public's right to know. It is the cornerstone of the system of self-regulation to which the industry has made a binding commitment.

It is essential that an agreed code be honoured not only to the letter but in the full spirit. It should not be interpreted so narrowly as to compromise its commitment to respect the rights of the individual, nor so broadly that it constitutes an unnecessary interference with freedom of expression or prevents publication in the public interest.

It is the responsibility of editors and publishers to apply the Code to editorial material in both printed and online versions of publications. They should take care to ensure it is observed rigorously by all editorial staff and external contributors, including non-journalists, in printed and online versions of publications.

Editors should co-operate swiftly with the PCC in the resolution of complaints. Any publication judged to have breached the Code must print the adjudication in full and with due prominence, including headline reference to the PCC.

### **Clause I (Accuracy)**

- i) The Press must take care not to publish inaccurate, misleading or distorted information, including pictures.
- ii) A significant inaccuracy, misleading statement or distortion once recognised must be corrected, promptly and with due prominence, and - where appropriate - an apology published. In cases involving the Commission, prominence should be agreed with the PCC in advance.
- iii) The Press, whilst free to be partisan, must distinguish clearly between comment, conjecture and fact.
- iv) A publication must report fairly and accurately the outcome of an action for defamation to which it has been a party, unless an agreed settlement states otherwise, or an agreed statement is published.

## **Clause 2 (Opportunity to reply)**

A fair opportunity for reply to inaccuracies must be given when reasonably called for.

### **\* Clause 3 (Privacy)**

- i) Everyone is entitled to respect for his or her private and family life, home, health and correspondence, including digital communications.
- ii) Editors will be expected to justify intrusions into any individual's private life without consent. Account will be taken of the complainant's own public disclosures of information.
- iii) It is unacceptable to photograph individuals in private places without their consent.

*Note - Private places are public or private property where there is a reasonable expectation of privacy.*

### **\* Clause 4 (Harassment)**

- i) Journalists must not engage in intimidation, harassment or persistent pursuit.
- ii) They must not persist in questioning, telephoning, pursuing or photographing individuals once asked to desist; nor remain on their property when asked to leave and must not follow them. If requested, they must identify themselves and whom they represent.
- iii) Editors must ensure these principles are observed by those working for them and take care not to use non-compliant material from other sources.

## **Clause 5 (Intrusion into grief or shock)**

- i) In cases involving personal grief or shock, enquiries and approaches must be made with sympathy and discretion and publication handled sensitively. This should not restrict the right to report legal proceedings, such as inquests.
- \*ii) When reporting suicide, care should be taken to avoid excessive detail about the method used.

### **\* Clause 6 (Children)**

- i) Young people should be free to complete their time at school without unnecessary intrusion.
- ii) A child under 16 must not be interviewed or photographed on issues involving their own or another child's welfare unless a custodial parent or similarly responsible adult consents.
- iii) Pupils must not be approached or photographed at school without the permission of the school authorities.
- iv) Minors must not be paid for material involving children's welfare, nor parents or guardians for material about their children or wards, unless it is clearly in the child's interest.

v) Editors must not use the fame, notoriety or position of a parent or guardian as sole justification for publishing details of a child's private life.

**\* Clause 7 (Children in sex cases)**

1. The press must not, even if legally free to do so, identify children under 16 who are victims or witnesses in cases involving sex offences.

2. In any press report of a case involving a sexual offence against a child -

i) The child must not be identified.

ii) The adult may be identified.

iii) The word "incest" must not be used where a child victim might be identified.

iv) Care must be taken that nothing in the report implies the relationship between the accused and the child.

**\* Clause 8 (Hospitals)**

i) Journalists must identify themselves and obtain permission from a responsible executive before entering non-public areas of hospitals or similar institutions to pursue enquiries.

ii) The restrictions on intruding into privacy are particularly relevant to enquiries about individuals in hospitals or similar institutions.

**\* Clause 9 (\*Reporting of Crime)**

(i) Relatives or friends of persons convicted or accused of crime should not generally be identified without their consent, unless they are genuinely relevant to the story.

(ii) Particular regard should be paid to the potentially vulnerable position of children who witness, or are victims of, crime. This should not restrict the right to report legal proceedings.

**\* Clause 10 (Clandestine devices and subterfuge)**

i) The press must not seek to obtain or publish material acquired by using hidden cameras or clandestine listening devices; or by intercepting private or mobile telephone calls, messages or emails; or by the unauthorised removal of documents or photographs; or by accessing digitally-held private information without consent.

ii) Engaging in misrepresentation or subterfuge, including by agents or intermediaries, can generally be justified only in the public interest and then only when the material cannot be obtained by other means.

**Clause 11 (Victims of sexual assault)**

The press must not identify victims of sexual assault or publish material likely to contribute to such identification unless there is adequate justification and they are legally free to do so.

### **Clause 12 (Discrimination)**

- i) The press must avoid prejudicial or pejorative reference to an individual's race, colour, religion, gender, sexual orientation or to any physical or mental illness or disability.
- ii) Details of an individual's race, colour, religion, sexual orientation, physical or mental illness or disability must be avoided unless genuinely relevant to the story.

### **Clause 13 (Financial journalism)**

- i) Even where the law does not prohibit it, journalists must not use for their own profit financial information they receive in advance of its general publication, nor should they pass such information to others.
- ii) They must not write about shares or securities in whose performance they know that they or their close families have a significant financial interest without disclosing the interest to the editor or financial editor.
- iii) They must not buy or sell, either directly or through nominees or agents, shares or securities about which they have written recently or about which they intend to write in the near future.

### **Clause 14 (Confidential sources)**

Journalists have a moral obligation to protect confidential sources of information.

### **Clause 15 (Witness payments in criminal trials)**

- i) No payment or offer of payment to a witness - or any person who may reasonably be expected to be called as a witness - should be made in any case once proceedings are active as defined by the Contempt of Court Act 1981.

This prohibition lasts until the suspect has been freed unconditionally by police without charge or bail or the proceedings are otherwise discontinued; or has entered a guilty plea to the court; or, in the event of a not guilty plea, the court has announced its verdict.

\*ii) Where proceedings are not yet active but are likely and foreseeable, editors must not make or offer payment to any person who may reasonably be expected to be called as a witness, unless the information concerned ought demonstrably to be published in the public interest and there is an over-riding need to make or promise payment for this to be done; and all reasonable steps have been taken to ensure no financial dealings influence the evidence those witnesses give. In no circumstances should such payment be conditional on the outcome of a trial.

\*iii) Any payment or offer of payment made to a person later cited to give evidence in proceedings must be disclosed to the prosecution and defence. The witness must be advised of this requirement.

### **\* Clause 16 (Payment to criminals)**

i) Payment or offers of payment for stories, pictures or information, which seek to exploit a particular crime or to glorify or glamorise crime in general, must not be made directly or via agents to convicted or confessed criminals or to their associates – who may include family, friends and colleagues.

ii) Editors invoking the public interest to justify payment or offers would need to demonstrate that there was good reason to believe the public interest would be served. If, despite payment, no public interest emerged, then the material should not be published.

### **The public interest**

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

1. The public interest includes, but is not confined to:

i) Detecting or exposing crime or serious impropriety.

ii) Protecting public health and safety.

iii) Preventing the public from being misled by an action or statement of an individual or organisation.

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

3. Whenever the public interest is invoked, the PCC will require editors to demonstrate fully that they reasonably believed that publication, or journalistic activity undertaken with a view to publication, would be in the public interest.

4. The PCC will consider the extent to which material is already in the public domain, or will become so.

5. In cases involving children under 16, editors must demonstrate an exceptional public interest to over-ride the normally paramount interest of the child.

**Appendix Two**  
**PCC rulings**

**A Woman v News of the World**

*Clauses Noted:* 3 (Privacy)

*Complaint:* A woman complained to the Press Complaints Commission on behalf of her daughter that an article published in the News of the World on 17 September 2006 headlined ‘Lady Mucky wanted me rough and ready!’ intruded into her daughter’s privacy in breach of Clause 3 (Privacy) of the Code of Practice.

The complaint was upheld.

The article was an account, from the man’s point of view, of an affair between a man and a married woman whose husband was a member of an aristocratic family. The account included sexual details. The woman’s mother said that there was no public interest for publishing the story.

The newspaper noted that the complainant’s daughter had already spoken briefly to the Daily Mail and her remarks, confirming the affair, had been published (a complaint was also made about this newspaper). It was only fair that the man with whom she had a relationship should have a chance to give his side of the story.

The complainant said her daughter had simply responded to a question from a Daily Mail reporter, but she would have preferred the whole matter to have remained private and had not sought publicity for the affair. Her daughter was not a celebrity, and did not deserve to have intimate information about her private life published in the press. Moreover, her judgement had been affected by the bipolar disorder from which she was suffering – something that was known to the man who gave the interview.

The newspaper wrote to the complainant to express its regret for distress caused to her daughter.

*Decision:* Upheld

*Adjudication:* When reporting one party’s account of a relationship, newspapers must also have regard to the other person’s right to respect for their private life.

Some of the detail in the article – particularly the description of sexual activity – was of an intimate nature. The piece revealed matters that would normally be regarded as private. The newspaper would either have needed some public interest for doing so, or been able to show that the complainant had previously been happy to discuss similar matters in such detail. Neither of these possible defences was a feature in this case. The information contained in the article was out of proportion to that already in the public domain. The complainant had not courted publicity, and any limited public interest inherent in exposing adultery committed by someone who was married into an aristocratic family was insufficient to justify the level of detail in the piece. There was an intrusion into the woman’s privacy and the complaint was upheld.



Press Complaints Commission—Written evidence

*Relevant Rulings:*

Jones v Daily Sport, Report 63

Feltz v Sunday Mirror/Daily Mirror, Report 56

*Report: 74; Adjudication issued 29/01/07*

## **Mullan et al v Scottish Sunday Express**

*Clauses Noted:* 3 (Privacy)

*Complaint:* Ms Elizabeth Mullan, Mr Robert Weir & Ms Morag Campbell complained to the Press Complaints Commission that an article headlined “Anniversary shame of Dunblane survivors”, published in the Scottish Sunday Express on 8 March 2009, intruded into their sons’ private lives in breach of Clause 3 (Privacy) of the Editors’ Code of Practice.

The complaint was upheld.

The article reported that the survivors of the Dunblane shooting in 1996 – who were now turning 18 – had ‘shamed’ the memory of the deceased with ‘foul-mouthed boasts about sex, brawls and drink-fuelled antics’ posted on their social networking sites.

The complainants said that the coverage had seriously affected their sons by criticising them and unnecessarily drawing attention to them as Dunblane survivors – including by publishing photographs of them – when they had previously been shielded from public view. They were just ordinary teenagers, and the article constituted a serious intrusion into their private lives.

The newspaper argued that the information had been publicly accessible on social networking sites. The identities of the individuals were well-known, as they had been named at the time of the shooting. Nonetheless, it recognised that the tone of the coverage was ill-judged and unjustified, and published a lengthy apology. It sincerely regretted any upset or distress caused to the families, and offered to meet them to discuss the matter or to send private letters of apology.

The complainants said that the published apology was unsatisfactory, and had only been made because of a national outcry and a petition which had attracted 11,000 signatures.

*Decision:* Upheld

*Adjudication:* This case represented the latest example of newspapers using material that has been uploaded by members of the public on to social networking sites. The Commission considers that it can be acceptable in some circumstances for the press to publish information taken from such websites, even if the material was originally intended for a small group of acquaintances rather than a mass audience. This is normally, however, when the individual concerned has come to public attention as a result of their own actions, or are otherwise relevant to an incident currently in the news when they may expect to be the subject of some media scrutiny. Additionally, if the images used are freely available (rather than hidden behind strict privacy settings), innocuous and used simply to illustrate what someone looks like it is less likely that publication will amount to a privacy intrusion. Circumventing privacy settings to obtain information will require a public interest justification.

In this case, while the boys’ identities appeared to have been made public in 1996, it was also the case – as the article itself had recognised – that they had since been brought up away from the media spotlight. The article conceded that ‘no photographs of any of the children have been seen in more than a decade’. They were not public figures in any meaningful

## Press Complaints Commission—Written evidence

sense, and the newsworthy event that they had been involved in as young children had happened 13 years previously.

Since then they had done nothing to warrant media scrutiny, and the images appeared to have been taken out of context and presented in a way that was designed to humiliate or embarrass them. Even if the images were available freely online, the way they were used – when there was no particular reason for the boys to be in the news – represented a fundamental failure to respect their private lives. Publication represented a serious error of judgement on the part of the newspaper.

Although the editor had taken steps to resolve the complaint, and rightly published an apology, the breach of the Code was so serious that no apology could remedy it.

*Report: 79; Adjudication issued 22/06/09*

## **Turner v Birmingham Mail**

*Clauses Noted:* 3 (Privacy), 5 (Intrusion into grief or shock), 8 (Hospitals)

*Complaint:* Ms Sue Turner, Chief Executive of the Birmingham and Solihull Mental Health NHS Trust, complained to the Press Complaints Commission that articles in the Birmingham Mail and Birmingham Mail Extra of 20 February and 25 February 2010, headlined "Suicide pact" and "Our suicide pact" respectively, were intrusive in breach of Clause 3 (Privacy), Clause 5 (Intrusion into grief or shock) and Clause 8 (Hospitals) of the Editors' Code of Practice.

The complaint was not upheld.

The front-page articles reported that three patients at a Birmingham psychiatric unit, Main House, had - several days before publication - attempted suicide over concerns about the future of the unit. They had subsequently been informed that Main House was indeed to be closed down, which prompted the newspapers' articles. The articles were accompanied by pixellated photographs of the patients being informed of the decision - said in the coverage to have been "supplied by the patients themselves via their psychiatrist" - in which they were shown to be distraught at the news.

The complainant said that the residents were extremely vulnerable adults to whom the Trust owed a duty of care: they were not in a position to give any clear consent for the taking and publication of these photographs, which had been taken inside Main House. The complainant argued that the newspaper should have obtained consent from not only the patients but also their respective carers, consultants and/or relatives before publication. Indeed, while there is some assumption under the Mental Capacity Act 2005 that patients have capacity to make their own choices, it is not automatically the case that they do and the newspaper should have sought further guidance from appropriate individuals. The Trust was now unable to assess retrospectively whether the patients had the capacity to make decisions about the photographs, but considered that they would not have had the capacity to make such a decision due to their vulnerability.

The complainant said that the photographs had also been taken in breach of patient confidentiality by a GP who worked with the patients once a week, and was not their consultant or primary carer. He had been dismissed following a disciplinary hearing and the case had been referred to the General Medical Council.

The complainant stated that the Trust had received a number of complaints about the articles from the family of one of the patients and another former service user. The former service user said that she had been identified as her car had been recognised following the publication of a photograph of the exterior of Main House. The Trust was prepared to contact the concerned parent to support its complaint, but was worried about causing additional stress by doing so.

The newspapers said that the closure of Main House was a major local issue. When they received the photographs of the distressed patients they gave careful consideration to their publication. They felt justified in publishing for the following reasons: the photographs had been taken with the knowledge of the patients; they had been taken by a medical professional working with the patients; the patients, who were all adults, had given their

consent for publication and were actively keen for them to be shown; and a parent of one of the patients had supported the use of the images. The newspapers added that they had taken steps to protect the identities of the patients by pixellating their faces.

The newspapers said that they had given a voice to mental health patients who said that they were being ignored and distressed by the sudden closure of the unit midway through a public consultation. They had received no complaints from the patients or their families directly. They also said that - given the small size of the photograph of Main House - it would not have been possible to identify registration numbers of the cars.

*Decision:* Not Upheld

*Adjudication:* In making this decision the Commission wished to make clear that it took into consideration the many special circumstances of the case. While the Commission had not received a complaint from the individuals at the centre of the coverage, it decided that it was able to investigate a complaint from the NHS Trust, which was certainly a relevant party in the matter. In making this ruling, the Commission had to be particularly aware of the potentially competing positions of the Trust and the patients themselves, who were apparently content for publication to go ahead.

The protection of vulnerable individuals is at the heart of the Editors' Code and the question of intrusion in regard to patients at a mental health facility was clearly a serious matter. An attempt by the newspapers to ignore - or bypass - the terms of the Code, and compromise the welfare of patients, would be the subject of vigorous censure by the Commission. However, the Commission did not believe that the newspapers had made any such attempt on this occasion.

The key consideration for the Commission related to the question of appropriate consent. In normal circumstances, editors are rightly able to rely on the consent of affected parties to publish private information about them. In this case, the three patients at Main House had provided explicit consent (and apparent encouragement) for the publication of the images. However, the complainant had argued that this consent was insufficient, due to the vulnerable nature of the patients and concerns over their ability to make an informed decision.

This was an important point and one which the Commission weighed heavily. There were also two other significant factors, relating to the photographs, for it to bear in mind: they had been provided by a doctor, who was employed by the facility; and they had been pixellated by the newspapers, to prevent identification of the patients (who had also not been named in the articles). There was a final issue relating to the public interest inherent in the story, which reported the closure of a mental health unit and its impact on the patients who lived there (which had even led the patients apparently to seek to take their own lives).

At this stage, it was not possible for the Commission (or indeed the Trust) to establish the specific capacity of the patients to offer informed consent about publication. The Commission did recognise, though, that legitimate concerns would exist about the patients' capacity in this area. This was something which the newspapers had a responsibility to take into account. The Commission considered that patients' consent on its own may not be sufficient always to justify publication.

In the Commission's view, it was the existence of the other factors that tipped the balance in favour of the newspapers' decision to publish: the involvement of the doctor; the decision to pixellate; and the public interest in the story as a whole. The Trust's position was that the doctor, who had provided the images, had acted inappropriately and in breach of his own professional standards. However, it did not necessarily follow that the newspapers, in making use of the images, had acted in breach of their own professional standards. At the time of publication, the newspapers had to be able to give weight to the fact that the image had been provided by a medical professional, who was involved in the care of the patients. In any case, the newspapers had not published the photographs unaltered, but had ensured that the patients' identities were not revealed to a wide audience.

In all of these circumstances taken together, the Commission did not consider that the newspapers' actions represented a failure to respect the private lives of the patients in breach of either Clause 3 (Privacy) or Clause 8 (Hospitals) of the Code. This was not an easy decision, but the Commission in the end found that the newspapers had managed to balance their duty to behave responsibly towards vulnerable individuals with the need to cover a story of important public interest.

Clause 5 refers to publication being "handled sensitively" at times of grief or shock. This clause normally applies to the aftermath of a death or serious accident, which was not the case here. The Commission did not consider that the newspapers had handled their coverage of what was a distressing time for the patients in an insensitive way.

Finally, the Commission did not consider that the publication of a photograph of the outside of Main House, which showed a number of cars in the car park without clearly showing their registration numbers, represented an intrusion into the private life of a former service user in breach of Clause 3.

*Date Published: 04/08/2010*

## **Liberal Democrat Party v The Daily Telegraph**

*Clauses Noted:* 10 (Clandestine devices and subterfuge)

*Complaint:* Mr Tim Farron MP, President of the Liberal Democrat Party, complained to the Press Complaints Commission that a series of articles in The Daily Telegraph on 21 December 2010, 22 December 2010 and 23 December 2010 contained information which had been obtained using subterfuge in breach of Clause 10 (Clandestine devices and subterfuge) of the Editors' Code of Practice.

The complaint was upheld.

The articles quoted a number of comments made by senior Liberal Democrat MPs in their constituency surgeries which had been secretly recorded by the newspaper's journalists posing as constituents. The MPs featured included the Business Secretary, Vince Cable, in addition to Ed Davey, Steve Webb, Michael Moore, Norman Baker, Andrew Stunell, David Heath and Paul Burstow.

The complainant - who was formally acting on behalf of the MPs concerned, with their consent - said that the newspaper had embarked on a 'fishing expedition' "designed solely to entrap Members of Parliament" which had no plausible public interest justification. While robust media scrutiny of politicians was critical for a vibrant democracy, the manner in which the newspaper had sought information in this case had ramifications for the future: this would mean that MPs of all parties would be constrained from engaging in frank discussions with their constituents. He said that the practice threatened to undermine the privileged nature of the relationship between MPs and their constituents.

The newspaper denied that it had undertaken a 'fishing expedition'; rather, it had acted upon specific information it had received from parliamentarians and members of the public. In private meetings at the Conservative party conference in 2010, the editor had been informed by Conservative ministers including a Cabinet minister (themselves informed by local party activists) that the public and private views of some Liberal Democrat ministers were increasingly at odds, particularly on the issue of Coalition policies which had been backed publicly. Similar concerns had also been expressed separately to senior reporters and the issue was raised with several MPs in the course of various engagements. A consistent theme began to emerge of growing Liberal Democrat private dissatisfaction. The newspaper said that the Conservative ministers were understandably reluctant to go on the record, or provide information or contacts in Liberal Democrat constituencies to back up their concerns.

Additional enquiries with Liberal Democrat contacts had also led to claims of a growing divide within the party between those who wished to support Nick Clegg, and the Coalition in general, and those who wished for the party to assert its identity more clearly in public. Several people declined to go on the record. At the same time there were claims of Liberal Democrat tension over tuition fees with rumours of ministers wishing to resign (which were strongly denied in public). The newspaper had also been contacted by several readers with the same concerns.

After editorial discussion - where it was concluded that most of the information gathered could not be used as it might identify sources - the newspaper began to consider the

decision to go undercover to test the allegations. Previous newspaper investigations using extensive subterfuge were discussed, which had not been subject to censure by the PCC. The subterfuge had been kept to a minimum and was proportionate to the circumstances - posing as members of the public at constituency surgeries. The newspaper had been informed that the apparent dissatisfaction was, or potentially was, systemic (an impression strengthened after the first approaches). As such, a decision was taken to approach as many ministers as possible, especially in view of the attempt to establish the weight of its case. While it had attempted to arrange interviews with the entire Liberal Democrat front bench, ten ministers had been visited in total.

The newspaper said that its enquiry was undertaken in the public interest: it was predicated on the fact that there was "a reasonable expectation that some legitimate public interest would be served" (a factor to which the Editors' Codebook made reference), based on information received from multiple sources. Visiting constituency surgeries was the only way to do so without disproportionate effort. All the issues related to public policy under the responsibility of the minister and nothing personal had been raised. The manner in which the reporters sought to test the allegations was shown in the transcripts of the interviews which the newspaper provided as part of its evidence.

In the event, most of the ministers expressed opinions which were at odds with their public positions and statements: Ed Davey had publicly defended Coalition cuts in October 2010 yet, in the surgery, he had said that he was "gobsmacked" by the announcement on child benefits which was "dreamed up out of the blue" and said that housing benefit cuts were "deeply unacceptable" as they were going to "hit people while they are down"; Vince Cable had spoken carefully in public about the News Corporation bid for BSkyB owing to the legal process, yet had said to the reporters that he had "declared war on Mr Murdoch" ("I have blocked it, using the powers that I have got...his whole empire is now under attack"); Michael Moore had, on the day of the visit, told the BBC that the rise in tuition fees would prevent universities being "starved of the money they need to provide quality education" and - while the issue was "difficult" - there was no "workable alternative" but, to reporters, his view was very different (the decision was "ugly", "horrific" and "a train wreck" and the party's renegeing on their election pledge was "the worst crime a politician can commit"); and Paul Burstow had subsequently publicly acknowledged his embarrassment that he had said "I don't want you to trust David Cameron".

The newspaper said that its investigation had proved that the Liberal Democrat members of the Government were not consistent in their private and public statements, which it rightly brought to the attention of its readers and the wider public. The newspaper argued that a constituency surgery was not a private forum: while MPs had a duty of confidentiality to their constituents, constituents did not have such a duty for their MPs.

The complainant said that it was the public statements and comments of ministers which were the basis of collective ministerial responsibility, regardless of what other views they might hold, and which formed the basis on which politicians were judged by the electorate.

*Decision:* Upheld

*Adjudication:* Clause 10 of the Code states that newspapers "must not seek to obtain or publish material acquired by using hidden cameras or clandestine listening devices". It also makes clear that "engaging in misrepresentation or subterfuge...can generally be justified only



in the public interest and then only when the material cannot be obtained by other means". The Commission has consistently ruled that so-called 'fishing expeditions' - where newspapers employ subterfuge and use clandestine devices without sufficient justification - are unacceptable.

In determining whether a newspaper has embarked on a 'fishing expedition', the Commission must have regard for the circumstances which led to the decision to employ subterfuge. The questions for the Commission in this case were, ultimately, as follows: had the newspaper demonstrated that it had sufficient prima facie grounds for investigation before its reporters were asked to go undercover, such that would justify the recording of numerous MPs at their surgeries without their knowledge; and was such an investigation (using hidden listening devices) justified in the public interest?

There was a fine balance to be struck here. The Commission accepted from the outset that there was a broad public interest in the area the newspaper had chosen to investigate: the unity of a Coalition government, which was something of a new political departure in Westminster. The Code's definition of what is in the public interest includes "preventing the public from being misled by an action or statement of an individual or organisation" and the newspaper was seeking to highlight an apparent disparity between comments made by MPs on Coalition policies in public and comments made privately. The newspaper had said that it had acted on information from various sources, who had been unwilling to go on the record.

There were some grounds, therefore, for the newspaper's interest in this matter, and for it to devote resources to exploring how the Coalition was working in practice. In the Commission's view, the newspaper had not sought to discount the terms of the Code or the need for adherence to it. However, it felt that, nonetheless, the newspaper had reached the wrong decision in deciding to pursue subterfuge on this occasion for the following reasons.

First, the evidence on which the newspaper was acting (such as the Commission could see) was of a general nature. The newspaper did not appear to have any specific information (the significance of which could be established in advance) that the ministers in question had expressed private views at odds with Coalition policy. Rather, it was responding to broad assertions of party-wide disquiet, which perhaps could have been reported on an unattributed basis. It did so by focussing what amounted to disproportionately intrusive attention on a number of MPs (who had been selected purely on the basis of their ministerial position). This was demonstrated by the fact that - as the transcripts made clear - each minister had been asked to respond, in effect, to the same lines of questioning.

The Commission considered that there was an important dislocation here between the prima facie evidence and the method used to test it. It was notable, for example, that the newspaper was relying upon off-the-record comments from Conservative ministers on the subject of the Coalition to justify covert recordings of Liberal Democrats on the same subject. Those Ministers were being asked, in the Commission's view, to comment on a series of policy issues with the evident intent of establishing on which subject they might say something newsworthy.

Certainly, the level of subterfuge was - contrary to the newspaper's assertion - high. The Commission wished to make it clear that recording individuals using clandestine listening devices without their knowledge was particularly serious and intrusive, requiring a strong

public interest defence. Secretly recording a public servant pursuing legitimate public business was without question a serious matter.

On this occasion, the Commission was not convinced that the public interest was such as to justify proportionately this level of subterfuge. The newspaper had provided some supporting material to establish the claim in advance that there were differences of opinion and philosophy within the Coalition government. This was, in the context of debate about politics in the UK, significant. But the Commission did not consider that it was enough to warrant the use of undercover reporters taping MPs as they went about their constituency work. The Commission had to have regard for the importance of the democratic process (which it was in the public interest to preserve), which could be threatened if journalists were to be allowed to use hidden devices to record MPs' views, expressed within the confines of their constituency surgeries, in order to test broad claims about policy matters. This was particularly the case in regard to Ministers who were required to act in accordance with the principle of collective responsibility when commenting in public.

For the Commission to have sanctioned this method, it would have had to be convinced that a high level of public interest could reasonably have been postulated in advance. It did not believe that the Telegraph - although acting no doubt with legitimate intent - had sufficient grounds, on a prima facie basis, to justify their decision to send the reporters in. The complaint was therefore upheld.

The Commission did feel that the newspaper had uncovered material in the public interest regarding the remarks made by Vince Cable about the News Corporation bid for BSkyB, which had led to him being divested of his role in that decision. However, there had been no suggestion that the intention of the newspaper had been to explore how he had been handling the bid (it made clear in its coverage that Mr Cable had spoken "despite not being asked about the issue"), and the newspaper itself had chosen not to make it a focus of its first day's coverage. The test for the Commission was whether there were grounds in the first place to justify the subterfuge: the Cable disclosures about Sky were not relevant to that.

Other published material did reveal discrepancies between what Ministers had said representing the Government and what they said to the reporters, and was related to the policy areas highlighted by the reporters (views on particular policies such as, for example, child benefits and tuition fees). The Commission had due regard to the public interest in revealing this information. But, in the end, it did not feel that the public interest was sufficient to provide justification for the subterfuge.

The Commission recognised that the issue of how journalists make use of subterfuge deserved scrutiny, and went much wider than the Telegraph's actions on this occasion. It has undertaken to issue further guidance on the subject with a view to ensuring high standards across the industry.

#### *Relevant rulings*

Ryle v News of the World, Report 53  
Munro & Bancroft v Evening Standard, Report 54  
Monckton v Evening Standard, Report 64  
Date Published: 10/05/2011

### **A woman v Loaded**

*Clauses Noted:* 3 (Privacy)

*Complaint:* A woman complained to the Press Complaints Commission that an article headlined "Wanted! The Epic Boobs girl!", published in the February 2010 edition of Loaded, intruded into her privacy in breach of Clause 3 (Privacy) of the Editors' Code of Practice.

The complaint was not upheld.

The article featured a number of photographs of the complainant - who was said to have the "best breasts on the block" - taken from the internet and offered readers of the magazine a reward of £500 for assistance in encouraging her to do a photo shoot with it. The complainant said that the article was intrusive: the magazine had published her name and the photographs, which had been uploaded to her Bebo site in December 2006 when she was 15 years old, had been taken from there and published without permission. Given the length of time which had elapsed, she could not remember whether her site had any privacy settings in place and did not know the circumstances in which the photographs had been removed. The publication of the article had caused her upset and embarrassment.

The magazine said that that it had not taken the photographs from the complainant's Bebo site; rather, they were widely available on the internet. The complainant's photograph, for example, came up in the top three in a Google image search on the word "boobs". At the time of complaint, there were 1,760,000 matches that related to her and 203,000 image matches of her as the "Epic Boobs" girl. Moreover, the complainant's name had been widely circulated and achieved over 100,000 Google hits, including over 8,000 photographs.

The complainant said that - until the article appeared in the magazine - she was not aware that the images had been widely disseminated, something which the magazine considered to be surprising.

*Decision:* Not Upheld

*Adjudication:* This case raised the important principle of the extent to which newspapers and magazines are able to make use of information that is already freely available online. The Commission has previously published decisions about the use of material uploaded to social networking sites, which have gone towards establishing a set of principles in this area.

However, this complaint was different: the magazine had not taken the material from the complainant's Bebo site; rather it had published a piece commenting on something that had widespread circulation online (having been taken from the Bebo page some time ago by others) and was easily accessed by Google searches.

It was not a matter of dispute that images of the complainant had been freely available for some time (having been originally posted in 2006) or that she had been identified online as the person in the pictures. The Commission could quite understand that the complainant objected strongly to the context in which they appeared online: what were images of her and her friends in a social context had become proclaimed as "pin-up" material, the subject of innuendo and bawdy jokes.

## Press Complaints Commission—Written evidence

It was, of course, within this context that the magazine article operated. This was an important point: the magazine had not accessed material from a personal site and then been responsible for an especially salacious means of presenting it; instead it had published a piece discussing the fact that this material was already being widely used in this way by others.

The Commission did not think it was possible for it to censure the magazine for commenting on material already given a wide circulation, and which had already been contextualised in the same specific way, by many others. Although the Code imposes higher standards on the press than exist for material on unregulated sites, the Commission felt that the images were so widely established for it to be untenable for the Commission to rule that it was wrong for the magazine to use them.

That said, the Commission wished to make clear that it had some sympathy with the complainant. The fact that she was fifteen-years-old when the images were originally taken - although she is an adult now - only added to the questionable tastefulness of the article. However, issues of taste and offence - and any question of the legality of the material - could not be ruled upon by the Commission, which was compelled to consider only the terms of the Editors' Code. The Code does include references to children but the complainant was not a child at the time the article was published.

The test, therefore, was whether the publication intruded into the complainant's privacy, and the Code required the Commission to have regard to "the extent to which material is already in the public domain". In the Commission's view, the information, in the same form as published in the magazine, was widely available to such an extent that its republication did not raise a breach of the Code. The complaint was not upheld on that basis.

*Date Published: 11/05/2010*

## **Minogue v Daily Mirror**

*Clauses Noted:* 3 (Privacy)

*Complaint:* Ms Dannii Minogue complained to the Press Complaints Commission through Hackford Jones PR that an article headlined "Look who's Xpecting!", published in the Daily Mirror on 9 January 2010, intruded into her private life in breach of Clause 3 (Privacy) of the Editors' Code of Practice.

The complaint was upheld.

The article reported that Ms Minogue was expecting a baby with her boyfriend, Kris Smith. The complainant's representative said that she had not yet had her twelve-week scan at the time of publication, and the newspaper had known this. Nonetheless, it had gone ahead to publish the story which represented a gross intrusion into her private life.

The newspaper said that it was aware of the general 'first scan' rule in regard to pregnancy. However, the news of the pregnancy had been in the public domain before publication, appearing on the Faded Youth blog and on the Sydney Morning Herald website the previous day. In those circumstances, the news had already ceased to be private. The newspaper argued that information is either "in" or "not in" the public domain; it cannot be partially in the public domain. Nonetheless, the newspaper was happy to publish an apology to the complainant, as a gesture of goodwill.

*Decision:* Upheld

*Adjudication:* The Commission's case law on this matter is absolutely clear: "as a matter of common sense newspapers and magazines should not reveal news of an individual's pregnancy without consent before the 12-week scan, unless the information is known to such an extent that it would be perverse not to refer to it". This is because this scan can reveal complications relating to the health of the baby and the viability of the pregnancy.

For the newspaper to justify publication on this occasion, it would have to argue that the references in the Sydney Morning Herald and online - which were, in any event, speculative - made it "perverse" for it not to have referred to the pregnancy. This was manifestly an untenable argument and was rejected by the Commission. The Code specifically requires the Commission to have regard to the "extent" to which the information has previously appeared. This was no more than common sense: otherwise, any reference online would represent automatic justification for a newspaper to publish otherwise intrusive material.

On this occasion, the Commission considered that the article constituted a regrettable lapse in editorial judgement at the newspaper. It had no hesitation in upholding the complaint.

Relevant rulings

Riding v The Independent, Report 73

Church v The Sun, Report 75

*Date Published:* 28/01/2010

### **Minogue v Daily Record**

*Clauses Noted:* 3 (Privacy)

*Complaint:* Ms Dannii Minogue complained to the Press Complaints Commission through Hackford Jones PR that an article headlined "X Factor Dannii is pregnant", published in the Daily Record on 9 January 2010, intruded into her private life in breach of Clause 3 (Privacy) of the Editors' Code of Practice.

The complaint was upheld.

The article reported that Ms Minogue was expecting a baby with her boyfriend, Kris Smith. The complainant's representative said that she had not yet had her twelve-week scan at the time of publication, and the newspaper had known this. Nonetheless, it had gone ahead to publish the story which represented a gross intrusion into her private life.

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#### *Relevant rulings*

Riding v The Independent, Report 73

Church v The Sun, Report 75

*Date Published:* 28/01/2010

### **A woman v Nottingham Post**

*Clauses Noted:* 6 (Children)

*Complaint:* A woman complained to the Press Complaints Commission that an article headlined "Day of drama as bus ploughs into bridge", published in the Nottingham Evening Post on 12 December 2009, contained a photograph of her daughter which was published without consent in breach of Clause 6 (Children) of the Editors' Code of Practice.

The complaint was upheld.

The article reported that a bus full of primary school children on a day trip had crashed into a low railway bridge. The complainant objected to the inclusion in the coverage of a photograph of her daughter, together with numerous other children, being comforted by a policeman at the scene of the accident. Her daughter had been pictured in a clear state of distress and the complainant had not been asked for her consent for the photograph to appear. The child had been further upset by the publication of the image.

The newspaper said that the accident had occurred in a public place in full view of a number of onlookers. An immediate investigation had been announced and it had spoken to a number of angry parents who were concerned about what had happened. While there had been a lot of discussion at the time as to whether the use of the image was justified, it had ultimately decided that the publication of the photograph was in the public interest, given that that the story related to an important matter of public health and safety. In addition, the fact that there were no serious injuries or fatalities had been an important factor in deciding to move forward to publication.

*Decision:* Upheld

*Adjudication:* Newspapers are entitled to publish stories and pictures of serious road accidents, which take place in public and often have wide-reaching consequences. In this case, it was not in doubt that the bus crash - which involved more than fifty schoolchildren - was a serious incident which raised important questions in regard to public health and safety. The Commission did not wish to interfere unnecessarily with the newspaper's right to report the matter, which it generally had done in a sensitive manner.

However, it was clear that the complainant had not given her consent for the newspaper to either take or publish the photograph which showed her daughter in a state of distress. The subject matter of the close-up photograph certainly related to her welfare.

There may be occasions where the scale and gravity of the circumstances can mean that pictures of children can be published in the public interest without consent. In the specific circumstances of this case, the Commission did not consider that there was a sufficient public interest to justify the publication of the image. It accepted that the newspaper had thought carefully about whether to use the photograph, but the Commission considered that it was just the wrong side of the line on this occasion. The complaint was therefore upheld.

*Date Published:* 18/03/2010

**A woman v Leicester Mercury**

*Clauses Noted:* 6 (Children)

*Complaint:* A woman complained to the Press Complaints Commission that an article headlined "Tender arm of the law", published in the Leicester Mercury on 12 December 2009, contained a photograph of her daughter which was published without consent in breach of Clause 6 (Children) of the Editors' Code of Practice.

The complaint was upheld.

The article reported that a bus full of primary school children on a day trip had crashed into a low railway bridge. The complainant objected to the inclusion in the coverage of a photograph of her daughter, together with numerous other children, being comforted by a policeman at the scene of the accident. Her daughter had been pictured in a clear state of distress and the complainant had not been asked for her consent for the photograph to appear. The child had been further upset by the publication of the image.

The newspaper said that this was a serious accident in which there was a legitimate public interest. The children depicted in the photograph had not been injured and were all safe from further harm. The decision to publish the photograph had not been taken lightly: its main concern was the possible impact any use of the picture would have had on the children. The photograph had been taken on the street and had been unaccompanied by any private details of the children involved. It would also not have had an impact on the welfare of the children as it had appeared only in Leicester, outside their local area. It said that they would not have been embarrassed or distressed by the coverage.

*Decision:* Upheld

*Adjudication:* Newspapers are entitled to publish stories and pictures of serious road accidents, which take place in public and often have wide-reaching consequences. In this case, it was not in doubt that the bus crash - which involved more than fifty schoolchildren - was a serious incident which raised important questions in regard to public health and safety. The Commission did not wish to interfere unnecessarily with the newspaper's right to report the matter, which it generally had done in a sensitive manner.

However, it was clear that the complainant had not given her consent for the newspaper to either take or publish the photograph which showed her daughter in a state of distress. The subject matter of the close-up photograph certainly related to her welfare.

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*Date Published:* 18/03/2010



**Appendix Three**

**Proactive approaches by the PCC**

**2010**

No	Issue	Proactive action taken by PCC	Notes
1	Bus crash in Cumbria causing two fatalities to students and the driver.	Proactive approach to Cumbria Police passing on our details should any issues arise.	No further contact at the time but see further entry re: ensuing inquests.
2	Arrest of a man on suspicion of murdering three women.	Proactive approach to West Yorkshire Police passing on our details should any issues arise.	No further contact.
3	Shootings by Derrick Bird in Cumbria.	Several proactive approaches during the ongoing incident to Cumbria Police and NHS Trusts passing on our details should any issues arise. Also, approaches to family representatives of Derrick Bird and the Diocese of Carlisle to check up on how the family was coping with the media and give advice.	Number of further steps taken and ongoing contact with Cumbria Police.
4	Fox attacks in east London on very young children.	Proactive approach to Great Ormond Street Hospital passing on our details should any issues arise.	Family made clear through GOSH press office that press contact was not causing problems.
5	Photographs of crying children at a military funeral published in a national newspaper.	Proactive approach to Royal Air Force to see whether anyone wished to complain and provide information about the PCC.	No further contact.
6	Raoul Moat shootings.	Proactive approach to Northumbria Police passing on our details should any issues arise.	Follow up call to Northumbria Police on 9 July.
7	Death of young woman which had caused some third party complaints about inquest reports.	Proactive approach to family (via an intermediary) outlining the provisions of Clause 5 of Code and supplying information about how to complain to the PCC.	5 subsequent formal complaints made; all complaints resolved to the satisfaction of the complainant.
8	Four young men apparently committed suicide in and around the Dundee area.	Proactive approach to Tayside Police regarding Clause 5 of the Code and suicide reporting.	Good feedback from the police. Aware of guidance/Code and would contact should problems arise. Further contact from PCC office on 3 August after two more apparent suicides.
9	The Commission became aware of a blog published claiming that a family was being harassed	Direct contact made with blogger to offer advice on making a complaint, how we could help practically in	Desist notice sent to the media making clear that the family did not wish

Press Complaints Commission—Written evidence

	following the death of a child.	regard to harassment and to provide all necessary information.	to speak; arranged meeting with blogger to discuss media handling strategy in cases of bereavement; these comments fed into guidance issued by the PCC in June 2011; further note sent out at the time of the funeral in September 2010.
10	Media reports about the deaths of two parents and two toddlers.	Proactive approach to Hampshire Police passing on our details should any issues arise.	No further contact.
11	Reports of a young boy who died in washing machine accident.	Proactive approach to Derbyshire Police passing on our details should any issues arise.	No further contact.
12	PCC informed that a well-known family was having problems with the press.	Proactive approach to family to offer advice about harassment and other Code issues.	No further contact.
13	Two women had been found dead at their home.	Proactive approach to Hertfordshire Police passing on our details should any issues arise.	The press officer already knew about the PCC having dealt positively following a death in the past; no further contact.
14	Reports of an incident involving a woman who had placed a cat in a dustbin captured on CCTV.	Proactive approach to West Midlands Police to check whether there had been any specific problems/harassment.	No further contact.
15	Reports of an alleged MI5 employee found dead.	Proactive approach to the Metropolitan Police passing on our details should any issues arise.	No further contact.
16	Death of child at a holiday camp in North Wales.	Proactive approach to North Wales Police and authorities regarding ensuing media coverage.	Police confirmed that there were no problems with press so far; no public statement from family.
17	Death of a woman who had fallen from a building onto railings in Kensington.	Proactive approach to Metropolitan Police passing on our details should any issues arise.	Police confirmed that Family Liaison Officers would be passed a copy of the relevant advisory booklets.
18	The death of a British woman in Afghanistan.	Proactive approach to Foreign and Commonwealth Office and family given the high-profile reporting of the death, advising on our services.	The family confirmed that the media had responded sensitively to their wishes, and had no cause for complaint; grateful for the approach.

Press Complaints Commission—Written evidence

19	A number of reports of the death of a man killed on his farm.	PCC proactive approach to Sussex Police following 3rd party complaints under Clause 5. Offered details of the PCC's services including complaints work.	Police confirmed knowledge of PCC's services and had advised the family accordingly; no specific issues; Police requested more leaflets from PCC.
20	PCC aware of statement on a football club's website alleging misquotation.	Proactive approach regarding the statement offering advice under Clause 1 of the Code.	The club responded to thank the PCC for the information, and would consider making a complaint. No complaint eventually received.
21	PCC alerted, through Twitter, to possible Clause 11 issue in local newspaper.	Proactive approach to Lancashire Police to inform the family of the stipulations of the Code and determine whether they wished to complain.	No further contact but we updated the person who had originally drawn our attention to the issue about the action we had taken.
22	Impending return to UK of two hostages following their release by kidnappers in Somalia.	Proactive approach to Foreign & Commonwealth Office regarding potential harassment concerns and other Code issues.	FCO confirmed that PCC details would be given to the family. (We had had previous contact whilst the couple were still held hostage).
23	Reports that a family in Bristol in a high-profile national news story had requested privacy.	Proactive approach to FCO to see whether there had been any media harassment and to give general advice.	No further contact.
24	Media coverage of disappearance and death of Joanna Yeates.	Proactive approaches to Avon & Somerset Police passing on our details should any issues arise.	We have since provided information about the PCC to the Police to be passed to the relevant parties at the time of the trial.

2011

	Issue	Proactive action taken by PCC	Notes
1	Media coverage of Joanna Yeates death.	Proactive approach to local MP offering PCC services.	No further contact.
2	Media coverage of the arrest of a man in association with the death of Joanna Yeates.	Proactive approach to the man's lawyer explaining our services.	Followed up with further email on 31 January and then on 7 & 8 March following release of client without charge.

Press Complaints Commission—Written evidence

3	PCC alerted to statement by pop star's management company about inaccuracies in the media.	Proactive approach to management company to pass on PCC details and contacts.	No further contact.
4	PCC alerted to statement issued by family of man who died abroad about alleged harassment by journalists.	Proactive approach to FCO to remind of PCC services.	No further contact.
5	Media attention following barging incident on a female assistant referee at a football match.	Proactive approach to Referees' Association offering advice and contact details.	PCC informed that the referee is being supported and had no current concerns about media attention.
6	Media interest following Cumbria shootings.	Further approach to local police, authorities and family representatives. Sent copies of Editors' Code of Practice, and general advice about PCC services.	Follow up PCC contact on 14/07/2011 revealed that inquests had gone well; no problems at all with media.
7	Media attention after a TV star lost her baby.	Proactive approach to TV star's agent to give contact details and explain PCC services.	Email of thanks received; will be in touch if necessary.
8	PCC alerted to a national newspaper report about a cricketer's unhappiness with accuracy of report about him.	Proactive approach to cricketer's representatives offering advice and contact details.	No further contact.
9	PCC received numerous third party complaints about the accuracy of a report about the death of a rock star.	Proactive approach to the man's widow (via an intermediary) to pass on contact details and advice of PCC services.	Several emails/calls and then no further contact.
10	Cumbrian shootings inquests.	Proactive approach to the solicitors acting for some of the families to make them aware of PCC's ongoing liaison with Cumbria Police and note sent out on behalf of the families.	The solicitors acknowledged the note and thanked the PCC for the information.
11	Reports that an international cricketer was returning home early from World Cup for health reasons.	Proactive approach to English Cricket Board (ECB) to pass on PCC details and advice.	No further contact.
12	Media attention following the death of a woman.	Proactive approach to Wiltshire Police passing on contact details and offering advice.	No further contact.
13	Media attention following death of husband of an MP.	Proactive approach to the individual's agent explaining PCC services in the aftermath of a death.	Two formal complaints received; both resolved to the satisfaction of complainant.

Press Complaints Commission—Written evidence

14	Media reports of an attack on a girl outside her school.	Proactive approach to West Midlands Police and Birmingham Children's Hospital with information and explanation of PCC services.	Desist notice sent out on behalf of the family on 11 April making clear that the family did not wish to speak.
15	Media attention on family of young child shot in London.	Proactive approach to Metropolitan Police with information and explanation of PCC services.	No further contact.
16	Press attention following a Royal Navy officer who died on a submarine.	Proactive approach to MOD with information and explanation of PCC services.	No further contact.
17	Reports of the death of a stuntman.	Proactive approach to Kent Police with information and explanation of PCC services.	No further contact.
18	Press attention around 1st anniversary of shootings in Cumbria.	Emailed all editors about continued position of community.	Continued contact from PCC.
19	Press attention following two deaths in Braintree.	Proactive approach to Essex Police with information and explanation of PCC services.	No further contact.
20	The death of a prominent political figure at Glastonbury festival.	Proactive approaches to several Conservative Party representatives passing on contacts and details of PCC services.	Confirmed receipt; no further contact.
21	Media reports of the death of girl who had been hit by a falling tree branch. A number of third party complaints received.	Proactive contact with Cambridgeshire police and victim's college giving contact details and information about PCC services.	Mail Online altered headline following PCC request.
22	PCC alerted to reports that world famous footballer had alleged inaccuracies in Sunday newspaper article.	Proactive approach to footballer's representatives passing our contact details and information about PCC services.	No further contact.
23	PCC alerted to article in local newspaper about press attention following murder of a man's girlfriend.	Proactive contact with the woman, explaining PCC anti-harassment work and making her aware of our services.	No further contact.
24	Possible press interest in hospital staff following the high-profile deaths of several patients.	Proactive contact with Hospital with information and explanation of PCC's services.	Followed up in September 2011 following release of individual arrested in relation to the deaths; contacted her lawyers and media representative.
25	Possible press interest in families following the high-	Proactive contact with Police offering information and explanation	No further contact.

Press Complaints Commission—Written evidence

	profile deaths of several patients.	of PCC services.	
26	Possible press interest following the sudden death of a singer.	Proactive approach to singer's solicitors offering information and explanation of PCC services.	Information passed to the family; no further contact
27	The deaths of 3 men in Birmingham killed during the August riots.	Proactive contact with West Midlands Police offering help and including a link to the new bereavement guidance.	Followed up on 15 August; no further contact.
28	PCC alerted to a celebrity couple concerned about harassment after the birth of their child	Proactive approach to the couple explaining the PCC's work in this area and offering advice if necessary.	No further contact.
29	Possible press interest following death of two women abroad.	Proactive approach to British Embassy in Turkey offering advice and information about the PCC services.	No further contact.
30	Possible problems surrounding publication of photographs of the children of a celebrity couple on a newspaper website.	Proactive contact to the couple's lawyer and security contact offering assistance.	Representatives confirmed that they were very grateful for the contact and would be in touch with any future problems.
31	Possible press interest following the death of a man at a football match.	Proactive contact to South Wales Police offering assistance to the man's family.	Complaints received (including from the relevant Football Club and from the man's family) about coverage of the death.
32	Death of a British man in Kenya; assumed kidnap of his British wife.	Proactive contact to British Embassy in Nairobi offering assistance and link to relevant information.	No further contact.

**Appendix Four**  
**Pre-publication assistance**

**2010**

<b>No.</b>	<b>Contact</b>	<b>Issue</b>	<b>Action by PCC</b>	<b>Follow up</b>
1	Celebrity / Family of a celebrity.	A celebrity couple who were getting married were being approached by the media. They were concerned about possible breaches of their privacy and wanted advice.	Advised them on how best to deal with these approaches, explaining the terms of Clauses 3 & 4 of the Code.	No further concerns raised.
2	Celebrity / Family of a celebrity.	2 newspapers gave details of a celebrity pregnancy prior to the 12-week scan. PCC was advised formal complaints would be forthcoming and was asked to ensure no other papers published details.	Emailed all editors outlining concerns under Clause 3 of the Code.	Formal complaints resulted in upheld adjudications against the two specific publications; no other newspaper carried information following the PCC's intervention.
3	Celebrity / Family of a celebrity.	A magazine published details of a celebrity's alleged pregnancy.	Emailed all editors outlining concerns under Clause 3 of the Code.	Complaint to the PCC under Clause 3 about published article; pre-publication work successful for other newspapers.
4	Victim of crime.	A victim of violent crime many years previously was concerned about being identified as the convicted man was about to be released.	Emailed all editors to make them aware of the concerns.	The victim emailed the PCC to say they had not seen anything published and to express their gratitude.
5	Relatives of a criminal suspect.	The family of a confessed murderer needed advice after approaches from journalists as they did not wish to speak.	Emailed editors to let them know the family's wishes.	No further concerns raised.
6	Celebrity / Family of a celebrity.	A celebrity was concerned that a Sunday newspaper was going to published a private video which they claimed was not authentic	Contacted the newspaper directly to ensure it was aware of the celebrity's concerns.	Newspaper confirmed it would not run the pictures or story.
7	Relatives of criminal suspect.	Members of the family of a criminal suspect needed advice about media	Emailed editors to let them know the family's wishes.	No further concerns raised.

Press Complaints Commission—Written evidence

		approaches.		
8	Family of deceased.	The family wanted the PCC to make newspapers aware of request that funeral be private	Passed on the family's wishes to editors.	No further concerns raised.
9	Family of deceased.	A family wanted the media to be aware they had no wish to comment beyond a statement that had been given after the inquest.	Emailed all editors to make them aware of the family's request.	No further concerns raised.
10	Celebrity / Family of a celebrity.	A celebrity double act were concerned that pictures of their houses may be published in two national newspapers.	Advised them on how best to deal with these issues explaining the terms of Clause 3 of the Code.	No further concerns raised.
11	Celebrity / Family of a celebrity.	A celebrity was concerned about being identified in reporting of an impending court case involving a relative.	Emailed editors about the celebrity's concerns under Clause 9 of the Code.	No further concerns raised.
12	Family of deceased.	Follow up to previous contact made with the PCC; in advance of the funeral the family requested that no press attend.	Emailed the request to all editors and legal departments.	No further concerns raised.
13	Family of deceased.	The family requested privacy following a death.	Passed on a general request for privacy to all editors with a note that funeral would be private.	Further contact later in month before funeral.
14	Family of deceased.	The family raised concerns in advance of a private, family-only funeral.	PCC copied into and circulated more widely a legal letter on behalf of the family re: forthcoming funeral.	Further contact later in year before inquest.
15	Member of the public.	The father of an individual pictured at football match making controversial gesture contacted the PCC with concerns over his family's safety if a national newspaper published the man's photograph.	Emailed the editor outlining the concerns.	The newspaper decided not to name or photograph the individual as a result of the PCC's intervention.



Press Complaints Commission—Written evidence

16	Family of deceased.	The family of a young girl who took her own life wanted advice in regard to the forthcoming inquest; they had no wish to be approached for comments.	Passed on the parents' wishes to editors.	No further concerns raised.
17	Public figure.	A former leader of a local Council did not wish to be approached for comment following his resignation due to ill health.	The PCC circulated a letter from the Councillor expressing his concerns to editors.	Formal complaint received from complainant about some published articles; subsequently not pursued by complainant.
18	Family of deceased.	The mother of a young girl whose death was linked to Mephedrone (meow, meow) contacted the PCC about continued misreporting of her daughter's death.	Emailed all editors to they were aware of her concerns.	No further concerns raised.
19	Organisation.	Advice requested about the alleged secret recording of conversations between famous sports stars.	Circulated to all editors a copy of a letter sent out directly by solicitors, with particular reference to Clause 10.	No further concerns raised.
20	Celebrity / Family of a celebrity.	A celebrity concerned that a national newspaper had contacted them about a sensitive subject and private medical information which they thought may be published.	Emailed the newspaper outlining concerns under Clause 3 of the Code.	No further concerns raised.
21	Member of the public.	A young lady who had allegedly had a relationship with a celebrity contacted the PCC about a forthcoming story in a Sunday newspaper.	Emailed editor of the newspaper to ensure they were aware of the concerns.	No further concerns raised.
22	Family of deceased.	A family, which had previously complained successfully to the PCC under Clause 5, had a prepared statement for a forthcoming inquest; did not wish to speak directly to press.	Emailed all editors to make them aware of the concerns, and remind them of the previously upheld adjudication.	No further concerns raised.

Press Complaints Commission—Written evidence

23	Organisation.	Concerned over alleged inaccuracies to be published in a Sunday newspaper article.	Emailed editor with the concerns raised.	Formal complaint received about published story; complaint resolved between the parties.
24	Public figure.	A celebrity concerned following publication of topless photographs in a Sunday newspaper; she did not want to comment or for her elderly parents to be harassed.	Emailed the newspaper outlining her concerns.	No further concerns raised.
25	Celebrity / Family of a celebrity.	Concerned that nude photos would appear taken on a personal computer.	Passed the concerns raised under Clause 3 on to editors.	No further concerns raised.
26	Member of the public.	The wife of a man seriously injured in accident requested not to be contacted further by a local newspaper.	Emailed the editor outlining the concerns.	The newspaper confirmed no further contact would be made and that the husband's name does not appear in print or online.
27	Family of deceased.	Pre-publication contact from a local paper and the family's objections to method of death going into print.	Advised the family that it cannot prevent publication but passed on their concerns under Clause 5 of the Code	No further concerns raised.
28	Member of the public	Concerns raised about possible publication in national newspaper that the individual was working as an escort.	Passed on her concerns to the newspaper.	No article published.
29	Celebrity / Family of a celebrity.	A celebrity was concerned that a photograph on a Sunday newspaper website could lead to identification of his home.	Emailed the editor outlining the concerns under Clause 3 of the Code and the request that the photograph to be removed.	No further concerns raised.
30	Member of Royal family.	A Sunday newspaper published details of home address.	Copied into letter from solicitors which was	No direct PCC action.

Press Complaints Commission—Written evidence

			disseminated for information.	
31	Celebrity / Family of a celebrity.	A celebrity couple requested for any photos of their baby son to be pixelated to protect his privacy during a visit to theme park.	Passed on the request to all editors.	No further concerns raised.
32	Family of deceased.	The family wanted a reminder passed on to editors for the request for privacy in light of the beginning of the inquest.	Contacted all editors reiterating previous position.	No further concerns raised.
33	Family of deceased.	A local police family liaison office requesting that the family of murdered man not be contacted for comments.	Passed on the request from the police to all editors.	No further concerns raised.
34	Member of the public.	Lottery winner requested anonymity after big win.	Forwarded an email to all editors reminding them of the PCC Guidance Note and passing on the winner's request for anonymity.	No further concerns raised.
35	Family of deceased.	Privacy concerns following a death. The family did not wish to speak to the media, were concerned about possible coverage of the funeral and general sensitivity issues.	Emailed all editors with the family's concerns.	No further concerns raised.
36	Celebrity / Family of a celebrity.	Concerned about photos of children being published and children being photographed generally.	Emailed all editors outlining the concerns under Clause 6.	No further concerns raised.
37	Member of the public.	A former boyfriend of a missing girl worried about approaches from the media.	Emailed all editors outlining concerns about ongoing contact from media outlets.	No further concerns raised.
38	Member of the public.	Concerned about emails received from a Sunday newspaper journalist.	Emailed newspaper making clear that the individual was unable to speak because of client confidentiality.	No further concerns raised.
39	A serving policeman.	Concerned about possible imminent publication of information regarding an	PCC emailed newspaper outlining the	No article published.

Press Complaints Commission—Written evidence

		employment claim in a national newspaper.	concerns under Clause 3 of the Code.	
40	Family of deceased.	Privacy concerns before funeral.	Emailed all editors to make clear they were aware that the funeral would be private affair.	No further concerns raised.
41	Family of deceased.	Parents whose children had died abroad did not wish to speak to the press, and were concerned about media presence at the forthcoming funeral.	Emailed all editors outlining their concerns.	No further concerns raised.
42	Victim of crime.	Approaches made to the victim at on ongoing court case. Concerned about privacy and identification following crime.	Emailed all editors outlining the concerns under Clause 3 of the Code	No further concerns raised.
43	Celebrity / Family of a celebrity.	A celebrity concerned that inaccurate and intrusive reports that she was 12 weeks pregnant would be published.	Emailed all editors outlining concerns under Clauses 1 & 3 and forwarded message denying the claims.	No further concerns raised.
44	Family of deceased.	Family concerned about inaccurate reports in some national newspapers.	Emailed editors concerned outlining concerns of the family.	PCC received formal complaints about various newspapers; all complaints resolved.
45	Member of the public.	Concerned about privacy issues and not wanting to be contacted by media.	Emailed all editors outlining concerns under Clause 3 of the Code.	No further concerns raised.
46	Member of the public.	Concerned over comments attributed to his daughter in a Sunday newspaper.	Emailed all editors to make them aware of concerns.	No further concerns raised.
47	Member of the public.	Concerned about repeated contact of elderly mother for comment.	Emailed all editors outlining concerns under Clause 4 of Code and to make clear that none of the family wish to be contacted.	No further concerns raised.

Press Complaints Commission—Written evidence

48	MP.	Concerned about approaches to his daughter by a Sunday newspaper.	Emailed the newspaper outlining concerns under Clause 6 of the Code	The paper confirmed it had no plans to publish any information.
49	Family of deceased.	Concerned about possible media contact because of forthcoming inquest.	Emailed all editors to pass on concerns.	No further concerns raised.
50	Family of deceased.	Concerned in advance of a funeral of someone related to a celebrity - private, family-only occasion.	Emailed all editors to ensure they were aware of request for funeral to be a private affair.	Excellent feedback from police as the request helped the family to grieve privately.
51	National organisation.	Ongoing coverage of multiple suicides in London.	Passed on emails and reminded editors of suicide reporting guidance note.	No further concerns raised.
52	Solicitor.	Concerned over publication of illegally obtained emails including personal information.	Emailed all editors outlining concerns under Clauses 3 and 10 of the Code	No further concerns raised.
53	Member of the public.	Concerned about possible contact by media for comments about death of her husband who was a police officer.	Her statement sent out through PA, which the Commission also passed on; made clear she would not be commenting.	No further concerns raised.
54	Member of the public.	Pre-publication concerns regarding allegations against him, which he denied.	Emailed the publication to pass on his concerns.	No further concerns raised.
55	Member of the public.	Concerned regarding protection of anonymity of a lottery winner.	Emailed all editors reinforcing the lottery guidance note.	No further concerns raised.
56	Family of deceased.	Family concerned about privacy at the forthcoming funeral.	Emailed all editors outlining concerns under Clause 3 of the Code and the request for funeral to be a private family occasion.	No further concerns raised.
57	Celebrity / Family of a celebrity.	A celebrity couple concerned in advance of their son's first birthday party about possible	Emailed all editors outlining concerns under Clauses 3	No further concerns raised.

Press Complaints Commission—Written evidence

		invasions of privacy.	and 6 of the Code.	
58	Various authorities.	Concerned about possible jigsaw identification of children who had been sexually abused.	Circulated email to all editors setting out the issues under Clause 7 of the Code.	No further concerns raised.
59	Student.	Concerned about mis-quote in a national newspaper about the student protests. The student denied the quotes and did not wish to comment further.	Emailed all editors to pass on concerns.	Formal complaint received by PCC about quotes; resolved between the parties.
60	Member of the public.	Concerned about forthcoming issue of a Sunday newspaper referring inaccurately to a charity.	PCC passed on the correspondence to newspaper concerned.	Newspaper confirmed they had no intention of mentioning the charity.
61	Family of criminal suspect.	Concerned about media speculation about their son.	Emailed all main newspaper groups with a copy of a letter outlining concerns under Clauses 3 & 4 of the Code.	No further concerns raised.
62	Various authorities.	Concerns about jigsaw identification of children who had been sexually abused.	PCC reminded all editors of previously-circulated message, prior to the sentencing hearing.	No further concerns raised.
63	Family of deceased.	Family had requests for comment from media when they did not wish to speak.	Emailed all editors to make them aware of the position.	No further concerns raised.

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No	Contact	Issue	Action by PCC	Follow up
1	Celebrity / Family of a celebrity.	A soap star was concerned about possible publication of an article containing inaccuracies.	Emailed the publication to ensure it was aware of concerns.	Newspaper made changes to story; celebrity declared he was happy with alterations.

Press Complaints Commission—Written evidence

2	Family of deceased.	The family of a woman murdered abroad were concerned about a video being released to the media. Concerned about possible publication of unseen footage.	Emailed all editors outlining concerns under Clauses 3 & 5 of the Code.	No further concerns raised.
3	Member of the public.	Concerned about approaches by a national newspaper.	Emailed newspaper outlining concerns under Clause 6 of the Code.	No further concerns raised.
4	Celebrity / Family of a celebrity.	Concerned about approach by journalist concerning her health.	Emailed all editors outlining concerns under Clause 3 of the Code.	No further concerns raised.
5	Member of the public.	Concerned about a Sunday and a national newspaper possibly printing inaccurate stories about her.	Emailed newspapers mentioned outlining concerns under Clause 1.	Email from the national newspaper confirming no intention to publish.
6	MEP.	An MEP concerned about a former employee selling story to a Sunday newspaper using stolen documents as evidence.	Emailed newspaper directly outlining concerns under Clauses 1 and 10 of the Code.	No further concerns raised.
7	Celebrity / Family of a celebrity	A soap star concerned over private details which might appear in a national newspaper.	Emailed newspaper directly outlining concerns under Clause 3 & 6 of the Code.	No further concerns raised.
8	Celebrity / Family of a celebrity.	A film actor concerned about a story appearing that he is looking for property with his partner.	Emailed newspaper directly making clear the position under Clause 3 of the Code.	No further concerns raised.
9	Family of deceased.	The wife of a man who committed suicide concerned about a story that was appearing in a national	Emailed newspaper directly to make clear concerns under Clauses 1	No further concerns raised.

Press Complaints Commission—Written evidence

		newspaper that was inaccurate and intruded in her privacy.	& 3 of the Code.	
10	Celebrity / Family of a celebrity.	A young soap star concerned about the accuracy of a story to be published in a national newspaper.	Emailed newspaper directly making clear the position under Clauses 1 & 6 of the Code.	No further concerns raised.
11	Celebrity / Family of a celebrity.	A Premier League footballer concerned about a proposed story giving details of an individual pregnant with his baby before 12 week scan.	Emailed newspaper directly making clear the position under Clause 3 of the Code.	No further concerns raised.
12	Member of the public.	Concerned about re-publication of a photograph of her with her former partner who had been murdered.	Emailed specific editors making clear concerns.	Action taken by numerous newspapers to remove her images from archives.
13	Member of the public.	A CEO of a company concerned about media speculation over state of his marriage by a newspaper.	Emailed newspaper directly outlining concerns under Clauses 4 & 10 of the Code.	Formal complaint received.
14	Celebrity / Family of a celebrity.	A TV presenter concerned about possible press attention after birth of her son.	Emailed all editors outlining concerns under Clause 3 of the Code.	No further concerns raised.
15	Celebrity / Family of a celebrity.	A sports presenter concerned about an approach by a newspaper over inaccurate speculation of an alleged injunction and an alleged affair.	Emailed newspaper directly making clear the position under Clause 1 and 3 of the Code.	No further concerns raised.
16	Celebrity / Family of a celebrity.	A former Premier League footballer concerned about an approach by a newspaper over speculation of an alleged injunction about his alleged affair.	Emailed newspaper directly making clear the position under Clause 1 and 3 of the Code.	No further concerns raised.



Press Complaints Commission—Written evidence

17	Member of Royal Family.	Member of the Royal Family concerned by a story due to be published about an alleged security breach.	Emailed newspaper directly making clear the position under Clause 3 of the Code.	Newspaper emailed back assurance on non-identification of property.
18	Journalist.	Journalist concerned about possible media interest after a story about an injunction involving an alleged affair with another journalist.	Emailed all editors outlining concerns under Clauses 3 & 4 of the Code.	No further concerns raised.
19	Organisation.	Concerned about privacy of lottery winners and potential press stories.	Emailed all editors making clear concerns and reminding of PCC's Guidance Note about Lottery winners.	No further concerns raised.
20	Celebrity / Family of a celebrity.	Sports presenter was contacted by national newspaper journalist at her house and contact with her son.	Emailed newspaper directly making clear the position under Clauses 3, 4 & 6 of the Code.	Newspaper sent immediate apology, which was accepted.
21	Member of the public.	Concerned about contact by journalists from a Sunday newspaper.	Emailed newspaper directly outlining concerns under Clause 4 of the Code.	No further concerns raised.
22	Member of the public.	Concerned about contact by journalists from a Sunday newspaper.	Emailed newspaper directly outlining concerns under Clause 4 of the Code.	No further concerns raised.
23	Member of the public.	Concerned over possible accuracy of local newspaper stories after inaccurate national newspaper stories already published.	Emailed local editors making clear the position under Clause 1 of the Code.	Formal complaint received about national newspaper; no stories published locally.
24	Celebrity / Family of a celebrity.	Actress concerned that photographs taken abroad of her &	Emailed all editors outlining concerns under	No further concerns raised.

Press Complaints Commission—Written evidence

		daughter by paparazzi would be used by UK publications.	Clause 3 & 6 of the Code.	
25	Member of the public.	Concerned over contact by journalists from a national newspaper.	Emailed newspaper directly outlining concerns under Clause 4 of the Code.	No further concerns raised.
26	Member of Royal Family.	Member of the Royal Family concerned about press intrusion.	PCC copied into letters sent to all editors making clear the position under Clauses 3 & 4 of the Code.	No direct PCC contact.
27	Family of deceased.	Family concerned about publication of information about the father's health problems following her death.	Emailed all editors outlining concerns under Clause 3 of the Code.	No further concerns raised.
28	Member of the public.	Concerned over potential story in national newspaper linking her with a TV personality.	Emailed newspaper directly outlining concerns under Clauses 3 & 4 of the Code.	Newspaper agreed to remove personal details.
29	TV Show/Member of the public.	TV talent show and member of public who appeared on it concerned about possible newspaper stories after fix allegations appeared online and comments about sexuality.	Emailed all editors outlining concerns under Clause 6 of the Code.	No further concerns raised.
30	Member of the public.	Concerned about possible press attention after daughter appeared on TV programme.	Emailed all editors outlining concerns under Clause 4 of the Code.	Nothing further heard.
31	Member of the public.	Concerned about allegations appearing of a relationship with a Premier League footballer in a Sunday newspaper.	Emailed newspaper directly making clear the position under Clause 3 of the Code.	No further concerns raised.

Press Complaints Commission—Written evidence

32	Family of deceased.	The family of a convicted murderer who committed suicide in prison were concerned about press attention at the inquest.	Letter drafted to be sent to all editors outlining concerns under Clauses 3, 4, 5 and 9 of the Code.	No further concerns raised.
33	Celebrity / Family of a celebrity.	A writer about possible press attention.	PCC advice given on best way to handle issues.	Decided to take no action at present time.
34	Family of deceased.	Family concerned about possible press attention on day of funeral of 13 year old daughter.	Emailed all editors in advance of the funeral taking place making clear concerns under Clause 4 and 5.	No further concerns raised.
35	Family of deceased.	Family concerned about press attention during murder trial of daughter.	Emailed all editors outlining concerns under Clause 4 of the Code.	No further concerns raised.
36	Celebrity / Family of a celebrity.	A celebrity concerned about a possible story in a Sunday newspaper about living arrangement of his in-laws.	Emailed newspaper directly making clear concerns under Clauses 1 and 3 of the Code.	Story modified following PCC involvement; inaccurate claims removed.
37	National organisation.	Concerned about reporting of multiple suicides.	Copied into email to newspapers organisation.	No direct PCC contact.
38	Member of the public	Concerns that witnesses in a murder trial have been distressed by approaches by press and broadcast journalists.	Emailed all editors making clear concerns and passing on the request that approaches be made via the MPS and CPS press offices.	No further concerns raised.
39	MP.	An MP had been approached by a Sunday newspaper about her local constituency indicating that families may have been phone-hacked. Wanted advice on how	PCC gave advice on options.	MP agreed that we should await any further contact. None was received.

Press Complaints Commission—Written evidence

		to proceed to protect families.		
40	Family of deceased.	Wife of a serviceman killed in Iraq concerned after several attempts to contact her about whether or not her phone was hacked.	Emailed all editors making clear her concerns under Clause 4 and explaining that there was no indication from the police that it had.	No further concerns raised.
41	Family of deceased.	The partner of a man who died saving his daughter from drowning concerned around photograph of the child with the father on two national newspaper websites.	Telephoned newspapers directly making clear the concerns about the photographs and Clause 6 issues. Concerns also passed to news desks to try to prevent publication the following day in the paper editions.	One newspaper removed photo from website and did not publish in print edition. The other cropped the photo on the website and used cropped image in print edition.
42	Member of the public.	Wanted advice on possible media coverage of her famous parents. The identity of her mother was not in the public domain and she wished it to remain that way.	Advice given on the telephone; no further action necessary.	No further contact.
43	Member of the public.	Concerned about video of him drunk which appeared on two newspaper websites, and still images.	Emailed newspapers outlining concerns under Clause 3 of the Code.	Both newspapers removed the video, and some still images which might identify the complainant.
44	Family of deceased.	Police on behalf of family concerned about significant contact by press following death of their son.	Emailed all editors outlining concerns under clauses 4 & 5 of the Code and	No further concerns raised.

Press Complaints Commission—Written evidence

			making clear that the family did not wish to comment other than by means of a short statement.	
45	Family of deceased.	Family concerned about contact by a Sunday newspaper concerning their son's death 4 years previously.	Emailed newspaper directly making clear the position under Clause 4 of the Code.	No further concerns raised.
46	Member of the public.	Concerned about contact by a Sunday newspaper asking for comments about the death of a friend.	Emailed newspaper directly outlining concerns under Clause 3.	No further concerns raised.
47	Member of the public.	A mother concerned about the use of a photograph of her child on a national newspaper front page in conjunction with story about hospital deaths.	Emailed newspaper directly outlining concerns under Clauses 3 & 6 of the Code.	Pictures cropped to remove child and instruction that the picture will not be used again in its original form. Paper requested that third party databases expunge the picture as well.
48	Member of the public.	Concerned about contact by a Sunday newspaper asking for comments about the death of a friend.	Emailed newspaper directly outlining concerns under Clause 3 of the code.	Newspaper confirmed that the messages would be passed on to the journalist in question.
49	MP.	Concerned about possible story about private life in Sunday newspaper after comments from blogger.	Emailed newspaper directly outlining concerns under Clause 3.	Newspaper confirmed that no story would be published.
50	Celebrity / Family of a celebrity.	A TV celebrity concerned about privacy while he was on holiday in Europe during August.	PCC circulated an email to editors detailing concerns.	No further concerns raised.

Press Complaints Commission—Written evidence

51	Member of the public.	General worries around press approaches to comment about her mother (a convicted murderer) including concerns around comments attributed to her which she denied making.	Emailed all editors making clear position under Clause 4 of the Code.	No further concerns raised.
52	Family of deceased.	Press attention following death of boy killed by an animal.	MP, who is friend of family, given advice about PCC services and contact details.	Very positive and knowledgeable about PCC's pre-publication work, just wanted to check they could contact us anytime.
53	Celebrity / Family of a celebrity.	A celebrity chef was concerned about media requests for comments following the announcement of the end of his marriage.	Email all editors outlining concerns under Clauses 3 & 4 of the Code and making clear the family would not comment further to what had already been released in the statement.	No further concerns raised.
54	Member of the public.	Concern about Sunday newspaper story alleging fraud and an affair.	Emailed newspaper directly outlining concerns under Clauses 1 & 3 of the Code.	Story was published but no mention of affair; formal complaint received by PCC.
55	Public figure.	Concerned about privacy issues following approach from a Sunday newspaper about a story related to his finances.	Emailed newspaper directly outlining concerns under Clause 3 of the Code.	Story was published and a formal complaint made. Further message sent to editors to pass on concerns about a possible follow-up article.

**Appendix Five**

**Advice given to editors for the month of August 2011**

<b>No</b>	<b>Type of publication</b>	<b>Type of Query</b>	<b>Advice</b>	<b>Outcome (if known)</b>
1	Scottish	Whether newspaper can publish details of allegations - in regard to a schoolchild - which led to a resignation.	Potential Clause 3 issue.	The newspaper decided not to identify the girl.
2	Scottish	Query about Clause 6 issue involving the republication of a photograph of a schoolchild.	Potential Clause 6 issue, but could argue public interest (and the previous publication of the photograph).	The newspaper decided to publish the story with the photograph; two complaints subsequently received
3	Scottish	Query under Clause 1 about publishing a letter from a man under nom de plume suggesting it was a woman.	Informal advice that this would probably not breach Clause 1.	The newspaper simply wished for the matter to be discussed; no action taken.
4	English regional	The newspaper wished for some advice about an inquest report of a soldier it had published which was completely wrong, having stemmed from an agency.	There was a definite Clause 1 issue about which the PCC had received several complaints; the newspaper should rectify swiftly and prominently.	The newspaper published a 1,000 word front page apology with the widow's approval.
5	Northern Irish Sunday	Query about asylum seeker fired from care home, HIV positive status; can the newspaper refer to this?	Potential Clause 3 and Clause 12 issues; is there a legal requirement to inform the home of HIV status? What is the public interest?	The newspaper found out that it was a legal requirement, and was mentioned in court; story was published.

Press Complaints Commission—Written evidence

6	Magazine	Query about story about man who pleaded guilty to GBH after knowingly infecting his girlfriend with herpes.	Potential Clause 3 issue, but heard in court so brought into the public domain.	
7	Magazine	Query about Clause 16 and payment to two women, both convicted of offences, relating to their friendship.	There could be a public interest for one of the women involved, but the other payment may well be in breach of the Code.	
8	National newspaper	Query about reports of suicides.	The newspaper removed the reference to one of the suicides.	
9	English regional	Query about Clause 16 and potential payment to a man originally arrested during riots but then released.	There was an issue about glorification, but there could be a public interest defence.	
10	Scottish	Query about the publication of information relating to a heart attack in prison of an infamous prisoner.	Certainly a Clause 3 issue, but the information has stemmed from the prisoner's mother.	
11	Magazine	Query about whether the PCC had received a complaint about photographs of a celebrity.	The PCC had not received a complaint.	



Press Complaints Commission—Written evidence

12	Scottish	Query about taking photographs of a councillor who had been convicted of offences, taken in his front garden.	Potential Clause 3 issue, but the individual appeared to be clearly visible from the street.	
13	Scottish	Query about whether an individual was entitled to waive his anonymity as a victim of sexual assault.	Potential Clause 11 issue, advice to obtain written confirmation of position and to what the individual is consenting.	
14	National newspaper	Query about whether an individual had contacted the PCC for advice, and whether contact could be made with them directly.	Gave background on a strictly not for publication basis.	The newspaper would not seek to contact the individual.
15	Scottish	Query about a story involving a quad bike accident abroad.	Potential issues under Clauses 1,3 4 and 5.	
16	English regional	Query about whether the newspaper could identify friend who was an stolen as stolen	Potential issue under Clause 3: advised removal of certain information to avoid a complaint.	

**Appendix Six**  
**Prominence Statistics for 2010**

*Further forward than the original article: 45.5%*

*Same page as the original: 24.2%*

*Designated corrections column: 10.6%*

*Within five pages of the original: 14.4%*

*More than five pages later than the original: 5.3%*

Newspapers and magazines should not bury corrections and apologies. Working towards ensuring that corrective action is published with due prominence is a key aim for the PCC and is something we have monitored since 2005. In that year, 59% of corrections negotiated by the Commission were published on the same page or further forward than the material under complaint. In 2010, the figure was 69.7%. Looking only at corrections that contained an apology, the proportion rises to 81.1%.

Of course, due prominence does not mean necessarily that corrections must appear on a set page. An apology for a serious error might properly be published closer to the front of a newspaper than the original article appeared. A clarification of less significance might - on rare occasions - reasonably be published further back. And some people prefer to have a correction on a particular page, the letters page for example.

However, the overall picture is certainly encouraging, with 89.4% of PCC-negotiated corrections being published no later than two pages further back than the material complained of or in a dedicated corrections column<sup>376</sup>.

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<sup>376</sup> PCC Annual Review 2010: <http://www.pcc.org.uk/review10/statistics-and-key-rulings/complaints-statistics/prominence-of-corrections.php>

**Log of anti-harassment work carried out by the PCC in 2010 and 2011**  
**The table relates to work referred to in paragraph 67**

<b>CONTACT</b>	<b>ISSUE</b>	<b>ACTION TAKEN BY PCC</b>	<b>FOLLOW UP</b>
Member of the public	Alleged harassment by Sunday newspaper.	Passed on an email to newspaper outlining concerns under Clause 4 of the Code.	Nothing further heard: PCC action successful
Members of the public	Repeated contact from a national newspaper about a court case.	Passed on an email to newspaper's editorial team making clear they did not wish to speak.	Nothing further heard: PCC action successful
Celebrity / Family of a celebrity	Wife of an international footballer pursued by journalists and photographers abroad.	Emailed all editors outlining concerns under Clause 4 of the Code	Nothing further heard: PCC action successful
Celebrity / Family of a celebrity	Premier League footballer and his wife concerned about pursuit by journalists.	Emailed all editors outlining concerns under Clause 4 of the Code	Nothing further heard: PCC action successful
Celebrity / Family of a celebrity	A celebrity concerned about privacy at his home and possible pursuit by journalists.	Emailed all editors outlining concerns under Clauses 3 and 4 of the Code.	Nothing further heard: PCC action successful.
Celebrity / Family of a celebrity	Premier League footballer and his wife concerned about pursuit by journalists and inaccurate information being published.	Emailed all editors outlining concerns under Clauses 1, 3 & 4 of the Code	Nothing further heard: PCC action successful
Celebrity / Family of a	Mother of famous singer concerned about harassment	Emailed all editors outlining concerns under Clause 4 of the	Nothing further heard: PCC action successful

Press Complaints Commission—Written evidence

celebrity	by photographers.	Code	
Celebrity / Family of a celebrity	Mother of celebrity concerned about repeated approaches from newspapers for comment about her son.	Emailed all editors making clear she had no comment to make.	Nothing further heard: PCC action successful
Celebrity / Family of a celebrity	Wife of pop star concerned about media presence outside her home and pursuit by photographers while with her children.	Emailed all editors making clear her concerns under Clauses 3, 4 & 6 of the Code	Nothing further heard: PCC action successful
Member of the public	Former partner of pop star concerned about photographers and reporters at her home abroad.	Emailed all editors outlining her concerns under Clause 4 of the Code	Nothing further heard: PCC action successful
Member of the public	Victim of 7/7 bombs in London contacted repeatedly by a national newspaper.	Emailed the newspaper concerned making clear she did not wish to speak.	The newspaper took note of the position and did not contact her further.
Local councillor	Concerned about approaches made and photographs taken by a newspaper abroad.	Emailed the newspaper outlining concerns under Clause 4 of the Code	Nothing further heard: PCC action successful
Celebrity / Family of a celebrity	Celebrity couple concerned about the presence of journalists at their home following news of their upcoming divorce. Did not wish to speak to	Emailed all newspapers to make clear the position.	Nothing further heard: PCC action successful

Press Complaints Commission—Written evidence

	the press aside from an official statement.		
Member of the public	Alleged harassment by Scottish Sunday newspaper.	Emailed the newspaper outlining concerns under Clause 4.	The Commission received a formal complaint under Clause 4.
Celebrity / Family of a celebrity	A sportsman concerned about the presence of journalists and photographers outside church for family occasion.	Forwarded an email to all editors reiterating concerns under Clauses 3, 4 and 6 of the Code.	Nothing further heard: PCC action successful.
Public figure	A prominent public figure concerned about considerable presence of journalists outside his house.	Emailed all newspapers outlining concerns under Clauses 3 & 4	The Commission received a formal complaint about the story which prompted the interest.
Celebrity / Family of a celebrity	Alleged harassment by a journalist from a national newspaper.	Emailed newspaper concerned outlining concerns under Clause 4.	Nothing further heard: PCC action successful
Family of deceased	Family of a victim of shootings in Cumbria concerned about repeated contacts for comment.	Emailed all editors to make clear the concerns under Clause 4 in addition to general privacy concerns.	Nothing further heard: PCC action successful
Celebrity / Family of a celebrity	Family of a Premier League footballer concerned about repeated requests for comment following England World Cup match.	Emailed all editors outlining concerns under Clause 4 of Code and making clear the family had no wish to comment.	Nothing further heard: PCC action successful

Press Complaints Commission—Written evidence

Celebrity / Family of a celebrity	Celebrity concerned about repeated approaches to her elderly mother for comment.	Emailed all editors outlining concerns under Clause 4 of the Code.	Nothing further heard: PCC action successful
MP	Concerned over repeated requests for comments after personal difficulties.	Emailed all publications concerned outlining concerns under Clause 4 of the Code	Nothing further heard: PCC action successful
Member of the public	Concerned over repeated requests for comment	Emailed all editors making clear there was no wish to speak and outlining concerns under Clause 4 of the Code	Nothing further heard: PCC action successful
MP	Alleged harassment by Sunday newspaper.	Emailed newspaper outlining concerns under Clause 4 of the Code.	Nothing further heard: PCC action successful
Member of the public	Concerned over presence of Sunday newspaper at property.	Emailed newspaper outlining concerns under Clause 4 of the Code.	Nothing further heard: PCC action successful
Local councillor	Concerned about repeated approaches by newspaper and broadcast media. Did not wish to speak to the press aside from an official statement.	Emailed all editors outlining concerns under Clause 4 of the Code.	Nothing further heard: PCC action successful
Celebrity / Family of a celebrity	Celebrity couple who were new parents were concerned about media presence outside their home.	Emailed all editors outlining concerns under Clauses 3, 4 and 6 of the Code.	Nothing further heard: PCC action successful

Press Complaints Commission—Written evidence

Celebrity / Family of a celebrity	Celebrity concerned about pursuit by photographers whilst abroad.	Emailed all editors outlining concerns under Clause 3 and 4 of the Code and reminding of similar request previously.	Nothing further heard: PCC action successful
Celebrity / Family of a celebrity	Pop star concerned about being harassed after announcing her pregnancy.	Emailed all editors outlining concerns under Clause 4 of the Code.	Nothing further heard: PCC action successful
Celebrity / Family of a celebrity	Father of a Premier League footballer concerned about alleged harassment of his family on holiday.	Emailed all editors outlining concerns under Clause 4 of the Code.	Nothing further heard: PCC action successful
Family of deceased	Alleged harassment of family on property by TV crews and reporters	Emailed all editors outlining concerns under Clause 4 of the Code.	Nothing further heard: PCC action successful
Celebrity / Family of a celebrity	Heavily pregnant soap star concerned about pursuit by photographers.	Emailed all editors outlining concerns under Clause 4 of the Code.	Nothing further heard: PCC action successful
Celebrity / Family of a celebrity	Celebrity couple with a new baby concerned about being pursued by photographers.	Emailed all editors outlining concerns under Clause 4 of the Code	Nothing further heard: PCC action successful
MP	Partner of an MP concerned about being pursued by photographer while heavily pregnant.	Emailed all editors outlining concerns under Clause 4 of the Code.	Nothing further heard: PCC action successful
Family of deceased	Family of a man who died in prison concerned about repeated	Emailed all editors outlining concerns under Clause 4 of the	Nothing further heard: PCC action successful

Press Complaints Commission—Written evidence

	media contacts.	Code.	
Celebrity / Family of a celebrity	Relative of X-Factor contestant concerned about repeated contact by media.	Emailed all editors with message outlining concerns under Clause 4 of the Code.	Nothing further heard: PCC action successful
Member of the public	Alleged harassment by a local newspaper.	Emailed editor of newspaper outlining concerns under Clause 4 of the Code.	Nothing further heard: PCC action successful
Celebrity / Family of a celebrity	Film star concerned by harassment abroad wished to prevent similar issues in UK before her return with her son.	Emailed all editors outlining concerns under Clauses 3 & 4 of the Code.	Nothing further heard: PCC action successful
Celebrity / Family of a celebrity	Pop star concerned about pursuit by photographers.	Emailed all editors outlining concerns under Clause 4 of the Code.	Nothing further heard: PCC action successful
Celebrity / Family of a celebrity	A TV comic's wife concerned about the media presence at her home and the welfare of her children.	Emailed all editors outlining concerns under clauses 3, 4 & 6 of the Code.	Nothing further heard: PCC action successful
Relatives of criminal suspect	Alleged approaches by photographers and concerns over photographs taken of family members at family home.	Emailed all editors outlining concerns under Clause 4 and making clear their wishes.	Nothing further heard: PCC action successful
Member of the public	The former partner of a suspected murderer concerned about repeated	Emailed all editors to make clear the concerns under Clause 4.	Nothing further heard: PCC action successful



Press Complaints Commission—Written evidence

	approaches by press; did not wish to speak publicly		
Family of deceased	Concerned about approaches by a Sunday newspaper	Emailed newspaper outlining concerns under Clause 4 of the Code.	Nothing further heard: PCC action successful.
Celebrity / Family of a celebrity	A celebrity concerned about being pursued by photographer while on holiday.	Emailed all editors outlining concerns under Clauses 3 & 4 of the Code	Nothing further heard: PCC action successful.

2011

CONTACT	ISSUE	ACTION BY PCC	FOLLOW UP
Celebrity / Family of a celebrity	Soap star concerned about alleged harassment by photographers	Emailed all editors outlining concerns under Clause 4 of the Code.	Nothing further heard: PCC action successful.
Celebrity / Family of a celebrity	Film star concerned about alleged harassment by photographers	Emailed all editors outlining concerns under Clause 4 of the Code.	Nothing further heard: PCC action successful.
Member of the public	Wife of police chief concerned about alleged harassment by journalists.	Emailed all editors outlining concerns under Clause 4 of the Code.	Nothing further heard: PCC action successful.
Family of deceased	Family of woman who committed suicide concerned about intrusion by media. Family did not wish to speak to press.	Emailed all editors outlining concerns under Clauses 4 & 5 of the Code.	Nothing further heard: PCC action successful.
MP	MP and his wife concerned about alleged harassment by journalists	Emailed all editors outlining concerns under Clause 4 of the Code.	Nothing further heard: PCC action successful.

Press Complaints Commission—Written evidence

Family of criminal	Daughter of a convicted murderer concerned about alleged harassment by journalists and photographers.	Emailed all editors outlining concerns under Clause 4 of the Code.	Nothing further heard: PCC action successful.
Member of the public	Concerned about alleged harassment by Sunday newspaper.	Emailed newspaper outlining concerns under Clause 4 of the Code.	Nothing further heard: PCC action successful.
Family of criminal	The wife of a convicted criminal concerned about journalists contacting parents at her children's school.	Emailed all editors outlining the concerns under Clauses 4 & 6 of the Code.	Nothing further heard: PCC action successful.
Member of the public	Former partner of deceased TV star concerned about excessive press attention.	Emailed all editors outlining concerns under Clause 4 of the Code.	Nothing further heard: PCC action successful.
Celebrity / Family of a celebrity	Premier League footballer concerned about alleged harassment by journalists.	Legal Notice issued to the media, copied to the PCC on consultation.	Nothing further heard: PCC action successful.
Celebrity / Family of a celebrity	Wife of a TV celebrity concerned about alleged harassment of her husband by journalists.	Emailed all editors outlining concerns under Clause 4 of the Code.	Nothing further heard: PCC action successful.
Celebrity / Family of a celebrity	Pop star concerned about alleged harassment by photographers.	Emailed all editors outlining concerns under Clause 4 of the Code.	Nothing further heard: PCC action successful.
Family of a suspected criminal	Family concerned about alleged harassment by journalists.	Emailed all editors outlining concerns under Clause 4 of the Code.	Nothing further heard: PCC action successful.

Press Complaints Commission—Written evidence

Member of the public	Daughter of one of the Cumbria shootings survivors concerned about media attention.	Emailed all editors outlining concerns under Clause 4 of the Code.	Nothing further heard: PCC action successful.
Family of deceased	Family of a boy who died abroad concerned media attention following the death.	Emailed all editors outlining concerns under Clauses 4 & 5 of the Code.	Nothing further heard: PCC action successful.
Celebrity / Family of a celebrity	Film star concerned about alleged harassment by photographers from a national and Sunday newspaper.	Emailed newspapers directly outlining concerns under Clause 4 of the Code.	Nothing further heard: PCC action successful.
Celebrity / Family of a celebrity	TV celebrity concerned about photographer following his children.	Emailed all editors outlining concerns under Clauses 4 & 6 of the Code.	Nothing further heard: PCC action successful.
Member of the public	Concerned about repeated contacts from a Sunday newspaper.	Emailed newspaper outlining concerns under Clause 4 of the Code.	Nothing further heard: PCC action successful.
Family of deceased	Family of a girl killed in a car crash abroad concerned over repeated contact by journalists following the funeral.	Emailed all editors outlining concerns under Clauses 4 & 5 of the Code.	Nothing further heard: PCC action successful.
Family of deceased	Family concerned about approaches by a national newspaper after the death of their baby son.	Emailed all editors outlining concerns under Clauses 4 & 5 of the Code	Nothing further heard: PCC action successful.
Celebrity / Family of a celebrity	TV comedian concerned about unwanted attention by paparazzi following birth of his	Emailed all editors outlining concerns under Clause 4 of the Code.	Nothing further heard: PCC action successful.

Press Complaints Commission—Written evidence

	son.		
Member of the public	Alleged harassment by photographers	Emailed all editors outlining concerns under Clause 4 of the Code.	Nothing further heard: PCC action successful.
Member of the public	Sister of a pop singer concerned about being followed by photographers.	Emailed all editors outlining concerns under Clause 4 of the Code.	Nothing further heard: PCC action successful.
Family of victim	Family concerned about repeated media approaches following attack on their daughter outside school.	Emailed all editors outlining concerns under Clause 4 of the Code.	Nothing further heard: PCC action successful.
Celebrity / Family of a celebrity	Wife of a celebrity concerned about photographers outside her home.	Emailed all editors outlining concerns under Clause 4 of the Code.	Nothing further heard: PCC action successful.
Celebrity / Family of a celebrity	Actor concerned over repeated contact by journalists following his wife's death.	Emailed all editors outlining concerns under Clauses 4 & 5 of the Code.	Nothing further heard: PCC action successful.
Celebrity / Family of a celebrity	Radio DJ concerned about alleged harassment by journalists.	Emailed all editors outlining concerns under Clause 4 of the Code.	Nothing further heard: PCC action successful.
Family of convicted criminal	Mother of a convicted man concerned about media approaches.	Emailed all editors outlining concerns under Clause 4 of the Code.	Nothing further heard: PCC action successful.
Member of the public	Wife of an MP concerned about alleged harassment by journalists from a national newspaper.	PCC copied into email to newspaper which outlined concerns under Clause 4.	Response received from newspaper setting out its version of events. Further contact on 25/5 in regard to other publications.
Celebrity / Family of a celebrity	Family of a Premier League footballer concerned about presence of	Emailed all editors (on two occasions) outlining concerns under Clause 4	Nothing further heard: PCC action successful.

Press Complaints Commission—Written evidence

	journalists outside their home.	of the Code.	
Member of the public	Wife of an MP concerned about alleged harassment by journalists	Emailed all editors outlining concerns under Clause 4 of the Code.	Nothing further heard: PCC action successful.
Celebrity / Family of a celebrity	Pop star concerned about alleged harassment by journalists.	Received copies of legal notice from solicitors to newspapers outlining concerns under Clause 4.	No direct contact by PCC
Celebrity / Family of a celebrity	Mother of a Premier League footballer concerned about press harassment.	Emailed all editors outlining concerns under Clause 4 of the Code.	Nothing further heard: PCC action successful.
Celebrity / Family of a celebrity	Brother of a Premier League footballer concerned about press attention following stories about his brother.	Emailed all editors outlining concerns under Clause 4 of the Code.	Nothing further heard: PCC action successful.
Member of the public	A soon-to-be married young woman concerned about alleged harassment by photographers including on motorbikes.	Emailed all editors outlining concerns under Clauses 3 & 4 and requesting that pictures taken by paparazzi not be published.	Nothing further heard: PCC action successful.
Member of the public	Alleged harassment by photographers and persistent pursuit outside her home.	Emailed all editors outlining concerns under Clause 4 and requesting that pictures obtained in cases of possible harassment not be published.	Nothing further heard: PCC action successful.
Celebrity / Family of a celebrity	Family of a Premier League footballer concerned about photographers outside their home on their return	Emailed all editors outlining concerns under Clause 4 of the Code.	Nothing further heard: PCC action successful.

Press Complaints Commission—Written evidence

	from holiday.		
Former journalist	Wife of a former journalist concerned about press outside the family home.	Emailed all editors outlining concerns under Clause 4 of the Code.	Dialogue with BBC and the representatives established. Some follow-up correspondence between BBC journalist and family solicitor.
Celebrity / Family of a celebrity	Hollywood couple concerned about alleged harassment by paparazzi and photographs being taken of their children.	Emailed all editors outlining concerns under Clauses 4 & 6 of the Code.	Nothing further heard; PCC action successful
Celebrity / Family of a celebrity	Celebrity couple concerned about approaches to them and the man's estranged wife, following the birth of their child.	Emailed all editors outlining concerns under clause 4 of the Code.	Further contact on 10/8
Celebrity / Family of a celebrity	Celebrity couple concerned about unwanted approaches in the aftermath of the birth of their child.	Emailed second notice to all editors, with a reminder to editors about the previous email of 1/8 outlining ongoing concerns under Clause 4 of the Code.	Nothing further heard: PCC action successful.
Member of the public	Father of a girl who appeared in court following the riots concerned about media approaches to the family.	Emailed all editors outlining concerns under Clause 4 of the Code.	Nothing further heard: PCC action successful.
Family of deceased	Family of a man who died on honeymoon abroad concerned about media approaches.	Emailed all editors outlining concerns under Clause 4 of the Code.	Nothing further heard: PCC action successful.

28 October 2011

**David Price QC, Gavin Millar QC, Gillian Phillips, solicitor, Director of Editorial Legal Services, *The Guardian*, and Reynolds Porter Chamberlain—Oral evidence (QQ 33–64)**

Evidence heard in Public

Questions 33–64

MONDAY, 24 OCTOBER 2011

Members present:

Mr John Whittingdale (Chairman)  
Lord Black of Brentwood  
Lord Boateng  
Mr Ben Bradshaw  
The Lord Bishop of Chester  
Lord Dobbs  
Paul Farrelly  
Lord Gold  
Lord Harries of Pentregarth  
Lord Hollick  
Lord Janvrin  
Eric Joyce  
Yasmin Qureshi  
Ms Gisela Stuart  
Lord Thomas of Gresford

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**Examination of Witnesses**

*Witnesses:* **David Price QC**, solicitor-advocate, David Price Solicitors and Advocates, **Gavin Millar QC**, Doughty Street Chambers, **Gillian Phillips**, solicitor, Director of Editorial Legal Services, *The Guardian*, and **Keith Mathieson**, Reynolds Porter Chamberlain.

**Q445 Chairman:** Good afternoon. This is the second evidence session of the Joint Committee on Privacy and Injunctions. We have two sessions this afternoon, which are roughly divided. I realise that it is not quite as cut and dried as this, but our panel of witnesses in the first session represents defendants and media interests, although I realise that sometimes you may find yourselves on the other side. I welcome David Price QC, Gavin Millar QC, Gillian Phillips from *The Guardian*, and Keith Mathieson. To start off, I put to you a question that we put last week as well: to what extent do you think there is a problem at the moment with the number of

injunctions and super-injunctions being granted? To what extent do you think this Committee has a job to do?

**Gillian Phillips:** In practical terms, since the Ryan Giggs affair we have not been served with any injunctions, super, anonymous or otherwise, so to that extent I would say that at the moment it does not appear to be a practical problem.

**Keith Mathieson:** I would echo that. The last injunction I dealt with involved Fred Goodwin, and we have not had one since.

**David Price:** I disagree with that. I do not think you can judge the effects of the law by the absence of court cases. The law creates a chilling effect. There may be a number of reasons why newspapers are not running such stories and book publishers are not publishing unauthorised biographies that have nothing to do with the level of court activity at the moment.

I think we should be concerned because the law has changed a huge amount over the last decade. The consequence is that in this country material that was perfectly lawful 10 years beforehand is now unlawful. I think that is something that should give rise to concern, because freedom of expression is fundamental to our society. The combination of Strasbourg decisions, a very vague human rights convention, which seems to have some parity between privacy and freedom of expression, and the way things have been interpreted by judges means that the law has changed. In this country we are less free than we were. I think the way things worked beforehand was perfectly acceptable and there was no need for the privacy law to come in the way it has.

I am not sure that this is a legal issue as such. The issue is the extent to which a right of privacy should be recognised by the grant of an injunction or other remedy restricting a person's freedom of expression to communicate true information. I think that is more of a moral or public policy issue, and I do not think the lawyers are in any better position than anyone else to opine on it. In some ways, I think we are in a worse position because our natural instinct is to remedy a perceived wrong through the use of court proceedings, which is a very blunt instrument.

**Q446 Chairman:** Mr Millar, on which side of the argument are you?

**Gavin Millar:** Unlike my newspaper colleagues, I am not really in a position to comment on the frequency of injunctions because they do not get served on me; I just hear what I hear. That certainly suggests they are right that there is not a flood of injunctions or super-injunctions, but there is a lot in what David says. We have had a legal culture shift in this country in the last 10 or 11 years from “publish and be damned”, which was our tradition, to embracing prior restraint injunctions in speech and media cases in a way we have never done before.

I think that has permeated people's thinking. It has permeated the thinking of lawyers and potential claimants that now they can go to the High Court and get a pre-publication injunction in the way they would never have thought about 20 years ago, if they can force the facts of their case into a privacy claim and into section 12 of the Human Rights Act 1998. The fact that change has taken place and the newspapers and journalists know that the potential to do that is there affects the way they write and the stories they publish. But the chilling effect is a very difficult thing to judge and characterise, because it is a negative; it is what you do not publish. You never get any academic studies or committees



David Price QC, Gavin Millar QC, Gillian Phillips, solicitor, Director of Editorial Legal Services, *The Guardian*, and Reynolds Porter Chamberlain—Oral evidence (QQ 33–64)

such as this being able quantitatively or qualitatively to say what the chilling effect is. One expresses an intuitive view about it, and that is really as far as it can go.

**Q447 Chairman:** But you and Mr Price are both of the view that the most aggressive tabloid end of the market is perhaps more restrained today than it was 10 years ago.

**Gavin Millar:** Definitely.

**David Price:** Yes, and in addition the phone-hacking case has had an effect on the way newspapers have been going about things in the past few months. They were trying to run up a head of steam on the back of these “bonkers privacy injunctions”, as they were portrayed. I think some of them were bonkers, but that is just my view. Newspapers are now on the back foot, so they are running fewer stories.

I am not really in the media camp as such; I have a private practice in which I act for a lot of claimants. I started my practice doing predominantly claimant work; now I do defendant work predominantly, but I have acted for a large number of individuals who have brought pre-publication injunctions.

**Q448 Chairman:** Gillian Phillips, obviously at your end of the market you experience injunctions. A famous case is one in which my colleague, Mr Farrelly, is an expert, but generally these are more towards the bottom end of the market. Is it your understanding that they too have seen injunctions dry up recently?

**Gillian Phillips:** You are right. The genuine privacy injunction that David has been talking about does not really affect *The Guardian*, save to the extent that previously we were or were not being served with them, or notified of them. A lot of procedural problems were addressed in the John Terry case primarily and now in the report of the Master of the Rolls. The procedural side of things is probably much better sorted now. We have an opportunity to know what is going on.

On breach of confidence injunctions such as *Trafigura*, traditionally we have always had one or two a year, or threats of one or two a year, and that probably continues. The trouble with *Trafigura* is that it strayed into some of this; it was super because you could not report it, and it was anonymised because you could not report the name of the claimant. To that extent there is overlap between them, but they are very different beasts in substance.

**Q449 Paul Farrelly:** My familiarity with super-injunctions that are anonymised and those that apply to anybody who becomes aware of them is as a result of the *Trafigura* case. I just want to explore a few issues that arose in my mind when I weighed whether or not to use parliamentary privilege, and decided to do so, that might potentially be relevant to privacy, which we are discussing here. The extent of this injunction seemed to me to be the latest wheeze that came off a clever solicitor’s word processor. It was looked at and consideration was given to what extra bell or whistle could be put on it to ask a judge effectively to rubber stamp it. I do not know whether this is as true in privacy cases in your experience, but the question is whether this has been a lawyer-led industry, as it were, with which judges have just gone along.

**Gillian Phillips:** That is my theory. Historically, the kinds of injunctions being obtained, whether it was confidence, as it used to be called, or privacy, or misuse of private information, started from a common standpoint. You can see them over the months of 2009–10 getting more, as you say, bells and whistles on them, each time someone thinking, “Well, let’s try to get this bit done, or get this or that anonymised.” You can trace that historically. I think that is the case, particularly in terms of the procedure being applied.

Because there was no scrutiny and no judgments published at the time, you had no idea what was being said behind closed doors. I have seen transcripts and notes of a hearing of a couple. We had to give undertakings to see them. I thought the conversation between the judge and the claimant’s lawyer was cosy, to say the least, and very unsatisfactory. I think the judiciary were not doing enough at the time to scrutinise properly what was put before them. I hope that has changed across the board post-Terry and since the report of the Master of the Rolls.

**David Price:** As to “lawyer-led”, it is punter-led. It is lawyer-led in the sense that it starts from a convention; it has been drafted by lawyers and interpreted by Strasbourg, and it is lawyer-led in that judges are making these decisions and lawyers are presenting the arguments. Obviously, lawyers are drumming up business because it is in claimants’ interests to get an injunction. It is a really good thing for a claimant who wants to stop a story to get a privacy injunction. That is where the marketplace is. The tabloids will run the stories in the first place. There is a marketplace between the newspaper and the public. The public want to read this material and newspapers want to sell it. Basically, the free market is operating in that situation.

The claimant wants to stop it; the judges have created the ability under the Human Rights Act, but essentially through judge-made law, for it to happen and the claimants go to the lawyers because they can make it happen and put arguments to which judges are receptive. That is how it works. It is not a very complicated transaction. If there is a remedy and punters want it, they will go to skilled lawyers, who will present the arguments and judges will uphold them. I do not see anything sinister in the way lawyers go about doing their job; they are just making the best case for their clients, which is what they have done all along. It is Parliament in part that has given them the ability to do this by passing the Human Rights Act and not giving sufficient safeguards at the time it did that.

**Q450 Paul Farrelly:** So there was no need for the Master of the Rolls to produce a report?

**David Price:** I am talking in generalities. That is the situation we have reached. There are lots of arguments round the edges about the extent to which there should be reporting of what is going on in court. I think *Trafigura* is a different situation because that is concerned with commercial confidence, which has been around for a long time. Even before the Human Rights Act, if a document had come from a law firm, they could try to get an injunction to stop that. If I may say so, that is an atypical case, though I appreciate one should be really concerned and that should not have happened.

I think that what you need to be concerned about is that there has been a sea change in this country where a whole series of things you could state freely beforehand you can no longer state freely. That is not the *Trafigura*-type case; it is personal, individual privacy. That is where everything has moved, and that is not really lawyers thinking up clever

arguments; it is lawyers having the opportunity to make those arguments because of the way things have happened following the Human Rights Act.

**Keith Mathieson:** If I have understood David correctly, he seems to be objecting to the fact that we have a law of privacy, not just the fact that people can get injunctions. The fact is that we do have a law of privacy, and I think the questions we are being asked relate to whether the system by which injunctions are granted is satisfactory or unsatisfactory. It seems to me that a lot of the problems that arose in relation to injunctions have now been dealt with. While as a newspaper lawyer I am not satisfied that the injunction system will necessarily achieve the right result in every case, a lot of the vices that we have been complaining about in relation to injunctions, super-injunctions and so on have been dealt with partly as a result of the committee of the Master of the Rolls. I think the courts understand the constraints within which they have to work.

It is an unsatisfactory feature of the law of privacy that so many of the authorities relate to injunctions. There have been very few trials, so a lot of the law that has been built up over the last eight or nine years has been on the back of applications in respect of which neither party, but in particular the defendant media organisation, has had much time to marshal its arguments or evidence. That is unfortunate. Since the Naomi Campbell decision there have been only three privacy trials against the media, the latest of which is the Ferdinand case. It is now quite refreshing to have a considered written judgment by a judge who has heard live evidence. As Gill said, most injunctions happen very quickly on paper. I have been to an injunction application on behalf of a newspaper in which the so-called evidence was dealt with in about five minutes.

**Gavin Millar:** It is lawyer-led, as are all developments in the common law. The lawyer has to make the point and the judge has to rule on it. I think the original idea was that lawyers getting privacy or confidence injunctions and drafting them would say to themselves, “What is another layer of safety to build into the injunction for my client?” Anonymity is obviously one; the rather metaphysical injunction that everybody has to pretend what has happened in court has not happened, or say it has happened, is another one. It just gives an extra layer of protection and reduces the risk of them out there, the media and public—whoever may get to know about the fact that the injunction has been granted—ferreting around to find pieces of information that will enable them to put two and two together about what the injunction may be about.

One can see why they did it; it is perfectly logical, and in pursuit of their professional duty to protect their clients’ interests it is a perfectly proper thing to do. The problem, as Gill says, is that if it is being done *ex parte* the court has to defend the interests of those who are to be prevented from reporting the fact that the case has taken place. Those are Article 10 rights. The ability to discuss what a court is doing is a very important Article 10 right; it is a high-value example of freedom of speech to say that a court, behind closed doors, granted an injunction against a particular defendant today, and one does not need to explain why it is so important to be able to discuss such a thing.

The problem is that sitting *ex parte* without the media being in court putting their arguments means it is quite difficult for a judge to say, “There really is not a necessity for it in this case.” Under Article 10 it has to be strictly necessary to add this extra bit to the injunction because you are restraining freedom of speech. There is a positive obligation on judges to protect Article 10 rights.

I sit as a part-time judge; I am a recorder in the Crown Court. It is very difficult when you are seized of an argument involving a person or litigant on one side and the

intangible cloud of freedom of speech on the other side to make sure you balance the two. More often your thoughts focus on the person in front of you whose Article 8 rights are in issue. I think that is what went wrong here. There was a creeping tendency not to think about the consequences of super-injunctions in principled terms under Article 10; that had to be stopped. I think it has been stopped. Whether it will start to creep again is another matter.

**Q451 Paul Farrelly:** David, you are absolutely right. *Trafigura* is a completely different case, but there are cross-cutting issues involved. Gavin, you mentioned two that I weighed: first, the opportunity for the media to present a proper case to contest the injunction; second, in circumstances when that is not so, the weight given by judges to the public interest. Gillian, do you think those issues have gone away in such a clear-cut way as Gavin has opined?

**Gillian Phillips:** Alan Rusbridger does not entirely agree with me on some of the nuances here. My personal view is that the threshold test for what is private is wrong and too low and that some of these matters should not be even considered to be private. The trouble is that at the moment the main arguing ground, which has failed if you like, is the public interest test. I am not sure that the battle should be at the public interest stage as opposed to slightly higher scrutiny as to what should and should not be private. David mentioned the cases of *Theakston*, *Flitcroft* and *Deayton* in 2000–03. They are very similar to all the cases we are arguing about today, but you have a completely different result. That is basically because the courts were quite happy to say that transient relationships were not covered by confidence, as it was then; now it is a different test. But I struggle to see why. I have an issue as to what is private and what gets you to the threshold, because once you are over whether Article 8 is engaged, you are straight away into the only defence available to the media: is it in the public interest? Truth and conduct are irrelevant.

My perception is that somehow it is a very different battleground from what I think it should be. Although *The Guardian* has been served with these things from time to time, it does not contest them because generally, as you might expect—I say slightly pompously—it is not the sort of thing in which we engage in terms of what we want to publish. On John Terry, we wrote and submitted our concerns primarily about the procedure being applied. I think that procedurally what happened in the report of the Master of the Rolls will apply across the board. What we are really concentrating on now is the substance of these matters.

I refer to Keith's point that because all of these things are being dealt with on an interim basis, it is very easy for lawyers—I say this as a lawyer—to present in writing the best possible case, worded in the best possible way that a judge will understand for a claimant. The reality of the claimant's case is sometimes a million miles away from what is submitted, not dishonestly or with any intent to deceive but just because that is the way lawyers present cases. Cases on paper are dealt with in that way. I would say there are some problems with the lack of scrutiny of the actual evidence.

**Q452 Mr Bradshaw:** Both David Price and Gavin Millar spoke of the chilling effect being difficult to measure or quantify, but I would imagine that the newspapers could provide us with evidence, at least in quantitative terms, as to what that is in terms of stories on the books that they have not been able to publish. David, you said you thought that 10 years

ago everything was fine. Do you really mean that, and does that include photographs being taken of someone half dead in a hospital bed published without their consent?

**David Price:** Gordon Kaye?

**Gillian Phillips:** 20 years ago.

**David Price:** We can all pick extreme examples. Gordon Kaye was an extreme example. I can pick an extreme example where the wife of a footballer, who was having unprotected sex with a prostitute and an injunction had been obtained, phoned up the newspaper to find out whether it was her husband and they could not tell her. There are crazy stories. That is the position we are in at the moment. As to Gordon Kaye, I am sure that remedies could have been obtained in that scenario. At the moment, what we are really talking about is information, and in particular people's stories. There is one question here to do with acting for individuals. What can be lost here is that often it is individuals who have had a relationship, mainly sexual but not necessarily, with somebody else, and their life experiences then become somebody else's property, so the Court of Appeal held in a case called *McKennitt v Ash*. That your life experience can be someone else's property is quite a frightening concept. I would rather go back to what might be called the bad old days, which I think worked fine. I would rather live in a society where there was less deference, people took things on the chin to a greater extent and there was maximum freedom of expression. I think we should be looking more to the US Constitution than Strasbourg in these matters. I want to get in a quote from James Madison: "Some degree of abuse is inseparable from the proper use of every thing; and in no instance is this more true than in that of the press."

Perhaps I may flag up some moral issues. I have talked about whether we should be deferential or our society should be robust. If we are protecting family life, is that served by married men getting injunctions to stop their infidelities being disclosed? Is that creating a culture that encourages something that is inimical to family life? I accept that is a moral issue. Should there not be exposure of conduct that a certain section of society might regard as shameful? Should that conduct be stopped by a court injunction, or should the matter be debated in the open? It is not a legal issue. My personal opinion is dictated by the experiences I have had acting for claimants and defendants. I think we should go back to where we were before. All of this is a big mistake, but it is very hard to go back to where we were.

**Q453 Lord Boateng:** Perhaps I may explore the moral issue of justice for all. Do you have to be as rich as Campbell, Croesus, Goodwin or Giggs given the situation we have reached, as you have put it, Mr Price? Do you have to be as rich as them to have any sort of right of privacy at all? Is there something about privacy law that makes it a more costly area than other areas of law? We have had some evidence that these injunctions are not only extremely costly but the cost has been added to as a result of the Master of the Rolls' practice directions. Perhaps you would comment on that and give the Committee, if not now but in the course of subsequent written submissions, a ballpark figure for the cost of obtaining an interim injunction and then obtaining or defending an injunction at a contested trial?

**Gillian Phillips:** Let me get my oar in first, because there are quite a lot of questions and I will forget them all. In general terms it is cheaper to contest a pre-publication privacy injunction than fight a trial, so there is a view that, although it is a very unsatisfactory way of

determining things, it may be a cheaper way, certainly from the media's perspective. It is quick; it is done. You do not like the decision but you get on with it, whereas if you have a trial for 12 or 18 months after the event it will be much more expensive. Therefore, the costs argument is not straightforward. To fight any litigation is expensive. These days, fighting media litigation is expensive, particularly if it is done on a conditional fee agreement, about which there are issues.

Everybody has a right to privacy, but I think that the reality for the person on the street is that they will never in a million years think of going to the courts to get a privacy injunction. Yet the reality is that everybody in the street, pub or wherever it is in their global world will know about it and you get on with it; you deal with it. It is unpleasant at the time, but you move on. I think we are creating a false culture for people at the top who have the money and ability to alter the landscape. That is my personal view.

**David Price:** As a lawyer you will know that the more uncertainty there is, the more it favours the wealthy, because they can afford to take the risk whereas people who do not have money cannot afford to take it. For any individual who wants to exercise his or her freedom of expression it is pretty much impossible. I think “impossible” would not be putting it too high. You cannot predict the outcome and therefore you cannot take the risk. I am involved in quite a high-profile case where the individual never wanted to tell her story. That is a much easier case to defend, but if you have story that you want to tell it is impossibly risky. We have a situation where we are balancing nebulous concepts. Well, I do not think freedom of expression is nebulous but privacy certainly is. If you then have to have an intense focus on the particular facts of the case, whatever that means, it is just down to the judge's opinion. You cannot predict whether you will win or lose; if you lose, the costs will be prohibitive and you will go bankrupt. If your costs come out of the home, you will lose it.

As far as claimants are concerned, if someone with not a lot of money comes to me and they want to bring an injunction application, I could offer them a conditional fee agreement to do it. We would then write to the newspaper, which might say, “Well, we don't want to run the story.” What do you do then? If they do not want to run the story and the person has no money, you might have done quite a bit of work to try to scare off the newspaper from running it and you cannot put in a bill. When somebody comes to you it is quite hard, because the only way you can make money is if the newspaper fights it and you win the injunction, and then hopefully you can get your costs back. If you get the result from them that you want, which is to frighten them off, which can take quite a long time, you cannot put in a bill, so how do you run a business commercially in a situation like that?

It is said in certain judgments that this is not all about rich people, but the reality is that you must have money to enter this game, or you have to be backed by a newspaper or somebody who has money.

**Q454 Lord Boateng:** Do any of you know of any cases where people of modest means have been able to go to law to enforce their right of privacy?

**Keith Mathieson:** In my experience of acting for newspapers most privacy claimants are well known and quite wealthy people, but there is a well-established conditional fee system, which I appreciate is under threat. One reason for that, incidentally, is that a lot of claimant lawyers have abused it and have been far too greedy in the fees they have sought to charge.

A minute ago you asked for some figures. You will probably get more reliable figures from the witnesses who follow us because they act for claimants and generally we do not, with the exception of David, who does some claimant work. Based on experience, obviously the cost of getting an injunction will vary from case to case, but I think it would be a minimum of £15,000 to £25,000, and it could be a lot more depending on the degree of opposition to the injunction. As to taking a privacy case to trial, I can give you the example of the Rio Ferdinand case in which the costs of the newspaper, for which I acted, were about £160,000 and the claimant's costs were about £270,000 or £280,000. I may stand to be corrected on that, but those are the kinds of figures we are talking about. As to where privacy stands in relation to other kinds of litigation, it is more expensive than personal injury but less expensive than commercial litigation and other forms of litigation.

**Gavin Millar:** I agree with everything everybody else has said. There is a category of privacy case where the person qualifies for legal aid and can apply for injunction. Those cases do happen. I acted for a claimant in that position against the BBC and obtained an injunction to stop or alter a television programme. As in all areas of the law, there is a gap between the few entitled to legal aid and those who can litigate without worrying about the cost.

**Q455 Lord Boateng:** That is a gap into which most people fall.

**Gavin Millar:** Yes, and they need a conditional fee agreement. David is absolutely right about that. It may not be very attractive to the lawyer, and there is a very small group of people who can bring these privacy cases. There will not be one on the high street. They cannot run off to David Price's office in Fleet Street and get to the point of asking him to do it on a CFA. What is interesting about cases where people are on legal aid, which I as well as colleagues in my chambers have done, is that they tend to be—I do not suggest this is in any way improper, or that their human rights should not be respected as much as anybody else's—criminals, prisoners and people involved in family litigation who happen to have lawyers on the job with the benefit of legal aid in some other area of their lives, and who get them to the point where they can think about bringing a privacy injunction against a tabloid for something being written about them. There is a big gap in the middle as far as concerns the people who do or can bring these injunction applications.

**Q456 Lord Gold:** Following on from the issue about cost and access to this area, should we move towards making the court the place of last resort? Should we look to encourage some sort of mediation, by which I mean something a little more than a go-between, rather evaluative mediation, where perhaps with a beefed-up PCC, claimants and newspapers are required to get into a dialogue at a very early stage? There will still be a need for legal representation but the costs could be very much lower. There would be a team of experts who know the area and the issues extremely well and who would seek to persuade or encourage the two parties to reach an accommodation. They would always have the opportunity to go to court if they cannot agree, but the idea would be to try to give access to those people who cannot go to lawyers and cannot afford it. It would also perhaps deal with Mr Price's point about balance, because I suspect that if there were experts in this field who were part and parcel of the process, we might well find that the pendulum would swing back to the sort of balance he has in mind. Is that a good idea?

**Gillian Phillips:** I think it is a good idea across the board in all media litigation. Increasingly, it is coming into the debate on libel reform. We would probably all agree that anything that keeps things away from the courts and offers a quick, cheap and effective remedy has to be explored. As a profession, one of the things we have not been brilliant at is trying to work towards that. Individually, we will all probably be able to tell you of our own personal experiences of using mediation of some kind, or arbitration, in individual cases. For me it relates more to the field of libel than privacy. The difficulty with privacy is the conundrum that, if you tell someone in advance that you will publish something about them that they consider to be private, they can go and get an injunction, and the chances are they will get it. As was explored in the Mosley case in Strasbourg, there is a tension about doing that or just publishing and sorting it all out afterwards. I know that in the past colleagues have had a mixture of what they consider to be public-interest journalism, plus other things round the edges that are part of the story that might be private matters and, if you razor-blade it out, will probably not be in the public interest. They have approached someone in advance and had a discussion to see whether it is possible to reach an accommodation. The person knows that this is going to be said, but they try to agree whether or not they can say they were with x when this meeting took place. There is definitely room for that. I think it is quite hard in privacy to see how it would work because most of the discussion is before rather than after.

**Q457 The Lord Bishop of Chester:** The evidence I have heard this afternoon paints an uncertain and rather unsatisfactory situation in this area. We are told that a great deal has changed over the past 10 years; that the test for privacy is too low; that the law has developed injunction proceedings that are limited in their nature; and that too much is down to a judge's opinion, just to choose some of the things that have been said. We are dealing with the rights of the ordinary citizen and there is a stratospheric aspect of the whole legal process that we have been discussing. Does not all this point to some sort of parliamentary process to establish a law of privacy that is clearer to the ordinary citizen, rather than having to piggyback on Rio Ferdinand, John Terry or whoever it might be?

**Keith Mathieson:** I think that assumes that you would be able by means of a statute to define privacy rights and the public interest sufficiently tightly to avoid people like us arguing about it. The difficulty is that we have Articles 8 and 10 and somebody has to strike a balance between the two. I think it is impossible, not just difficult, to prescribe in legislation how that balance should be struck in every case.

To go back to Lord Gold's suggestion, the solution may well lie not so much in legislating to remove the uncertainties, because I do not think you would achieve that however hard you might try, but in trying to address the difficulties of arbitrating disputes over where the balance should be struck. As Gill said, there is a problem pre-publication. It is hard to see quite how a tribunal could work in that situation, although it is certainly not inconceivable, but I am pretty sure that the newspapers and other media would look with favour on any system that reduced costs with the aid of experts, as Lord Gold suggested, although the judges who hear these cases have become experts in the field. I think a system like that has something to be said for it. I did balk slightly when Lord Gold was, I suppose, forced to concede that it would involve lawyers on both sides, because as soon as you involve lawyers there is a kind of arms race and everything becomes more complicated and therefore more expensive, but I would not like to do myself out of a job either.



**Q458 Lord Thomas of Gresford:** But do not lawyers prevent people shouting at each other, which is what could happen if unrepresented people appear before a tribunal such as that suggested by Lord Gold? What is wrong with the court except costs?

**Gavin Millar:** I tend to agree with that. I think the solution is to have a cheaper and more localised court system with an independent judge who has had judicial training and can judge a case properly. This is what happens on the continent. Then you are giving the all-important power of prior restraint in relation to freedom of expression to a judge rather than some other state body, which leaves me rather uneasy; and it has all the other advantages that Lord Thomas mentions.

Perhaps I may return to the Bishop's question. It is interesting that nobody has yet got down to the bottom line in this debate about privacy in this session. It is quite easy to say that the privacy right is engaged but perhaps that is unsurprising; that is just a legal threshold and a question of principle. Is the paper writing something about your private life? It can usually be assumed, if you have got to the door of the court, that you are able to establish that is the case. The real argument is about the balancing exercise, and within that the question is: how do you decide whether the matters being written about are the subject of a legitimate public debate or a matter of public interest? That is terribly nebulous. We have seen with the draft Defamation Bill that it is great and very democratic to say Parliament must come up with a definition of what is in the public interest, so it is not the judges but parliamentarians, as they are elected—or some of them are—who do it. That is fine, but when you get down to trying to draft a clause it is, as Keith says, effectively impossible to do because it will always be fact-specific.

What is interesting about the Strasbourg court is that they started with quite a narrow idea of what is a debate in the public interest. They have broadened it in the defamation cases quite substantially to all kinds of things that maybe they would not have thought about originally when essentially it was just a political debate. The problem in the seemingly never-ending contest between celebrities and the tabloids is that people have profoundly different views about what is a debate of public interest. The judge's characterisation of what is or is not in the public interest to publish becomes critical.

If I was to give one really strong but carefully expressed view about the way judges have approached this, I think they have been a little restrictive in privacy cases about what they think is or is not in the public interest. The ordinary person in the street probably has a broader concept of what is a debate in the public interest than a lot of the judges who have decided these cases. That is not a criticism; it is just the reality, and I think that is a problem with the system as it is at the moment.

**Q459 Yasmin Qureshi:** In observations and comments made in previous hearings and written submissions to the Committee a number of witnesses have said that the judges as a whole have applied Articles 8 and 10 to cases in quite a balanced way. I do not think Mr Price and Ms Phillips would say that is right. When Ian Hislop gave evidence to the Committee on Culture, Media and Sport in May 2008 he said of privacy injunctions: "Essentially it is censorship by judicial process because it takes so long and it costs so much." How much is that still a problem today?

**David Price:** If I may clarify one point, I am not critical of the judges for striking the balance in the way they have. They have to balance Article 8 with Article 10, and they are doing their best. My criticism is that they should not even have to deal with Article 8, or

strike that balance in the first place, and we should go back to something that is more certain, which is the notion of breach of confidence and duties that have been voluntarily accepted by somebody to keep something private. That was what we had before. I am not trying to criticise the judges for that. I would hate to have to strike that balance myself.

To answer the specific point about what Ian Hislop said, self-evidently we do have censorship. Censorship is somebody saying, “You can’t publish that,” and judges are doing that because of Articles 8 and 10, and really the only effective remedy is to say, “You can’t publish that.” There is judicial censorship, which does not arise just because of the costs of litigation but because of the nature of an injunction; it is an act of judicial censorship. But there is indirect censorship in terms of the chilling effect of the huge costs involved, so I agree with Ian Hislop on the specific point you raise.

**Q460 Yasmin Qureshi:** Mr Millar talked about the public interest. Is there not a difference between what is in the public interest as opposed to what is of interest to the public?

**Gavin Millar:** That is a very popular observation on the part of judges. There may be a distinction but I do not think it is quite as clear-cut as that. Somewhere in the middle it all gets a bit blurred. In this country we seem to have got ourselves, in the way we have interpreted *Von Hannover* and taken it forward, into a situation where there is a bit of a straitjacket put on media lawyers when arguing about the public interest. You have to plough through one or two leading cases, like *Campbell* and *McKennitt v Ash*, where judges have said certain things and they are taken as absolute gospel—almost as if they are legislative provisions. Therefore, certain arguments are off-limits because they have never been sanctioned by the judges.

I do not understand why, for example, when you are dealing with celebrities with a lot of money and a vast media organisation surrounding them—agents and PR people—the fact that they promote their own image to their financial benefit to a very high degree should not give you more latitude to speak about their private life, because they are profiting from their personality rights; they are selling their personalities to people to sell products, make money or whatever. But you will look in vain in any of the cases for any suggestion that you could have a broad notion of a public debate that allowed a newspaper to say, “Well, if you want to profit personally from your image like that, we have to be able to say more about your private life than we can about other people.” We just do not approach it in that way.

**Q461 Lord Harries of Pentregarth:** Gillian Phillips, you suggested that at the moment the threshold for the public interest was too low. You made the very interesting suggestion that you would rather have a distinction between what is private and public. I do not quite see how you can make that distinction or define “public” without in some way bringing in public interest. Could you elucidate that a bit further?

**Gillian Phillips:** I am not sure that I have particularly well thought out what I mean either. David said that Article 8 talks about privacy and family rights; it does not say “privacy or family rights”, so it puts those two things together as a collective, and that is a starting point.

The second point is: what is private? I think there are some things that just should not be private. There are things that are really private in terms of, for example, what I had

for breakfast. Only I and one other person know about that. I think that some distinctions can be made. For me, you really get into core privacy in terms of whether someone has a mental health issue; they are dying; they have had an abortion; or what their religious or political beliefs are, if they do not share those openly. It seems to me that all of those are issues where you need to have a public interest to justify putting it beyond what is someone's purely private domain. As to the public aspects, on which Gavin has also touched, if you are a celebrity you are a very public commodity. There are some celebrities who manage to live very private lives; there are others who choose not to and engage very publicly in a number of different spheres. I think all those things have to be looked at. For me, when that is looked at it seems to come out in a slightly unsatisfactory way at the moment.

As I said at the beginning, at *The Guardian* we are not really engaging day to day with those sorts of issues, but there is a tendency for hubris or something of that kind when we are looking at what the public interest is. It is very easy in highbrow cases to say what the public interest is, but, when you are looking at what might be considered to be at the lower end of the scale, the fact is that 7 million people buy or read the bottom end of the market every single day. Far be it for *The Guardian* to become a spokesperson for them, but you have to accept that those people have an assessment of what is in the public interest and what they like and do not like that is different from what appears to come out when judges look at these cases. I do not think there should be a statutory law of privacy. I think the courts are the only way to deal with this once the broad principles have been laid down. We can moan about it; we can appeal to a certain extent, and that is the system, but it is very easy to be too high-minded about some of these principles.

Another issue, which David also mentioned, is that you run the risk of creating a false image of people with money having clean-cut lives that never have anything wrong with them, whereas the rest of us do not live like that. If you are not careful, you create a completely false image by allowing the courts to deal with these things in the way they are.

**Q462 Lord Black of Brentwood:** You have talked a number of times, quite rightly, about the courts having been put in the position of having to balance Articles 8 and 10. Parliament foresaw that there could be trouble in this area, particularly in regard to interlocutory injunctions and material that comes into the public domain, and section 12 of the Human Rights Act 1998 was its attempt to deal with that. Do I take it from what you appear to be saying that generally you would tend to regard section 12 to have failed? Is the answer to some of the questions that we are looking at an amendment to section 12, whatever form it might be, along with some form of beefed-up mediator, whether it be the Press Complaints Commission or whatever, as Lord Gold suggested, that somehow could help the situation? My final point is a very general one. Gillian said that what she had for breakfast this morning was shared between two people. If your daughter put on Facebook that you had toast it might be shared with very large numbers of people. Will any possible change to section 12, or any change to self-regulation, whatever it might be, be viable and useful in the digital age of social media?

**David Price:** If the purpose of section 12 was to give the benefit of the doubt to freedom of expression, it has certainly failed. I am not saying that it is Parliament's fault, but it has failed because the House of Lords said, and it now seems to be established, that Articles 8 and 10 had to be of equal weight and there was no presumptive priority in favour of freedom of expression. If Parliament was trying to give that priority to freedom of

expression, if not a trump card but certainly a powerful hand to be played, then it has failed and it needs to be changed, because that is not what is happening in court at the moment; it is all very finely balanced. But I think the problem is more fundamental than that and comes from the very fact of the balance between Articles 8 and 10, and that can be undone only by quite drastic legislation.

On the PCC as a regulator, in an ideal world one would have the press regulating itself, and it is for Parliament to determine whether or not that should happen. I think a strong regulator would be a better way of going about things than the judicial process, but we have not had the opportunity to see whether a strong regulator can work in terms of privacy because the PCC has not had much control over pre-publication material. It is at the pre-publication stage where the battles are fought. If you are to have a privacy law then you have to have injunctions or some form of strong prior restraint. If it comes through a regulator, that regulator will need teeth to deal with it. That is not a criticism of the PCC; it is just a comment on its lack of powers.

On the digital age, a fact to bear in mind is that one is dealing with information, which is not something you can just lock up in a box. You are dealing with a situation where people want to impart and receive information. Therefore, laws will always struggle effectively to prevent that exchange between the communicator and the person receiving the information. That is something one should bear in mind, and it is a factor against having excessively restrictive privacy laws. The information will come out in any event.

**Q463 Lord Janvrin:** I come back to the threshold of privacy and how it affects people in public life. I think there were one or two comments about celebrities and their expectation of privacy. Does that apply to everyone in public life; and, if so, how does that work in terms of an expectation of privacy?

**Gavin Millar:** Again, it is all very grey. The test is: is there a reasonable expectation of privacy in relation to this information? The judges have to an extent accepted that you can look at the person concerned. Some people are more robust; some people may have a lower expectation of privacy than others. Somebody who is an entirely private person will have a higher expectation of privacy than a celebrity, so the same bit of information may result in a different decision on the threshold for different people. But that is not a very developed area of the law for the reason Keith has explained; it is just a threshold requirement. Nearly all of the cases are decided on injunction applications anyway, so it has never been looked at in any great detail.

Section 12 has probably failed, and the idea under Article 10 that prior restraint of the media would be granted only in exceptional circumstances, with very close scrutiny of the facts by the judge justifying prior restraint, has not been protected and preserved by section 12, largely because of the presumptive equality of Articles 8 and 10 but also because the exercise that it mandates—which is that at an incredibly early stage of the case where there is really no evidence you predict who is likely to win at a full-blown trial months later—is almost impossible for a judge to do properly. It is one of those “do your best” exercises but you cannot do it properly, and I do not think it works. We have to go back to a test that says, by all means presumptively the two rights are equal, but to get a prior restraint order it has to be an exceptional case. There are other perfectly adequate remedies that the person can get further down the line if they do not prevent publication. You should confine prior restraint to the core privacy cases about which Gill talked—medical information; welfare of children; some aspects of sexual life and sexual preference—

for certain types of people: for private rather than public individuals. But prior restraint injunctions have in recent years been handed out very readily by judges applying the section 12 test. That has never been the intention under Article 10.

**Keith Mathieson:** Perhaps I may jump in on the question about public figures. It is often said, rightly, that just because you are a public figure, whether you are captain of the England football team or Prime Minister, does not mean you do not have a right to a private life. That is obviously right. But it does not follow that all figures, public or private, have exactly the same expectations of privacy. It would seem to me right that if you are a van driver in Solihull and you have a serious illness like MS, for the sake of argument, that is entirely your business. If on the other hand you are head of the army, it does not seem to me you could plausibly argue, or at least should be entitled to argue, that you have a reasonable expectation of privacy about that information. That is how I view the intense focus that the courts have required people to place on privacy rights and the public interest.

**Gillian Phillips:** I found the Dominique Strauss-Kahn affair very interesting, in the sense that here was a man who was going to be asking French voters to vote for him and information about him was being suppressed by a very compliant French press. That seemed to be a classic example of where there was a public interest, but I think it goes beyond that. To be fair, in that instance and in the Giggs case both were men for whom this was not a one-off incident. It turns out that there is a serial side to it. I have some slight concerns about hiding that type of behaviour, particularly—as in the case of Dominique Strauss-Kahn and Giggs—once it is in the public domain, other people come out of the woodwork and say, “This man has done this to me.” I think there are issues about that. There is a public interest in that coming out and people feeling free to speak out about it. We come back to the point that just because it is about sex does not mean it is the end of the story and there can never be a public interest. I think you have to be quite subtle in the analysis you make in those situations.

**Q464 Mr Bradshaw:** On the other hand, do any of you think that there is any deterrent on people entering public life because of fears for their own privacy and that of their families? One thinks of previous political leaders, including prime ministers. If we had known all the stuff we now expect to know about their private lives they might never have entered politics, let alone become prime ministers.

**Gillian Phillips:** It is a really interesting thing with which we have to grapple. When people write their autobiographies down the line, how much will be excised? Suppose you are the love child of someone in this situation. Are you never going to be able to speak out about it? These are all very difficult issues. Somehow we have to come up with a balance that allows freedom of expression to do what it should be doing and protect what is genuinely private information for those people who have a proper and reasonable expectation of it. I am not saying it is easy or that I want to be the one who makes that choice. As an in-house newspaper lawyer, we do self-censor and self-regulate to some extent; we make these choices, and sometimes we get it wrong. There should be a proper penalty to pay when we get it wrong seriously and deliberately, but it seems to me we need the choice and freedom to make those decisions and for those to be scrutinised properly by the wider public.

**David Price:** That question illustrates why this is not a legal issue but really a moral issue, and that is a very strong point to make. If somebody wants to go into public life, will it put off good people? All of us can lapse. We can set ourselves extremely high standards,

and if every time we lapse we will get clobbered maybe that is not an incentive to go into public life. My opinion is that we are better served by freedom of expression and minimum restrictions, even if that means that from time to time people will suffer. I think it is the best safeguard we have for the abuse of power, and it is a way for people to let off steam. I am afraid I am with Paul Dacre on someone letting off some steam after 10 hours' work in a Sunderland call centre. Sometimes it is grubby but it is just human exchange; it is what people want to communicate and read. We also have libel laws that hopefully protect against publishing false information. With privacy, what we are dealing with is true information that is to the discredit of a person, not false information.

**Q465 Lord Hollick:** You have all expressed important reservations about the difficulty of striking the right balance between these two principles. I think the strong message that comes across is that you feel it is far too much in favour of privacy. Short of repealing the legislation, which is what Mr Price would like to do, and going back to “publish and be damned”, what measures can we take? I entirely take your point that there is a moral dimension to this, but the reality is that it ends up in the legal system. Therefore, as we struggle to reconcile these matters, what recommendations do you think we should consider, both legislative and procedural—for instance, spelling out more clearly what the public interest might be—to try to redress the balance that you believe has gone too far in favour of privacy?

**Keith Mathieson:** One thing you could do would be to introduce a test of seriousness and substantiality into the issue of whether there is a prima facie case of privacy infringement. At the moment, even very trivial, in my opinion, infringements of personal privacy are actionable. A couple of other members of the panel have mentioned this. For example, where the choice of somebody's flowers at their wedding has been revealed by the press it is likely to be considered an infringement of their private life. That does not seem to me to be the kind of thing that the courts and the law of privacy should be troubling themselves with, but at the moment they have to. I do not know how you deal with the public interest. That really comes in more at the threshold expectation of privacy stage than the balancing exercise between privacy and public interest. I think it is very difficult to legislate for that. You will always be dependent on judges making their assessments on the particular facts of the case, but at least getting rid of trivial cases, as the Joint Committee on the Draft Defamation Bill is thinking of doing in relation to trivial libels, would perhaps be a starting point.

**Gavin Millar:** I repeat that I think the test for a prior restraint injunction should be higher and that can be done consistently with Strasbourg case law, provided other adequate remedies are given to people after publication to complain that their privacy has been infringed. That is very important. It is terribly difficult for Parliament to find a way to say to judges they should adopt a broader notion of what is a debate in the public interest, but I think it would be worth a try, perhaps by framing a clause setting out some factors that should be taken into account in favour of freedom of expression and the public interest that are not dealt with in the cases at the moment. I would have thought that one of them is the extent to which that person profits from their own image.

I think that could be done, provided it is not prescriptive and is done subtly in a statutory provision indicating the sort of factors that ought to be considered in assessing the public interest. It would at least enable defence lawyers to argue all the possible points and in that way maybe broaden the judge's understanding of what is a debate in the public

interest. At the moment, you are limited to a large extent to picking through observations in past decisions by judges and trying to argue that they help you towards having a broader definition of a public debate. It would be much simpler if Parliament could just say, “In our view, these are the sorts of factors that it is legitimate to think about when deciding whether there is a debate of public interest.” But from my point of view the biggest problem is the unfairness in celebrities being able to profit from their own image and then claim, as Keith says, the same right of privacy as somebody driving a van in Solihull.

**Q466 Lord Thomas of Gresford:** On the basis of Gavin’s last answer, are we not looking at a broader definition of public interest that has democratic legitimacy? Obviously, David Price thinks that the pendulum has swung too far towards privacy; the judges obviously think a different way. They could be right; you could be right. What is required is democratic debate followed by legislation, which is the way we go about things, so Parliament can take a view broadening the concept of public interest or keeping it as it is, as the democratically elected House, not to mention the House of Lords, think is proper.

**Gillian Phillips:** I think the PCC code is a very good starting point, in that the definition in it of the public interest is one of the few expanded definitions of what is in the public interest. I think the definition in the PCC code could be expanded, in that it tends to look very much at wrongdoing as opposed to the more positive side, which is that there can be a public good in these things. It should not be limited just to exposing wrongdoing in its various manifestations. I notice that one of the questions we were sent asked about hypocrisy. Though it is put in a slightly different way, hypocrisy is part of the PCC code. I think you can use that as a very good basis to expand it. The PCC manages to work very well with that as its starting point, but there is an opportunity possibly to put in a couple of extra pointers that are more positive. Of course, section 12 says that you should refer to the privacy codes. As an in-house lawyer I am not like Gavin; I do not study every judgment that has come out recently, but I cannot remember whether I have seen in any of the recent judgments on pre-publications injunctions in privacy any judge dwelling, if at all, on the PCC code or what it sets out in terms of what the public interest may be. It is talked about as a golden egg; you either have it or you do not, and as a tabloid it is much harder for you to have it than, say, *The Guardian*.

**David Price:** I was quite happy to let things go as they had been, but, bearing in mind where we are now, obviously Parliament has to look at this and legislate; there must be some democratic mandate to establish where we should be. I am concerned that Parliament will be constrained by the European Court of Human Rights and the Human Rights Act, which requires the courts to take into account decisions by Strasbourg. I wonder how much room Parliament leaves itself when it commits itself to Articles 8 and 10 and the way they have been interpreted by the Strasbourg court.

**Gavin Millar:** If you do construct a clause like that, could you put a little proviso at the end to make clear to the judges that what is of interest to the public may indeed be in the public interest? I find the way that is trotted out a little insulting to the public, if I may say so.

**David Price:** But we tried to go down that road. I was involved in the case of *McKennitt v Ash*. The Flitcroft case was a great decision of the Court of Appeal. The Lord Chief Justice, Lord Woolf, and Lords Justices Dyson and Laws—brilliant judges—said one had to take into account what the public wanted to read. What happened in *McKennitt v Ash*? They say that decision is incompatible with Strasbourg, and it is. We have to look to

David Price QC, Gavin Millar QC, Gillian Phillips, solicitor, Director of Editorial Legal Services, The Guardian, and Reynolds Porter Chamberlain—Oral evidence (QQ 33–64)

Strasbourg for the balance between Articles 8 and 10. Our fantastic democratic tradition has gone to a series of countries—I made this submission to the Court of Appeal and they had a go at me—in eastern Europe none of which, frankly, has any tradition of freedom of expression. They referred to it as an American fetish. They do not have our robust tradition of challenging authority and have a culture of deference. That is what you are up against.

**Q467 Lord Thomas of Gresford:** You should be voting in the European debate.

**David Price:** Indeed; I should be outside with my placard this afternoon. It is not the European principle with which I have a problem. My problem is with the fact that the Strasbourg court has interpreted a right to privacy, which originally was to prevent jackboots kicking down your door, into something that restrains people from expressing their life experiences; it restricts freedom of expression and is interpreted in a way that I do not believe it should ever be interpreted. That is what you are stuck with as long as you have the obligation under the Human Rights Act to take into account Strasbourg jurisprudence.

**Q468 Yasmin Qureshi:** You talk about the Human Rights Act being problematic, but we have signed up to the European Convention on Human Rights, which is a treaty obligation. The Human Rights Act is only embodying the convention into our domestic system.

**David Price:** But do not take into account how Strasbourg interprets it. If you have to keep the European Convention on Human Rights, do not make the Strasbourg court effectively dictate how it should be interpreted.

**Gavin Millar:** I think the Lord Chief Justice, Lord Judge, was right the other day when he said that the Act just obliges us to take into account those decisions. This is an important point. There is a margin of appreciation. We can develop a characteristic law of freedom of speech and privacy in this country without worrying too much about Strasbourg judges. I think you have to be rather subtle about it. I have a lot of sympathy with David's view that we should get into the TARDIS and go back 10 or 20 years, but it ain't going to happen. Unless we are to come out of the convention, we have our international law obligations, so I am afraid we must be much more subtle.

**Chairman:** We are straying into a much bigger issue than privacy, obviously, which I suspect may occupy Parliament in future.

**Q469 Lord Dobbs:** I shall try to offer a very brief answer to a simple question in order to ask a second question thereafter. We talked earlier about how since the public frenzy over injunctions in the case of Rio Ferdinand, other footballers and so forth—I was going to call it a media frenzy, but that would be very impolite of me—the number of injunctions has not only fallen but almost seems to have disappeared in this area. Is this because our legal system has managed to gain some sort of balance between these conflicting interests, or is it simply another calm before the next storm?



**Gillian Phillips:** I have two answers to that. One is that of course footballers go on holiday in the summer and see a lot more of their wives rather than when they play away in a Blackburn winter or whatever. I think there is a seasonal tendency in that regard.

**Q470 Lord Thomas of Gresford:** They are just coming back from the Rugby World Cup.

**Gillian Phillips:** Absolutely. That is the practical answer. The more serious answer is that I think claimants are just running scared at the moment. Because of Giggs, and John Terry before that, this is not guaranteed; it is not a right you just have. I suspect that those from whom you are about to hear are busy working out their next strategy—unless these are being obtained in such secrecy now that we do not know about them at all—on how to deal with this. That is where we are. They develop a strategy; we then find out about it and try to challenge it and come up with some proper legal challenges; and it moves along like that.

**Q471 Lord Dobbs:** I take that to be a general answer from the rest of you. I go to my next question. Mr Price talked about abuses of power; Mr Millar talked about the chilling effect that the current situation is having on reporters, editors and so forth. For many of us, the sex life of a footballer is not the fundamental issue on which the freedom of the press should be based. Can you give me some practical examples of this chilling effect where newspapers have shied away from publishing what are truly stories about abuses of power because of the present legal situation?

**David Price:** I think one has to look at it in a more general way. Every time something becomes harder to do, there is a disincentive even to explore the possibility of doing it. One has to look at it in terms of environment. The minute you have an environment in which it becomes expensive and difficult to argue whether or not publication of something is legally justified and there is a risk of injunction, inevitably there will be a chilling effect from that. If you are prepared to invest resources in an investigation and you have the material, eventually you will be able to publish it, and the privacy laws as they stand will not stop that if it is what might be called genuine public interest: evidence of an abuse of power. But I do think it is an oversimplified way of looking at it. Sometimes things come out in one thing and then another thing comes out. Sometimes you do not know what you do not know; you find things out. You live in a society where there is a greater flow of information and therefore that society as a whole is one that will be less prone to abuse of power or corruption.

**Q472 Lord Dobbs:** I understand why you are offering a general response, but I did ask a specific question.

**Keith Mathieson:** Perhaps I may give an example.

**Q473 Lord Dobbs:** Yes, please. I am very much interested in practical examples.

**Keith Mathieson:** I do not know whether it will pass your threshold because it also involves sex but not footballers. The Fred Goodwin case, in which he was alleged to be

having an affair with a female executive at the bank—nobody was quite sure how senior the executive was—is I think an example of the kind of story that newspapers were inhibited from investigating. The story got out. As soon as he got to know about it he got an injunction, and the terms of it were sufficiently wide to inhibit further investigation of the story. Therefore, it was very difficult for other newspapers or media to pursue that story. It seems to me, incidentally, to be the kind of story that possibly Gavin had in mind when he said that judges take rather too strict a view of what is in the public interest and too strong a view of privacy. It seems to me that the man in the street, as it were, would probably think there was quite a strong public interest in knowing that the chief executive of one of Britain's biggest companies might have been having an affair with a senior executive of the bank and keeping that entirely to himself. The judges, on the other hand, took a much more rigorous view.

**Gillian Phillips:** Again, I think the Dominique Strauss-Kahn case is an example of where, if you are not careful, you can end up. Tiger Woods is an example of the sort of case Gavin was talking about where someone is undoubtedly commercially exploiting his reputation as a clean-cut, clean-living man to make money. If you allow things to drift too far, the press will self-censor to the extent that happens in France and elsewhere. You stop all this sort of stuff. It is not just about sex, but that is where the focus happens to be at the moment.

**Q474 Lord Gold:** Where does Ryan Giggs fit into this in terms of public interest?

**David Price:** I am not going to comment on Ryan Giggs because I am involved in that case, but perhaps I may give an example that may seem quite trite but to me is quite important. Articles were published about the fact that the Arsenal manager, Arsène Wenger, had got a woman pregnant. I do not know whether it is true or untrue, but there was quite a lot of publicity about it last year. That is a case where I am sure he could have got an injunction if he had applied for one, but as an Arsenal supporter who pays a lot of money to go and watch their football club, as do loads of other people, the fact that possibly he has been having an adulterous relationship and got a woman pregnant seems to me to have a possible bearing on why my team has not been performing. To me, if he wants to do something like that and take on that role, large numbers of people will have a legitimate interest in that particular issue, because extramarital relationships do affect the way people behave in their roles. In a flippant way I give that as an example of why some people might want to factor it in when evaluating whether that person is performing in his role.

**Gillian Phillips:** For me, the issue in Giggs is not whether it is in the public interest; you should not even be arguing whether it is in the public interest. Is it private and does it get over the threshold in the first place? If it does not, he could still sue after the event for privacy. I know there is an issue about whether damages are an adequate remedy, but they have been so regarded for reputational harm for as long as we have had reputational harm. It seems to me there is a category of cases, of which I would say Giggs is one, where an injunction should not have been awarded. If he has an issue after the event, he can sue; he might get some damages; he might get £10,000 or whatever. There is proportionality here.

**Q475 Lord Gold:** Are you abandoning the public interest point?

**Gillian Phillips:** Not at all.

**Q476 Lord Gold:** If not at all, what is the public interest?

**Gillian Phillips:** Before you get to public interest you have to get over a substantiality hurdle and the hurdle of whether it is private. At the moment, there is no public interest in the sense being discussed in Ryan Giggs' sex life, but, as David said, some of the public have an interest in that. They have paid to watch him play football and he may not be playing it very well.

**David Price:** Except that he was playing football better.

**Gillian Phillips:** But it is too easy to say that is not in the public interest per se. It is not my interest; it may not be yours, but there are people who may be able to say that they have some interest in that.

**David Price:** What about the person who is in the relationship? The first question should be: why should the person who is in the relationship be enjoined before you even ask about the public interest?

**Gillian Phillips:** Slightly flippantly, if footballers in these situations want to come to the courts and get injunctions they should at least come armed with the support of their wives or partners to say, "I know what is going on, but I also want our family to have privacy over this." I think that is a much stronger argument. My suspicion is that a lot of footballers get these things not to stop the tabloids, which is the big issue, but to stop their wives and families knowing about it.

**Chairman:** I think we could spend the rest of the afternoon on this. I thank all four of you very much. We need to move on to our next session.

Ian Hislop, Editor, *Private Eye*, Alan Rusbridger, Editor, *The Guardian*, John Witherow, Editor, *The Sunday Times*, and Jonathan Grun, Editor of the Press Association—Oral evidence (QQ 162–209)

**Ian Hislop, Editor, *Private Eye*, Alan Rusbridger, Editor, *The Guardian*, John Witherow, Editor, *The Sunday Times*, and Jonathan Grun, Editor of the Press Association—Oral evidence (QQ 162–209)**

[Transcript to be found under Alan Rusbridger, Editor, \*The Guardian\*](#)

## Ian Hislop, Editor, *Private Eye*—Supplementary written evidence

At the end of my oral evidence to the Committee on 31 October 2011, I was asked to respond in writing to questions about *Private Eye* and the Press Complaints Commission (“PCC”). The letter dated 4 November 2011, from Mr Besly on behalf of the Committee, sets out three questions. This letter sets out my response to those questions.

### **(Q2) Why has *Private Eye* not subscribed to the PCC?**

1. The short answer to why *Private Eye* has not subscribed to the PCC is that it has not made sense for it to do so. The PCC has lacked independence from the newspaper industry; *Private Eye* has not needed the PCC, either to set editorial standards or to help us resolve complaints; and *Private Eye* would not have derived any benefit from being subject to the PCC’s jurisdiction, since this would not have protected *Private Eye* from costly or protracted legal proceedings. I explain this a little more fully below.
2. As Editor, I am responsible for what is being published in *Private Eye*. I take that responsibility seriously. I think carefully about what is to be published: where necessary, discussing and considering it carefully with others, including the journalists concerned and our lawyers. So far as the law is concerned, there is, as the Committee will be aware, a wide range of laws, both common law and statute, which apply to anyone publishing information. The courts can award an injunction and/or damages and/or costs (which can be very large sums) for civil claims made for libel or for misuse of private information/breach of confidence. Similar remedies can be given for breach of the Data Protection Act 1998 (“DPA”) (which protects personal data) or the Protection from Harassment Act 1997 (“PHA”). Both the DPA and the PHA also create criminal offences. There are numerous other criminal statutes creating offences that can be committed by publishers or journalists, arising out of what they publish (or seek to publish) and/or the methods used to obtain information. In addition, the rules relating to contempt of court restrict some reporting and there are severe penalties for breach.
3. *Private Eye* is subject to the law, but not to the PCC. While I have no problem with the contents of the PCC’s “Editors’ Code”, I do not believe that *Private Eye* needs that Code – or to be policed by the PCC – in order to work out what editorial standards are appropriate or to ensure that those standards are applied.
4. I do not see that it would assist *Private Eye* in dealing with complaints to be subject to the PCC. When a complaint is made to *Private Eye*, we try to deal with it as quickly and effectively as we can. Some complaints to *Private Eye* can be easily resolved: for example, a recent complainant was happy to have a letter published as the first item in the letters page. Others are not capable of being resolved and result in legal proceedings, which either go to court or settle on the way. I outlined the position in relation in my written evidence to the DCMS Inquiry on Libel, Privacy and Press Standards, which was published at the end of the evidence I gave on 5 May 2009. For convenience, what I said was:

“I have looked at what happened in 40 cases since the beginning of 2000 involving libel claims made against *Private Eye*. For the avoidance of doubt the making of these claims did not necessarily lead to court action being started, as some were settled without any need to institute court action and others were not pursued. One action went to trial—the Condliffe action which was mentioned during my evidence—and resulted in victory for *Private Eye* when the action was abandoned after some six weeks of trial. One action went to trial and resulted in a hung jury. One action was settled on the eve of trial with a substantial payment of costs in the *Eye*’s favour, in other words a victory for the *Eye*. Of the remainder, 26 claims were not pursued and 11 resulted in agreed settlement.”

Where a complaint can be resolved with the complainant, we do not need the PCC; where it cannot, the dispute is best resolved by the courts. The PCC cannot determine significant factual disputes.

5. Further, and most importantly, I do not believe that the PCC would be an independent and impartial tribunal for determining complaints against *Private Eye*. For decades *Private Eye* has reported on, and been critical of, the press. The “Street of Shame” column appears in every issue, taking up a page or more with stories about the press, many of which are critical and/or uncomplimentary. *Private Eye* has been very critical of individuals who are, or were at the relevant time, board members of the PCC, as well as of newspapers, whose representatives sit on the PCC. When I gave evidence to the DCMS on 5 May 2009, I said this at Q890:

“We do not pay and *Private Eye* does not belong to the PCC, no. I have always felt *Private Eye* should be out of that. It means that we just obey or do not obey or we are judged by the law rather than by the PCC. Practically two and a bit pages per issue of *Private Eye* are criticism of other individuals working in journalism. On the whole, they appear on the board of the PCC adjudicating your complaint, so I would be lying if I said that did not occur to me. So no, I always thought it would be better for the *Eye* to be out of it.”

I also refer to the answer I gave to the Joint Committee on the Defamation Bill on 11 July 2011 at Q726:

“..the record of the PCC recently—well, for quite a long time—is that it has been ineffective, toothless and often wrong. The PCC are the people who censured the *Guardian* for running the phone-hacking story, so you can see why some of us feel that their judgment has not been awfully hot in the past few years. I do not belong because it is a supposedly self-regulatory body that had a very strong tabloid and News International influence for many years. Therefore, I felt that to go before it and to offer myself to its judgment was not something that I wanted to do. We run a column every week called Street of Shame. I would rather comment about them. So that was my position. I know that the Prime Minister has rather jumped the gun in saying that it is all over, but I think that there would have to be a fairly major rethink about who is on the PCC and what it does if you want to use it as a regulatory body.”

**(Q3) What would persuade *Private Eye* to subscribe to any successor organisation to the PCC?**

6. *Private Eye* would subscribe to a successor organisation to the PCC if it made sense for it to do so. When I gave evidence to the DCMS, I heard what *The Guardian's* editor, Alan Rusbridger, who was also giving evidence in the same session, said about the role and functioning of the PCC (see Q891-895) and, when I was asked whether I would find a changed PCC “acceptable”, I said at Q896 that if its structure and the means of redress offered were different, I would “think very seriously about joining again, because that would make sense.” That is and was my position. Issues of independence and effectiveness would need to be addressed. As I said when I gave evidence to the Joint Committee on the Defamation Bill at Q727: “...if you are going to come up with a regulatory body, it has to be very different from what the PCC has been before.”
7. I am aware that at the outset of his Inquiry, Leveson LJ encouraged the media to discuss issues relating to regulation, to see if a “sensible way forward” could be devised: Inquiry transcript Monday 14 November 2011, 1/4/14 – 1/5/7. If an alternative form of voluntary self-regulation is to be contemplated, then it would have to be one to which the major newspaper publishers would be willing to subscribe and, therefore, it is for them to take the initiative. I would be happy to consider, with interest, any proposals they put forward.
8. I should make clear that I believe that statutory regulation of the press would be undesirable as a matter of principle. As I have said, there are already ample – more than ample – legal restrictions in relation to what can be published or what means of obtaining information can be used. So far as complaints are concerned, one option could be to consider whether the courts could offer a faster, more effective and cheaper route to resolving disputes.
9. If there is to be a new press regulator (whether voluntary or statutory), with the power to adjudicate on complaints, then it must be independent, impartial and effective. One important question is whether adjudication by such a regulator would be *instead of* (rather than as well as) adjudication through the court process. Of course, if involvement in a self-regulatory system would protect the publisher from court proceedings, that would be an incentive to publishers to wish to be involved.

**(Q1) How can non-statutory guidelines work when some publications are not signed up to the existing PCC's Editors' Code of Conduct?**

10. It has not been suggested, to the best of my knowledge, that the non-statutory guidelines in the PCC's Editors' Code of Conduct do not “work” because *Private Eye* has not signed up to the PCC or, for that matter, that they would have worked better if it had. So far as *Private Eye* is concerned, I refer to what I have said above, in particular, at paragraphs 2-4.
11. I am aware that one of the issues being considered by the Leveson Inquiry is the “extent to which the .. regulatory framework has failed”: Monday 14 November 2011, 1/2/8-9. One question would be the extent to which the PCC has worked in relation to those who do subscribe, or have subscribed, to it. Of course, the fact that guidelines (or laws) exist does not mean that they will always be complied with fully:

some mistakes cannot be avoided. It is, however, for those who have subscribed to the PCC to explain whether the Editors' Code has been inadequately applied, ignored or deliberately broken.

12. It seems to me that non-statutory regulations do not need to apply to all "publications" for them to "work". There are many different types of publication and, depending on what problem or perceived problem is being addressed, different forms of guidelines or regulation may be appropriate. If the aim is to regulate the "press", then the more major newspaper publishers which sign up (national and regional, broadsheet and tabloid), then the more effective regulation is likely to be. But guidelines can and do "work" without having to apply to every publisher.

23 November 2011



## **Professional Negligence Lawyers' Association—Written evidence**

### Introduction

The Professional Negligence Lawyers Association consists of over 500 members nationwide from a variety of specialisations with the common theme being the conduct of professionals giving rise to complaints, civil litigation claims and disciplinary proceedings. Members include those acting for both victims and the professionals concerned and their insurers.

The issues raised by the call for evidence of this Committee have wider implications and perhaps something to be learned from the remedies available within the wider professional community as to the conduct of Editors under the Editorial Code (as administered by the Press Complaints Commission) and the Broadcasting Code operated under the Communications Act 2003 administered by OfCom and BBC Trust.

### Professional Standards

The basic test applied in professional negligence claims is as follows and known as 'the Bolam test':

McNair J in *Bolam v. Friern Hospital Management Committee*: "The test is the standard of the ordinary skilled man exercising and professing to have that special skill; it is well established law that it is sufficient if he exercises the ordinary skill of an ordinary competent man exercising that particular art."

Clearly within a particular profession or indeed an industry Codes of Practice are built up which set the standards. This appears to have been the regulatory background for both the Press and Media industries being considered by this Committee.

There is a great deal of legislation and large volumes of codes – however of particular note are the following sections which appear to set the tone for the standards that have been set under the codes concerned and administered by the regulators referred to within the scope of this Committee:

### **OfCom: The Ofcom Broadcasting Code February 2011 Section Five: Due Impartiality and Due Accuracy and Undue Prominence of Views and Opinions**

(Relevant legislation includes, in particular, sections 319(2)(c) and (d), 319(8) and section 320 of the Communications Act 2003, and Article 10 of the European Convention on Human Rights.) This section of the Code does not apply to BBC services funded by the licence fee, which are regulated on these matters by the BBC Trust. Principles: To ensure that news, in whatever form, is reported with due accuracy and presented with due impartiality - To ensure that the special impartiality requirements of the Act are complied with.

**Press Complaints Commission: Editors' Code of Practice: Section 1: Accuracy**

i) The Press must take care not to publish inaccurate, misleading or distorted information, including pictures ii) A significant inaccuracy, misleading statement or distortion once recognised must be corrected, promptly and with due prominence, and - where appropriate - an apology published. In cases involving the Commission, prominence should be agreed with the PCC in advance iii) The Press, whilst free to be partisan, must distinguish clearly between comment, conjecture and fact iv) A publication must report fairly and accurately the outcome of an action for defamation to which it has been a party, unless an agreed settlement states otherwise, or an agreed statement is published.

Freedom of the Press/Media – including omission?

Conduct of professionals in the wider context includes not only providing incorrect advice but also omitting to provide advice. Complaints to a professional body or Ombudsman, civil litigation claims and misconduct complaints in disciplinary proceedings can all be spawned not only by incorrect, negligent, incompetent and even dishonest advice but also by way of failing to provide any advice when a professional should have done so.

At point (2) of the call for evidence a series of questions are asked about the balance between freedom of expression and privacy. The assumption being that 'privacy' is always concerned with revelations about a person's private life. However if the legal and regulatory framework addresses only news stories published without consideration of omissions to publish then there is an argument that this provides a 'black hole'.

For example as posed in point g. if a celebrity or politician who uses their private life for popularity is subject to an unflattering publication then there are remedies if that publication itself is in breach of the law. However what appears not to be regulated is either the withdrawal of any publicity to that person or the absence of publicity for positive aspects of that person's life.

The Broadcasting Code requires 'impartiality' and 'accuracy' and prohibits 'undue prominence of views and opinions'. The PCC prohibits 'inaccurate, misleading or distorted information'. However neither require the choice of what is published or not to be controlled. In our example if it is decided that a celebrity or politician should receive no press attention this could potentially as effectively ruin their livelihood providing no recourse within the regulatory or legal framework.

Freedom of expression in extreme situations

The Press and Media may well regard their power to choose to publish what is 'news' as a fundamental area that they need to control. Their main function is to interest their readers and viewers and gain financial rewards from their popularity.

On the whole they do not act as a group – one newspaper might lose interest in a celebrity or politician but another may well continue to regard them as newsworthy. The scenario posed previously seems unlikely to happen unless there is some reason for a conspiracy for all the press and media jointly to make the same decision. The absence of legal or regulatory controls therefore might be regarded as unnecessary for such an unlikely scenario.

However what if there was a reason for the Press and Media all to omit to publish news which was unarguably newsworthy?

This does appear to have arisen recently in relation to the following legislation:

- a. The Defamation Bill;
- b. The Legal Aid Sentencing and Punishment of Offenders Bill – notably sections 43 and 45 concerning 'no win no fee' funding of civil litigation costs.

Other issues which may affect all the Press and Media businesses would include the proposals of this Committee and issues surrounding any reform of the regulatory framework for the Press and Media.

Therefore it is possible to conceive of 'extreme situations' where the Press and Media as businesses are not only likely to omit to publish news which may affect large numbers of their readers and viewers, but also they may well be legally bound to do so.

An extreme situation would arise if there is proposed to be a change or reform which might harm readers and/or viewers but where the change or reform would substantially benefit the Press and Media as a whole.

#### Civil Litigation Costs Reforms

Within this background the Committee have asked for evidence at point (2) I on the sufficiency of damages as a remedy, whether punitive financial penalties would be an effective remedy and indeed whether or not they would deter disproportionate breaches. There is further reference at n. to aggravated damages. Injunctions themselves are a remedy within civil litigation.

Therefore the proposed Government reforms in sections 43 and 45 of the Legal Aid Sentencing and Punishment of Offenders Bill (currently in the Committee Stage in the House of Lords) are highly relevant to the evidence being sought within this Committee.

The impact of these reforms would be to make it impossible for many victims of publications which break the law by Press or Media businesses – whether by way of privacy, defamation or otherwise – to fund civil litigation for damages and/or injunctions.

Clearly any company which provides publications by way of press articles or broadcasting must have regard to its own financial welfare. Directors are legally bound to act in the best interests of their companies by way of the Companies Act 2006:

#### **Section 172 Duty to promote the success of the company**

*(1) A director of a company must act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole..*

Therefore there is a fundamental conflict of interest for the directors of such companies in an extreme situation if there is legislation which is clearly 'news' but if published could lead to a lack of 'success' in the financial performance of the business.

In relation to civil litigation costs the current position is that a claimant can obtain funding by way of 'no win no fee' a Conditional Fee Agreement whereby a solicitor can offer not to be paid at all if the case is lost but if successful can charge their usual base costs plus a 'success

fee' assessed according to the litigation risk of winning the case. The maximum success fee is 100% - or double fees.

Further the claimant can obtain insurance against losing the case – known as After the Event Legal Expenses insurance – which is currently available by way of no payment of the premium up front – only if the case is successful – ie a 'no win no fee' insurance premium.

If such a strong claim (lawyers and insurers do not tend to offer 'no win no fee' unless there is regarded to be a strong claim) and it is defended by a Press or Media business but they then settle or lose at trial – then the combined costs they have to pay include the base costs, the success fee and the insurance premium. If the claimant loses the case then the legal costs of the defendant Press or Media organisation are paid by the insurer (subject to any limit of cover).

The impact of the proposed reforms in section 43 and 45 by abolishing recovery of success fees and insurance premiums therefore will deter many claimants from bringing claims – whether for damages or injunctions. Unless the damages that can be recovered exceed the success fee and insurance premium – they will recover no damages at all even if they win their case.

Expensive civil litigation involving an injunction followed by a damages claim for a privacy action may well be just such a case where the success fee and insurance premium are very likely indeed to exceed the damages that could be recovered. Further a defendant Press or Media business may be tempted tactically to deter claimants by driving up costs because the success fees and insurance premium would be likely to exceed the damages.

On a mathematical level even if punitive or aggravated damages were introduced – they would not relate to the amount of time it would take the claimant's lawyers to win the case. Clearly an increase in recoverable damages might encourage some claimants to bring a claim in the hope of some financial recovery after paying their legal costs – but this would entirely depend on the level of those costs as a result of the strength of the defence.

Disputes about legal costs are determined in a specialist Court – the Senior Courts Costs Office. The following submission was made to the Ministry of Justice which confirms from an impartial source that there is concern about conduct generally in civil litigation in these terms even within the existing regime as follows: *'The Costs Judges deal with many bills in which the costs have been significantly but avoidably increased by the conduct of Defendants. In some cases, the litigation is conducted with hostility, thereby requiring claimants to address each and every point. In others, defendants delay, thereby causing unnecessary additional costs.'* MOJ

Submission by Master Colin Campbell, Master Peter Haworth, Master Colum Leonard - 14 February 2011 Senior Courts Costs Office

If the claimant's costs are capped with payable success fees as a percentage of damages then lawyers may well be deterred from offering 'no win no fee' funding at all – especially for case with non financial remedies such as injunctions.

This is very much an 'extreme situation' because this legislation will be highly beneficial financially to all the Press and Media businesses. It would reduce the number of civil litigation claims being brought against them and those that are brought will be cheaper for them to settle as the legal costs will be lower and indeed claimants will be more eager to settle for less at an earlier stage in view of the costs risks of a future trial.

There has been little in the way of publications or broadcasting highlighting the impact of these reforms on readers and/or viewers. This would be very unpopular legislation with them. The reforms adversely affect all civil litigation by any person or business except for

personal injury and clinical negligence claims which are being provided with an alternative costs saving mechanism.

#### Remedies for failure to publish news

In an extreme situation where all the Press and Media have a financial interest in failing to publish news there appears to be no regulatory remedies within the scope of Ofcom or the PCC.

There is potentially some further legislation in relation to competition law which might apply. The Competition Commission have advised as follows:

*The role of the [Competition Commission](#) is to conduct in-depth inquiries into mergers, markets and the regulation of the major regulated industries following a reference made to us by another authority: usually the [Office of Fair Trading](#) or one of the sector regulators for communications, gas and electricity, water, rail, airports, and postal services. We cannot initiate investigations without a referral from one of these bodies nor can we advise on competition policy.*

*If you believe there is an attempt to restrict competition in the civil litigation marketplace, the appropriate body for you to contact is the Enquiries and Reporting Centre at the Office of Fair Trading (OFT). The role of the OFT is to promote and protect the interests of consumers in the UK while ensuring that businesses are fair and competitive.'*

The OFT have provided their comments as attached in a letter of 22 December 2011. It is clearly far from certain that there is any regulatory remedy through them and depends on a situation coming within their 'prioritisation principles'.

The OFT also refer to scope for a private civil litigation action in damages for a breach of competition law. However the practicalities of bringing and funding such proceedings on behalf of an abused supplicant market at first glance seem somewhat daunting.

The Committee will hopefully find this submission useful for consideration for potential regulatory remedies and in consideration of the 'extreme situations' described.

23 December 2011

#### **Letter from the Office of Fair Trading to the Professional Negligence Lawyers' Association dated 22 December 2011**

Thank you for your emails of 8 and 16 December regarding your concerns about proposed reforms to no win no fee conditional fee arrangements and the coverage of these reforms in national newspapers. We understand you would like to include details of the Office of Fair Trading's (OFT) position, in relation to competition law, in your submission to the Joint Committee on Privacy and Injunctions.

By way of background, the mission of the OFT is to make markets work well for consumers. We achieve this by promoting and protecting consumer interests throughout the UK, while ensuring that businesses are fair and competitive. Our primary duties involve the

enforcement of competition law, and the application of consumer protection legislation in respect of matters that adversely affect the collective interests of UK consumers.

As you will be aware, the relevant legislation covering competition in the UK is the Competition Act 1998 (the Act). In brief, the Act contains two prohibitions. The Chapter I prohibition prohibits price fixing or other anti-competitive agreements which prevent, restrict or distort competition. The Chapter II prohibition prohibits conduct by companies which amounts to an abuse of a dominant position.<sup>377</sup>

As the Competition Commission has explained, potential breaches of the Act should be reported to the OFT or the relevant sector regulator in the first instance. The OFT considers all complaints it receives about anti-competitive behaviour. We will only take forward complaints that are substantiated and where the proposed case or project meet our prioritisation principles. We consider a range of factors, including impact on consumers, strategic significance, and resources. The OFT will then consider whether further action or investigation is, in the circumstances of a particular complaint, the most effective means of achieving positive outcomes for UK consumers. It is also open to any person who suspects there has been an infringement of the competition prohibitions to bring a private damages action.

Thank you for contacting the OFT, and I hope the above information clearly explains our position in relation to the complaints we receive.

Office of Fair Trading

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<sup>377</sup> For a brief overview of the Act and the type of complaints we consider, please refer to our website at [www.offt.gov.uk/OFTwork/competition-act-and-cartels/CA-overview/](http://www.offt.gov.uk/OFTwork/competition-act-and-cartels/CA-overview/)

## **The Professional Negligence Lawyers' Association—Supplementary written evidence**

The PNLA submission of 23 December 2011 is referred to. Since that date the results have been received of a Freedom of Information Act request for copies of the responses from the press and media businesses as listed below to the Ministry for Justice Consultation on the Legal Aid Sentencing and Punishment of Offenders Bill.

These responses starkly illustrate that sections 43 and 45 relation to abolition of recovery of success fees and insurance premiums are indeed an exceptional situation. The following bodies submitted responses in identical formats of which three are attached by way of illustration (Lords Clerk Mr Besley has advised that full disclosure is potentially too voluminous albeit full copies are available as required).

This appears to suggest not only that all these bodies agree with the Government policy but also some collusion in bringing the policy about.

This reinforces the view that there is a lack of regulatory control about the press and media by way of omitting to report news which may affect many readers and viewers but which would potentially also adversely affect these businesses if they did so. No balanced reporting therefore has taken place on this proposed legislation due to be determined by the Lords in Committee on or shortly after 18 January 2012.

***Associated Newspapers,  
BBC,  
Channel 4,  
Channel 5,  
Express Newspapers,  
Financial Times,  
ITN,  
ITV,  
Northern & Shell,  
Press Association,  
Sky,  
Telegraph Media Group,  
The Guardian / Observer,  
The Independent,  
The Newspaper Society,  
The Newspapers Publishers Association,  
Times Newspapers***

Copies of all the submissions have been forwarded by the PNLA to Melissa Herold of the Office of Fair Trading (whose letter was attached to the previous PNLA submission) but no response has been received so that it remains uncertain whether or not they have any regulatory power to investigate in this situation.

The Committee will hopefully find this submission useful for consideration for potential regulatory remedies and in consideration of the 'extreme situations' described.

The Professional Negligence Lawyers' Association—Supplementary written evidence

9 January 2012

The attachments to this submission are available from the Parliamentary Archives  
(telephone 020 7219 5314)



Reynolds Porter Chamberlain, David Price QC, Gavin Millar QC, and Gillian Phillips, solicitor, Director of Editorial Legal Services, The Guardian—Oral evidence (QQ 33–64)

**Reynolds Porter Chamberlain, David Price QC, Gavin Millar QC, and Gillian Phillips, solicitor, Director of Editorial Legal Services, *The Guardian*—Oral evidence (QQ 33–64)**

[Transcript to be found under David Price QC](#)

**Joshua Rozenberg, Professor Steven Barnett, and Professor Brian Cathcart—Oral evidence (QQ 119–161)**

Evidence heard in Public

Questions 119–160

MONDAY 31 OCTOBER 2011

Members present:

Mr John Whittingdale (Chair)  
Lord Black of Brentwood  
Mr Ben Bradshaw  
Lord Boateng  
Baroness Bonham-Carter of Yarnbury  
Mr Robert Buckland  
The Lord Bishop of Chester  
Baroness Corston  
Philip Davies  
Lord Dobbs  
George Eustice  
Paul Farrelly  
Lord Harries of Pentregarth  
Lord Hollick  
Martin Horwood  
Lord Janvrin  
Eric Joyce  
Mr Elfyn Llwyd  
Lord Mawhinney  
Penny Mordaunt  
Yasmin Qureshi  
Lord Thomas of Gresford  
Nadhim Zahawi

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**Examination of Witnesses**

*Witnesses:* **Joshua Rozenberg**, legal commentator and journalist, **Professor Steven Barnett**, Professor of Communications, Westminster University, and **Professor Brian Cathcart**, Founder of Hacked Off, Professor of Journalism at Kingston University London.

**Q119 Chair:** Good afternoon. Welcome to this afternoon's session of the Joint Committee on Privacy and Injunctions. We have two panels today, the first of which consists essentially of academics: Joshua Rozenberg, the legal commentator and

journalist; Professor Steve Barnett of Westminster University; and Professor Cathcart of Kingston University in London. Perhaps I might ask you to begin by saying whether or not you feel that the balance that is currently being struck by the courts between the right to privacy and the right to freedom of expression is roughly right, or whether there is a problem that needs to be addressed?

**Professor Barnett:** I don't mind kicking off, Chairman. May I start by saying that I have been asked to say on the record that I am currently a specialist adviser to the House of Lords Communications Committee for its inquiry on the Future of Investigative Journalism? Is the balance correctly struck? I think the law as it stands appropriately recognises, through Article 8 and Article 10, freedom of speech and privacy, and I think the courts have properly interpreted that that is sometimes a difficult balance. If you read some of the newspaper reports you would be forgiven for sometimes thinking that that balance is tipped wholly in favour of privacy. I don't think that is the case. I am not convinced that there was ever a need for Section 12 of the Human Rights Act 1998; reading the previous evidence to this Committee I am not even sure that Section 12, which is supposed to ask the courts to have particular regard for freedom of expression, has any proper meaning. In principle I think the balance exists. In practice I am not convinced at the moment that the courts can properly withstand some of the rather aggressive media attacks on concepts of privacy. Personally, as I said in my written evidence, I have reluctantly come to the conclusion that perhaps we need some kind of privacy law, partly so that Parliament, the properly elected representatives, can offer some democratic legitimacy to the process, rather than leaving it up to the judges. But I suspect my two colleagues disagree with that.

**Joshua Rozenberg:** I have never thought that Section 12 of the Human Rights Act had any meaning at all, but Parliament chooses to pass legislation for all sorts of reasons. I did not think it amounted to very much. Perhaps for the same reason, I would probably be against a statutory tort of privacy because ultimately it is going to boil down to a restatement of the existing law, and the courts are ultimately going to have to set a balance, as they do at the moment. All it will lead to is a certain amount of satellite litigation over whether the new law amounts to the same as the existing law, so I cannot see much point. In answer to your initial question, I think that the law does strike a fair balance between privacy and freedom of expression, but the only honest answer is that nobody knows. Nobody really has an overview, except perhaps this Committee.

**Professor Cathcart:** If you compare the judgments in the Mosley and Ferdinand cases you have a pretty good picture of the great care that goes into balancing privacy and the public interest in these cases, and the care the judges apply, and also the fairness of the process; they come out with verdicts that are not all leaning in one direction and for very good, reasoned grounds.

**Q120 Lord Thomas of Gresford:** What do you say to Professor Barnett's point that the judges have difficulty withstanding the pressure that is put upon them by the press? Do you agree with that?

**Professor Cathcart:** I agree that the pressures placed on judges are enormous, and indeed so are the pressures placed on politicians. I think that much of the press makes identical common cause on these issues in a way that is unsettling, and must be quite frightening if you are on the wrong end of it. This spring's torrent of coverage of the so-called super-injunctions scandal was a case in point; it was uncritical, emotional, very unbalanced and very difficult to withstand. The public is inundated with this information

saying that there is a terrible scandal going on. It is very hard to stand up and say, “No, there isn’t”.

**Professor Barnett:** If I may add just one more thing: I would be less willing to go for some kind of tort of privacy if I was absolutely confident that the HRA as it currently stands would remain fully intact. However, some of the aggressive opposition, in particular to Article 8, makes me feel rather less than confident.

**Q121 Mr Bradshaw:** Professor Cathcart, I am not sure from what you said, or from your written evidence that I otherwise found very compelling, which side of the argument you are on when it comes to privacy legislation.

**Professor Cathcart:** I am on another side from Professor Barnett. On balance I feel that what is to be lost, jeopardised, or at least put in danger in going for new legislation probably outweighs what you might gain, in the sense that you are going to end up with a law that leaves you in more or less the same position, but you are first of all going to expose yourself to another of these firestorms of press campaigning.

I also think there is an issue about legitimacy, which can be seen from the other side, which is that if the Human Rights Act does not have legitimacy, then nothing does. This is a law passed by the UK Parliament in the normal way. It was a manifesto promise of a Government that was elected with an overwhelming majority, introduced very soon after the election. It seems to me that if any law has legitimacy, surely that one does. As for the argument about it being European, foreign and those sorts of things: the press are very unhappy with the libel law, which is almost eccentrically British. How does that work out? You hate a law because it’s European and you hate a law because it’s British—I don’t know.

**Q122 Yasmin Qureshi:** Do you think that over the last few years, press standards regarding the publication of kiss-and-tell stories has got worse, changed or remained the same? If it has got worse, is it a uniquely British problem?

**Joshua Rozenberg:** We seem to specialise in prurient stories in this country, don’t we, more so than, for example, France? I am not sure that Dominique Strauss-Kahn would have survived here for as long as he did as a Frenchman. There seems to be more entrapment by people who have affairs with personalities in order to sell stories to the newspapers. There is a broader issue about newspapers trying to attract readers in a falling market. I have got in front of me, for example, the *Daily Mail* website—the *Daily Mail*, like all newspapers, is moving online—and what is perhaps a rather prudish newspaper in print has a very successful website, not because it has just started a serious political section edited by Simon Heffer, but because of stories such as, “After Gavin Henson chooses her as his girlfriend, Carianne Barrow strips off for provocative underwear shots”. Of course, I do not know who either of these people are. Other stories include “Trevor Eve and the wife’s look that says: You’re in the doghouse. Sharon Maughan appeared stony-faced as couple emerged from Belgravia home”; “Whoops! Cristiano Ronaldo emails fan’s X-rated pictures to everyone in his address book including fiancée”; “Ice T’s little devil! Coco’s sinful curves bust out of barely-there Halloween costume”; “I did sleep with Lucy’: Mark Wright confesses during Truth or Dare session at boot camp”, and so on.

As I say, there is this coverage, which seems to go down very well in the United States, where the website has a large audience. That is what we seem to do in this country.

**Professor Barnett:** The interesting question here is how standards have changed, and there is no agreement on that. It is interesting; if you go back to the Calcutt Committee report 20 years ago there were some pretty disgraceful things going on, and there have clearly been some pretty disgraceful things going on more recently. We have been told, by Paul Dacre amongst others, that things are much better now than they used to be. I would commend to this Committee a website by a journalist called John Dale; the website is called johndalejournalist.co.uk. I do not know John Dale and have only just come across his website, but he has been a tabloid journalist for over 30 years. He clearly knows his stuff, and is very offended, on behalf of those who have been doing it for that long, at what he believes are some of the calumnies being written and spoken about the way journalism used to work, saying that he and those he worked with would never do the kinds of things they are accused of having done then and others are clearly doing now. There is a debate about this, and I would not take at face value those who sit here and tell you that things are much better now than they were 20 years ago.

The second thing is: is it uniquely British? When the whole phone-hacking scandal broke, I did numerous interviews with international television and newspaper organisations around the world. Almost invariably, the first question was, “What is it about this country? Why do these things happen here?” There is no question but that Britain has a reputation. Some would argue it is a good reputation; it is about transparency and openness, and we can say what we want. Others say it is a bad reputation, and that there are things written about and techniques used that should not be admissible. But I think whatever position you take, we are quite different from many countries around the world, and I think this comes back to Joshua’s point about the competitive nature of our national press. We have a uniquely competitive national press, very widely read, and I think that makes a difference to some of the stories published and some of the techniques used.

**Q123 Lord Boateng:** On the point about a competitive press and Joshua Rozenberg’s point about what I think you described, Joshua, as a falling market in newspapers, do you agree with the proposition that we have heard as a Committee that it is in the public interest to have as many newspapers as possible; that those newspapers need to be profitable to remain viable; and that therefore, in examining privacy laws, we need to take that into account in terms of maintaining a healthy, viable market in newspapers?

**Joshua Rozenberg:** I do not think it is an overriding argument. I am obviously in favour of as many newspapers surviving as possible, but I do not think that this Committee, the Government or the country has a duty to the newspapers to keep them in business. If the newspapers are moving online, as they are, because their readers prefer to read their newspapers on iPads and computers rather than in print then that is the way the newspapers are going to go. There is still clearly a market for news mediated through journalists rather than simply provided by public bodies and repeated by bloggers, but I do not think that the newspapers can justify misdeeds simply by saying, “It is in the public interest for us to continue, come what may”.

**Professor Barnett:** May I second that? Brian and I are responsible for educating an awful lot of aspiring journalists, and I would find it very difficult to agree to anything that might somehow jeopardise the future employment prospects of the students who are going to graduate from our universities. But I am afraid that is no reason or excuse to justify some of the things that have been going on, or to relax appropriate journalistic standards. The analogy I used in my written evidence was that if you are running a jewellery store, it is no excuse to say you cannot possibly stay in business unless you are allowed to go and burgle

people's properties. We have to keep these things in perspective when talking about commercial survival and profitability.

**Professor Cathcart:** I endorse entirely what Steve says. I think the idea of offering a waiver, as it were, on what are essentially other people's rights to privacy in order to sustain the newspaper industry would be very hard to sustain.

**Q124 Paul Farrelly:** Steven, in your overview of evidence you say, "Press standards and intrusion have been a problem for at least 30 years." That might neatly date it back to the involvement of Rupert Murdoch in the British press. Would you point that finger, along with the impact of the increasing competitiveness of the market?

**Professor Barnett:** I have had arguments with my colleagues about this. It is very interesting; it comes back to the old dichotomy between, taking sociological views, structure and agency. Is it a structural issue—in other words, because of the levels of competition—that individual journalists have been driven to a point where they have to get stories in order to sell newspapers; and/or to what extent can you say that there is an individual owner or proprietor who encourages, or at worst allows and facilitates the kinds of stories or practices that produce the excesses we have seen? I have read virtually every biography of Rupert Murdoch—I even met him when I went with the Lords select committee to Washington—and I take on board everything that is said about his ability and willingness to fund journalism, but it is fair to say that he has not done very many favours, in particular at the lower end of the newspaper market, the tabloid end, in terms of the kind of practices that are allowed and encouraged within his newspapers. I am very reluctant to point the finger at individuals but if you read the Murdoch biographies, including those which are very flattering about his impact on journalism, it is perfectly clear that his philosophy is much less about investigative or watch-dog journalism than about sensationalism and prurience.

**Q125 Paul Farrelly:** Can I help stiffen your finger? When the Culture, Media and Sport Committee did their report on Press Standards, Privacy and Libel, the cry of the tabloid press about the McCanns was that this was very much a one-off, and yet we were able to cite the case of two newspapers that felt compelled, no doubt for their own competitive reasons, to identify where the daughter of Josef Fritzl, the Austrian man who raped her, was trying to rebuild her life in a new village. The reporters from those publications were called, "Satan's reporters" by the rest of the European tabloid press, and those two newspapers were *The Sun* and the *Daily Mail*. Do you think that there might be more than one culprit?

**Professor Barnett:** In terms of the decline in press standards? Is there more than one culprit? Let us put it this way: you can point to the McCanns and what happened with the *Express* newspapers. There we have at least three culprits. The fact is, these practices would not happen unless they were at the very least quietly allowed by those who own the newspapers and those who run them. On that basis, I do not think competition alone can be the answer. Ultimately I think that owners have to bear responsibility.

**Q126 Paul Farrelly:** Brian, I think it was back in 2008 you wrote a seminal article in the *New Statesman* entitled, "How the press tried to destroy the McCanns", and you have just recently written a very good, long piece in the *Financial Times* about the Christopher

Joshua Rozenberg, Professor Steven Barnett, and Professor Brian Cathcart—Oral evidence (QQ 119–161)

Jefferies affair. What do you think accounts for the lack of self-restraint in British newspapers; and who do you think are the main or the driving culprits over time?

**Professor Cathcart:** There is a matrix of problems. If you look at the way the law has functioned, you now have clear serial offenders. In the Robert Murat case, a group of papers were brought before the court, they all apologised, they all said they had no evidence to support what they had said and they all agreed to pay damages. They went through something more phased with the McCanns; you have something similar with the Tapas Seven—I don't know if you remember that group—associated with the McCann case, and with the Christopher Jefferies case. Where you have serial failures like that, there may be something wrong with the law. I think it is like reoffending, but there are also problems with regulation. The regulation does not involve any sort of post-mortem when there is a disaster like this, any sort of investigation of what has gone wrong and what lessons can be learned, or any level of recommendation or criticism or sanction. None of that happened in any of these cases. The damages are low, and there is no comeback, as it were, so why not do it again. I think those are serious problems.

**Joshua Rozenberg:** It is worth adding that in the Christopher Jefferies case the Attorney General began proceedings. I think this Attorney General has been more willing to bring contempt of court cases—there is another one pending—than his predecessors. I think that will get through to the press.

**Q127 Paul Farrelly:** Joshua, I have a final question for you, but Brian cannot just sidestep that, because there would be no need for regulation if there were not culprits. The same question again: who do you think have been the main culprits in terms of newspapers, proprietors and editors?

**Professor Cathcart:** That is a hard question—I am afraid I am probably going to duck it again—in the sense that there are two things going on here: one is that you have newspapers in a declining market, desperate to survive, and virtually everybody in this market is under the same pressures and willing to do more or less the same things to try to eke out the remaining years and protect their readerships. I really would not single out any one paper or proprietor. I think the remedies will be systemic, rather than focused on individuals.

**Q128 Paul Farrelly:** Brian, you will clearly still be able to write a column for anybody on the basis of that answer. Joshua, you are very well respected—you write for *The Daily Telegraph*, the BBC—are there any publications that you would not write for, not just because they do not run a legal column, but because of the culture in the newsroom and the culture of intrusion?

**Joshua Rozenberg:** The only newspaper I have worked for is the *The Daily Telegraph*, although I write a column for *The Guardian* at the moment, and I write for various other publications. I think that if a newspaper were to ask me to write a column—and some papers that I have not just mentioned have done so in the past—I would like a pretty good idea that what I might write is what would appear. If the newspaper was not able to offer me that guarantee—and some newspapers would not—then I would not write for them.

**Q129 Paul Farrelly:** Which newspapers would you ask most forcefully and pointedly?

**Joshua Rozenberg:** Any newspaper apart from the one I write for at the moment.

**Q130 Chair:** Professor Barnett, just to follow up Paul Farrelly’s question: two things seemed to have happened. First, there seems to be huge enthusiasm on behalf of the *Sunday Mirror*, *People*, *Star* and to some extent *The Mail on Sunday* to fill the shoes of the *News of the World*. It did not seem that the *News of the World* was unique in wanting to pursue those kinds of stories. One explanation is that there appears to be quite a revolving door of senior editorial staff in the tabloid market. The people who now work for the *Sunday Mirror* would have started off with the *News of the World* or *News International* and vice versa.

**Professor Barnett:** And it would be very helpful if we could hear a little bit more from those people who are involved at the coalface. The problem with the recent debates is that we have heard very little from people—apart from those in the very senior editorial positions—who are actually taking the orders or doing the kinds of journalism we worry about. I want to make it clear that it is very important that we do not condemn tabloid journalism. There is absolutely nothing wrong with—indeed, there are a lot of things that there are very right with—populist journalism. Certainly 20 years ago the Calcutt Committee was very taken by the argument that, “You must not condemn us simply because we are sometimes aggressive, or maybe not to an elite taste”. But I think there is a huge difference between stories that are popular—about popular figures, popular television programmes or campaigns that are popular—which are the fodder of all good tabloid, mass-circulation newspapers, and stories that are salacious and involve gratuitous invasions of the private lives of public figures. I think we have seen a lot less of that since the *News of the World* closed down. I am not convinced that what I have seen in the mass-circulation Sunday newspapers is the same; I think it is actually rather different from what we used to get at the *News of the World*.

**Q131 Lord Thomas of Gresford:** Some people enjoy reading salacious stories, and others are offended by them. Who draws the line? Should it be the market, the Press Complaints Commission, the courts or Parliament? You obviously have a line yourself, because you teach standards, and some things are beneath your standards. Why should we accept your line, for example?

**Professor Barnett:** Sorry, is this addressed to me?

**Q132 Lord Thomas of Gresford:** Well, anyone.

**Professor Barnett:** I do not have a line, and I would certainly not prevent other people who want to from reading salacious stories. It is the nature of those stories and the way in which they are achieved that is the problem. Everybody likes gossip; Andrew Marr calls journalism “the industrialisation of gossip”, which I think is a rather unfair characterisation of journalism. But there is nothing wrong with liking gossip. It feeds people’s conversations in pubs. The problem, as always, is getting the balance right and making sure that the subjects of that gossip are not subjected to unwarranted and unnecessary intrusions that cause personal distress. Public figures need to accept a certain amount of exposure and scrutiny; that is absolutely right. I think the culture in this country tends to be driven too much by a sense that because they are public figures they are fair game for virtually any story about them that we wish to publish. We will probably come on to this question about public versus private figures.



**Chair:** We shall shortly.

**Professor Barnett:** We shall. Okay, I will stop there.

**Professor Cathcart:** I will just add that I think the line in the end has to be the law, and we have a law that does that, and that is what students get taught.

**Joshua Rozenberg:** Initially it is the editors, but ultimately it is the law.

**Q133 Martin Horwood:** All three of you have roundly condemned the status quo—I think Professor Barnett compared the current activities of the tabloids with the activities of a police state—but I want to ask you how you think your strengthened regime of regulation, whether it is self-regulation or backed up with statutory powers, would work in practice? To follow on with this private/public issue, arguably there is a 200-year-old tradition of scurrilous gossip about things that are visible in public and the activities of celebrities in public. Is there not a risk that if you try to clamp down on all of that, on anything that would cause them distress, you are taking out a very colourful and vibrant part of journalism? Secondly, what kind of remedies do you think are appropriate? I think both professors talk in their written evidence about financial remedies, but is it not equally important to think about strengthening the right of reply, or the ability for the victim, if you like, to have a story of equal prominence in the paper that ran the story about them in the first place, or something like that?

**Professor Cathcart:** I spoke about a matrix of problems, and I think that improved regulation has a large part to play in improving the picture; it can, in fact, lift some of the burden from the law. I mentioned the idea of post-mortems when something dreadful happens, such as the McCann case, for example. If we have a railway crash, we go in and we find out what went wrong, and in the immortal tradition of journalism we name guilty parties, and print diagrams with arrows pointing to defective parts. We have that sort of culture. But somehow in the press there is no post-mortem culture, there is no desire to learn from experience and to put right problems as they arise. I think effective regulation can make quite a big difference, without bearing down in terms of personal blame or financial sanctions and so forth. Quite a big difference can be made simply by addressing these matters of great public concern when they arise.

**Q134 Martin Horwood:** Can I ask you who is going to address them though? If you are still arguing for self-regulation, are you still expecting the same media that have failed over 20 years or more to address these issues themselves?

**Professor Cathcart:** I am not necessarily arguing for the same sort of self-regulation we know. Nowadays, we are keenly aware of a broad range of possibilities for regulation, which run from the sort of industry self-regulation that we have now, which in my view is not really self-regulation at all, to draconian state intervention. Between those there are a great many shades of grey, and I think we can find something, for example, that is independent of the press and also independent of politicians that can exercise the sort of investigatory function that I have mentioned.

**Q135 Martin Horwood:** A sort of General Medical Council for journalism?

**Professor Cathcart:** There are all sorts of models.

**Q136 Martin Horwood:** But isn't the PCC supposed to perform that kind of function?

**Professor Cathcart:** I would argue that we are told it is supposed to perform that function, but it was never designed to perform that function. It is, in fact, a not-bad complaints body, but that is all.

**Professor Barnett:** It is quite important to make that distinction; as far as I am concerned the PCC has failed. It has completely failed as a regulator, as a self-regulator. It patently has not done the job that a regulator is supposed to do in terms of standards of professional practice. Now, in its defence some people say that it was never supposed to be a regulator: it is simply a mediator. But if you go back to the Calcutt Committee and the terms on which the PCC was set up, it was established to do the job of self-regulation; it was the last-chance saloon because of all the egregious acts of the 1980s. As far as I am concerned, that last drink in the last-chance saloon has been going on for 20 years. It is time to call closing time.

What do you replace it with? I have no doubt in my mind that self-regulation is by far the best option, for all the reasons I am sure this Committee has heard, and Lord Justice Leveson is hearing too, about freedom of expression. But there are models; as Brian said, there is a spectrum of opportunity, and those who talk about Zimbabwe, Hungary and state censorship are deliberately trying to move the argument away from any proper engagement with where on that spectrum one might sit. My own favourite model, which I think can be adapted to these purposes, is the Solicitors Regulation Authority; it is an entirely self-regulatory body, staffed by professionals, people who understand how lawyers work, they understand how the law works, but behind them is the Legal Services Board, which is set up as an independent statutory body. It sits behind them, essentially looking over their shoulder, to ensure that the public interest is properly implemented.

**Q137 Lord Thomas of Gresford:** What about the Bar Standards Board? Perhaps Joshua Rozenberg can look at that body?

**Joshua Rozenberg:** Yes; the Solicitors Regulation Authority has had a slightly rocky start. The Bar Standards Board has a slightly easier job and is a bit smoother, but those would be perfectly good models for professions that have moved from self-regulation to, ultimately, regulation by the state. The press, of course, is not a profession, in the sense that nobody can authorise a person to become a journalist, and fortunately nobody can stop them writing. That is a very important distinction. I share Steven Barnett's view that I would like to see self-regulation continue, but realistically I fear that it is at an end.

I think that the Press Complaints Commission is a perfectly good mediation body. I was once the subject of a complaint myself from a judge who complained about something I had written about him. There was nothing wrong in what I had written, but I excused the judge's behaviour by pointing out that he was ill, and his complaint was he had not told a member of his family that he was ill, and the member of the family learnt it by reading my story. What happened was quite a lot of pressure was put on me and *The Daily Telegraph* to apologise to the judge, and I am sure that quite a lot of pressure was put on the judge to accept my apology. There was some fairly heavy mediation, and we all went away perfectly satisfied. That is what they do, and that is really all they do.

**Q138 Lord Harries of Pentregarth:** Do you think the requirement for prior notification should be made legally enforceable?

**Professor Cathcart:** I would say no because it is the norm, for all sorts of reasons, including quite powerful legal ones, for reporters to check stories before they break them. I think on the other hand that there are instances and occasions when you need to act without prior notification because you find yourself obstructed in all sorts of ways if you do not. I do not endorse Max Mosley's campaign, although I can see perfectly well why he feels the way he does.

**Professor Barnett:** I take a slightly different view on this, on the basis that, having seen the way the courts operate, there is quite a high threshold for preventing publication. They have to believe that the applicant will be successful in a court in preventing publication. On that basis, if you believe that what is about to be published is going to cause real distress, not necessarily to yourself, but to your family, to those around you, and your friends, I do not see anything wrong with having a right for that concern and anxiety to be heard in court. As I am sure many people have said to this Committee and will do over the next few weeks, privacy is something that, once it has been breached, you cannot get back. There are occasions where no damages will offer any kind of consolation or compensation. In those circumstances, I think people deserve a right to have their case heard before the damage is done.

**Joshua Rozenberg:** The problem is one of enforcement. You can tell a broadcaster that it must do this; you can probably tell a national newspaper to do this, but as you know, not every national newspaper even subscribes to the PCC; neither does *Private Eye*, whose editor you are about to see. How can you require these organisations to do so if you are not going to require individuals to do so? How do you distinguish between a newspaper, its website, a blogger or a tweeter? How do you draw the line?

**Professor Barnett:** I think that is actually very easy. There are publications, whether they be newspapers or a TV programme, that have mass circulation and mass audiences. There are very few blogs that have mass readerships, and those that do are essentially people in the know, talking to each other. The justification for revealing Ryan Giggs's name was that everybody knew it on Twitter. Frankly, there is a lot of difference between something that is revealed in 140 characters on the internet and having several pages of your private life splashed over a newspaper. I am afraid I do not buy this argument that modern technology vitiates arguments about privacy. There are ways of doing this, and of course—even Paul Dacre is now talking about compulsion in terms of ensuring that publications sign up to a code—once you have some means of ensuring that everyone is included, then you have the means to enforce those kinds of injunctions.

**Q139 Lord Thomas of Gresford:** Would you have journalists sign up to a code? For example, Joshua Rozenberg said that journalism is not a profession, but why shouldn't journalists qualify through various legal courses, or whatever sort of courses they have to take, and be subject to some form of discipline by a central body? Why not?

**Professor Cathcart:** There are two difficulties: one is that it is contrary to a very long tradition of openness and inclusiveness in the press in this country. The other is that, looking in the other direction as it were, in the future drawing those lines will not become easier; it is becoming more difficult. Does a blogger count as a journalist? Does someone who writes once a year in a local paper count as a journalist? I do not think we can establish thresholds: there is an argument, you could say, that people who receive money for

journalism might cross the threshold, but quite important people in the media, in terms of bloggers and commentators, never receive any money. They blog for nothing.

**Q140 Mr Llwyd:** In your opinion, has the development of privacy laws, as we now see them, and the use of injunctions, created a climate in which newspapers may feel unable to publish some stories that are of genuine public interest?

**Joshua Rozenberg:** If you take the story that was of the greatest public interest in recent years, which was the story about the expenses of Members of Parliament, this was a huge invasion of the privacy of hundreds of people. It revealed how they were spending money on intimate and personal matters, and the newspaper had no hesitation in invading the privacy of these MPs and peers because the newspaper—quite rightly in my view, and I was not working for it at that time—thought that it was in the public interest. I think that the national newspapers have not had this problem. On the other hand, I suspect that provincial newspapers cannot even afford the cost of ringing up their lawyer to ask for advice, let alone of defending a case in court. I think those papers are now going to be very careful before sticking their necks out.

**Professor Barnett:** I do not know if we are going to come on to the question of the public interest.

**Chair:** Very shortly, I believe.

**Professor Barnett:** I think I might reserve my answer for that, because I think a lot of this depends on having a properly worked-out definition of what constitutes the public interest. The short answer to your question, in my view, is that I do not see any evidence that simply because they might have to be more careful about intruding into people's private lives, in terms of salacious or gossipy-type stories, any journalists feel that they are somehow constrained in terms of issues that are clearly in the public interest.

**Q141 Baroness Bonham-Carter of Yarnbury:** Joshua brought up Strauss-Kahn and how in this country, possibly, the story of the way he lived his life might have been rather more public. My question is really directed to Steve: when you talk about privacy, does that extend to people who want to be presidents, prime ministers or hold positions of power? It is the fine-line question.

**Professor Barnett:** In a funny kind of way, I am not even sure how fine the line is. As far as I am concerned it again comes back to the notion of the public interest. It is quite clear that if people are in positions of power and they seek to exploit or abuse those positions of power, or seek to convey a deliberately inaccurate image of themselves to be elected, or in running their company, or even in teaching, then clearly the public have a right to know the truth. I think that is a wholly different position from those people who are talented, skilled, good actors, great musicians or artists, who are going through a divorce or have some kind of horrible personal distress happen to them, and seeing that paraded all over the nation's media. I think those are two entirely separate cases. For me it is like an elephant: you know the public interest when you see it, and I do not see any reason why that should not be protected.

**Q142 Baroness Bonham-Carter of Yarnbury:** But when you were doing all these interviews and other countries were saying to you, “Why is the UK like this?” your response was not, “We want to be like you”.

**Professor Barnett:** Absolutely not; in fact I was interviewed by French TV—AFP, the agency—and I said that we have a tradition in this country where Strauss-Kahn would not have got away for so many years with portraying himself in a way that he clearly is not. It did not go down well; I have no idea if it was broadcast.

**Q143 George Eustice:** It seems that from a lot of the evidence we have had there is not much wrong with the PCC code—it is quite similar to the broadcasting code—but where it goes wrong is this get-out clause of the public interest, which many people feel has been perhaps used and abused over the years. Professor Barnett, you said in your written evidence that you thought there needed to be a “public interest framework” established by Parliament. Could you explain what that might look like and how possible it is to define these things any clearer than there being a subjective judgment?

**Professor Barnett:** I have written what a public interest definition might look like, and it is not supposed to be exhaustive. It is in most of the codes: it is in the PCC code, the Ofcom code and the BBC guidelines. We are essentially talking about anything that involves the exposure of wrongdoing, injustice or incompetence; protecting the public from danger; preventing the public from being misled, and, as I have just been talking about, hypocrisy; and revealing information that fulfils a democratic role. There are these weasel words in the PCC code that you will not find in the Ofcom code, which is interesting, which is that there is a public interest in freedom of expression itself. That seems to me to be a get-out clause for essentially anything you want to publish. I do not think that is appropriate as a public interest defence. If there was something that was laid down—that had gone through the parliamentary process, had been debated in Parliament, that was subject to proper scrutiny—we could then turn round and say, “This is a democratic definition of what we mean by the public interest; any journalism that conforms to these sorts of standards, that can come under these headings, is okay”. It is more than okay actually: it is a good and proper defence, potentially even to phone hacking. So there is potentially a liberating effect of a public interest framework. The Bribery Act has no public interest defence. The Official Secrets Acts have no public interest defence. There are many ways in which a public interest defence can be liberating for good, watch-dog, accountability journalism of the kind that some people profess is going to be at stake if there is a greater standard of regulation. I think the opposite.

**Q144 George Eustice:** Coming back to what was said earlier about the difficulty of a privacy law being that the judges would still ultimately have to make the decision, would you not come up against the same problem there? If not, is a statutory definition of the public interest something that could have been incorporated in the Human Rights Act?

**Professor Barnett:** Let me be clear: there is no counsel of perfection in an Act of Parliament, as I am sure people in this room know much better than me. Every Act of Parliament is going to be subject to interpretation; the courts will have to look at the grey areas. I am not suggesting that a statute can iron out all the wrinkles. I think what it can do is say to the courts, “Here is a definition, which is democratically agreed, has democratic legitimacy, and we are asking you to use this framework when you come to assess whether

the law has been broken”, or say the same to the new PCC when it comes to assess whether codes of professional conduct have been broken.

**Q145 George Eustice:** Just finally on that: you talked about “weasel words” in the PCC code. There is another provision that says that if it is likely that this all might become public anyway, then that’s a factor to be taken into account in assessing the public interest. Do you think that is also wrong?

**Professor Barnett:** I am not sure what that means: “if it is going to become public anyway”. If the argument is that everyone is saying so-and-so’s name on Twitter, and therefore we may as well allow it to be public, no, I am sorry. Because people are talking about something in the pub does not mean to say that you can have a five-page spread in a mass-circulation newspaper. It is not a public interest defence to say that there are a few people who know this name.

**Q146 Mr Buckland:** On the point that Mr Eustice has just raised, I am interested in a definition, but should we not go further and encourage the courts to construe the public interest widely, and direct them to construe any exemptions to that narrowly, a bit like the approach that you take with various articles in the European Convention on Human Rights, where you construe the rights widely but construe exemptions narrowly? Could we frame that, do you think, as part of any statutory interpretation?

**Joshua Rozenberg:** It is tricky, isn’t it? How wide is wide? How narrow is narrow? I am sure that you can indicate to the courts what you would like them to do, but ultimately if they are going to be the judges of the public interest, you have to leave that to them. It is well known that the public interest is different from what interests the public. Lord Woolf, in what I would say was a rather unfortunate judgment in 2002, said, “If newspapers do not publish information which the public is interested in, there will be fewer newspapers published, which will not be in the public interest”, which picks up a point that Lord Boateng, I believe, mentioned earlier. But I do not think that is true. I think that the courts have got to do their best to interpret where the public interest lies, and if you in Parliament think the courts are getting it wrong then you can pass legislation to give them a nudge in one direction or another, but I am not sure that concepts like “wide” and “narrow” are going to be much use to the courts.

**Professor Cathcart:** One of the best things to come out of our present discussions, right across the state of the press, is an increased understanding and awareness of public interest arguments. When you say “widely” I am sure I agree with Joshua on the “how wide is wide?” question, but I think that the idea that this principle has quite wide application is very important. Steve mentioned a variety of laws in which there is not a public interest defence. Indeed, in the Regulation of Investigatory Powers Act 2000, as I understand it, there is no public interest defence for phone hacking. I would argue with Steve that there should be. It would have to be in pretty extreme circumstances, but there should be. If it were possible to elevate the idea of a public interest defence so that not just journalists, politicians and judges understood what it was, but that it was widely understood by the public, the function and purpose of journalism would be better appreciated.

**Professor Barnett:** But we have to remember that it is only because there was not a public interest defence to phone hacking that we are here now. In terms of how widely you draw it, it would have to be very clearly defined in terms of promoting the kinds of

democratic aims that most people are agreed about, rather than simply pursuing stories or fishing expeditions.

**Q147 Lord Janvrin:** Can I come back to a point touched on earlier; the question of remedies. If one takes a view that once privacy has been breached there is no going back, do you think there is any remedy or areas that we should be thinking about in terms of remedy thereafter?

**Professor Barnett:** In terms of privacy, you can obviously have exemplary damages; you can have damages that are designed to make the publication think very carefully about ever doing this again. But that's pretty scant consolation to someone who has had their private life splashed all over several pages of a mass-circulation newspaper. Because we are talking specifically about privacy, rather than something like inaccuracy—where I think there are potentially different remedies available—it is important to think about the distress and damage that is caused. I quoted in my evidence that I was very struck by the interview with Sienna Miller—and it is not as if she had behaved in any way that was reprehensible, even if you regard her as a role model—and the fact that she was going through a very difficult divorce and her private life was dragged through the pages of the popular press in the way it was. It was clearly extraordinarily depressing for her, and distressing. I think we need to take account of protecting not just ordinary people but even those public figures whom frankly, sometimes, we should probably try to value.

**Joshua Rozenberg:** We have seen the effect, have we not, of the *News of the World* invading the privacy of Milly Dowler's family? It can have consequences.

**Q148 The Lord Bishop of Chester:** Can I go back to the public interest? I was interested in Professor Cathcart's definition of the public interest. Who decides? In a democracy, who lays the guidelines down as to what is in the public interest? Isn't there a case for some sort of parliamentary undergirding, rather than just casting it before the courts? If it is as fundamental as what makes a society better does it not call for some sort of legislative undergirding of what is in the public interest?

**Professor Cathcart:** It may do. I simply cannot imagine the words that would do the job. That is to say, how far down that line—of defining particular circumstances that would constitute public interest and constitute breach of public interest, as it were—do you go? At present, the determinations are left to judges, who accumulate case law. If you look at the Rio Ferdinand case, for example, it is a very long, careful and thoughtful analysis of where the public interest lay in that circumstance. That is the way these things can be built up. I would be very impressed if Parliament could describe circumstances in such a way that it would lift individual cases out of the hands of the judges.

**Professor Barnett:** I probably disagree with Brian on that. Parliament does not have to pass a statute that is designed to address every individual case. On an issue of such fundamental importance as what kind of society we want to be, what constitutes the public interest, who else should define the framework for that in a democracy other than our elected representatives? It seems to me axiomatic that it must be Parliament that lays down the broad framework more or less in the way I have described it. It is in the codes that currently exist, and the courts are very adept, as Brian has said, at interpreting Parliament's will on a case-by-case basis where there are grey areas, which there inevitably will be. It is

not a counsel of perfection, but I think it is absolutely right that it needs to be Parliament that does this.

**Professor Cathcart:** One of the things that concerns me is the idea that Parliament might be led into defining who is a public figure, or who is a role model, or who is somebody who trades on their image. I think that is a marsh. You do not want to go there.

**Q149 Mr Bradshaw:** But in general terms, going back to the question of codifying this in statute, what about the argument that at the moment parts of the press are able to say, “This is all a judge-made law, so it has no democratic legitimacy”, giving people the impression it has no democratic or political legitimacy, although it comes from the Human Rights Act. Is that not an argument for some sort of codification?

**Professor Cathcart:** I would caution you against imagining that you are going to produce a solution with which the press will be happy. My view of the arguments put forward at the moment is that they are very weak and they are a flailing man’s arguments. You create a new law, you get another set of a flailing man’s arguments. I think the idea that you are going to get peace out of this is an illusion.

**Q150 Eric Joyce:** Perhaps I could address this one to Professor Barnett. You have made a distinction between mainstream media and social media, and you referred earlier to people talking down the pub when you talked about social media. It occurs to me that Stephen Fry has over a million followers; you could not fit all of those in the Groucho, I don’t think. Counting re-tweets he is probably listened to by several million people. The main thing it seems to me—I wonder if this influences your calculus—is that we talk about Twitter now, and it has only been going for two or three years, but Facebook has only been going for seven years. When you think about legislating for the future and the impact social media has, what impact do you think social media will have when the reach of social media is far greater than it is now? Facebook, for example, will have probably peer recommendation engines, so that people will be reached not just in the terms of hundreds of thousands or even a million, but by many millions. Would that not equate to the kind of reach that the regular media have at the moment, and therefore the difficulty of pursuing injunctions with people who are tweeting?

**Professor Barnett:** I have two responses to that. I think it is a terribly important issue. Going back to the Twitter and the blogs argument: people often use the Stephen Fry argument; it is very unusual for someone to have as many followers as he has. I think for that very reason he would be very unlikely to reveal Ryan Giggs’s name in a similar situation. The same thing with blogs: people often use the example of Guido Fawkes. Most blogs are read by a very small number of people; most Twitter accounts have a very small number of followers. The Facebook analogy for me does not work, because Facebook is something for which people have individual accounts. They talk to each other, they talk to their friends; there are many hundreds of millions of accounts all around the world, or there will be. But this is not a mass medium in the sense of one person suddenly being able to talk to 50 million people; these are 50 million people having lots and lots of different conversations with themselves. For me, the pub analogy still works.

Can I just say one more thing about the role of social media? It raises a very important question about privacy, which is we have to be careful about fighting yesterday’s battle—phone hacking—because one of the really interesting questions is how do we secure



the privacy of those social media data that kids in particular are accustomed to putting online? Data protection is clearly a problem. I am told there is more to come out about computer hacking, rather than phone hacking, which seems to me to be a much more serious risk for the future than phone hacking has been in the past. That is a slightly different question from the one you were putting, but I am afraid I stick by my answer that social media are not the same as one to many mass media, which still—despite fragmentation and despite the decline of newspapers circulations and TV and radio audiences—has a power in today’s media environment that social media do not. It is that notion of media power that I would ask you to think about.

**Q151 Nadhim Zahawi:** Just following that point through, would you say that someone on Twitter who is being disobedient—for instance, tweeting Ryan Giggs’s name—should be prosecuted? Should the law prosecute them for breaking an injunction?

**Professor Barnett:** My personal feeling is no, in the same way as if you are having a conversation down the pub and someone says, “You know this bloke they’re all talking about in the papers? It is Ryan Giggs”, would you prosecute that person? Would you prosecute someone in their own home for passing on information? I appreciate there are grey areas; I am not suggesting that this is a black-and-white issue, but I think we have to make distinctions. I go back to what I said before; the revelation of a name is very different from publishing the full salacious details of everything that that name is alleged to have done.

**Joshua Rozenberg:** But if this individual who tweets the name of Ryan Giggs can be identified; and if this individual perhaps works for a newspaper that has been given information because the newspaper has to know what it is the newspaper is not allowed to publish; and if this information is then picked up and retweeted by everybody else, I do not think that person would be exempt from—or should be exempt from—the law, if the law is going to mean anything. I think the judges have to be realistic; of course, if something is widely circulating on Twitter, you are not going to get hold of a large number of people. But I think if one or two individuals are the source of an injunction being widely broken then it is not too far-fetched to see those individuals finding themselves in trouble with the law, and I think that is probably the right thing if the law is to mean anything.

**Q152 Lord Thomas of Gresford:** It is for the Attorney General to decide whether it is in the public interest to bring proceedings for contempt of court, and therefore there is a filter as to whether proceedings will be brought at all. I think that you made the point earlier that the Attorney General currently is becoming more active in this area, and perhaps should become more active still, but it depends upon the scale in which information has been disseminated.

**Joshua Rozenberg:** That is right. I think he takes the view that Twitter is like the conversation in the pub that Steven Barnett refers to, and I think that is the view that the judges take as well. However, I can see circumstances in which it may be appropriate if that has been the origin of the sort of leak that would otherwise be prosecuted, and if it then spreads very widely and can be traced back to that source.

**Q153 Lord Black of Brentwood:** Could I just take you back to Section 12 and the issue of injunctions and super-injunctions? We heard evidence a few weeks ago from Lord Wakeham and also to a certain extent from Jack Straw that they saw the purpose,

which we can argue about, of enacting Section 12 being that the Press Complaints Commission, or other regulator—Ofcom, or whoever it might be—should deal in the main with privacy issues, whether it is pre-publication or not, leaving injunctions as something that were exceptionally rare. That has obviously not worked out. That may be because Section 12 was not drafted properly; it may be because the Press Complaints Commission was not constituted to be a regulator, and I agree with that analysis that it is not a regulator in the classic sense of the phrase, “regulator”. But the PCC is obviously also about to undergo a period of considerable change and transformation, which Professor Barnett has alluded to. Do you have any views about how the system might change to allow it a) better to deal with privacy complaints, and b) to fill the expectation that Jack Straw talked to us about, that a regulator or self-regulator should deal much more with those sorts of things, rather than leaving them to the courts?

**Professor Cathcart:** A regulator with investigative powers, which can, when things go badly wrong, address those and see lessons to be learnt, but also can address general issues, and produce findings about the state of reporting in this sort of field, having that general authority and scrutiny, would raise standards. This is the thing that the PCC has not been able to do. It would have the power to raise standards, and certainly, if we talk about a PCC or a future regulator which has more authority, you would assume that more authority would mean more compliance. I think that that area of clout would certainly reduce the burdens on the courts.

**Q154 Lord Black of Brentwood:** And hence lessen the need to injunct?

**Professor Cathcart:** Yes, I think it would.

**Q155 Martin Horwood:** Can I bring you back to your use of distress as a benchmark? Isn't that rather a worrying idea? There are clearly some personal issues that are intensely personal, to do with illness and so on, that are known to very few people, and that is clear, but there is a whole raft of areas of general gossip—it might be someone behaving badly in public on a night out or something like that—where it is clearly public, but it is something that they still might be distressed to have reported. Don't you start to go down a slightly dangerous slippery slope? If it is a politician, let us say, with a squeaky-clean image who is behaving badly, and they are able to cite the personal distress it would cause them or their family, are you not starting to go down a path where people can use this as a way of getting out of proper, free reporting?

**Professor Barnett:** I certainly was not trying to suggest that distress was, in and of itself, a sufficient justification for non-publication or for injuncting publication, absolutely not. I come back to what I said before about the need for proper scrutiny of public figures carrying out their public functions. As I say, I think a public interest framework could easily accommodate those kinds of things.

**Q156 Martin Horwood:** This is not their public function; this is, in some ways, private behaviour—let us say something like a nightclub or a night out. If you start to constrain that kind of reporting you are going to reduce all the gossip magazines to empty pages, aren't you?

**The Lord Bishop of Chester:** “Bishop on his day off”.

**Martin Horwood:** “Bishop on his day off”, exactly.

**Professor Barnett:** Again, there are grey areas here. An individual who is found lying drunk in the gutter who is a politician or a member of the Cabinet is clearly going to be a legitimate target for public scrutiny, comment and gossip. However, if it is their 19-year-old child, where is the legitimacy there? For me the distress issue is much more about things like bereavement, illness, and divorce. I get a little bit frustrated when we always hear, “What about the politician who does this or the chief executive who does that?” There are public interest defences that can be drafted that would accommodate that. I entirely accept there are grey areas. I do not think a law needs to address every individual case, t, I really do not. I think it just sets the legal framework for what we, as a society, and what Parliament believes should be legitimate in a democracy.

**Q157 Lord Janvrin:** I would like to come back to the nature of regulation. Brian, I think you suggested a regulator with investigative powers. I would be interested to know whether, in order to be an effective investigator, you need some kind of powers of sanction.

**Professor Cathcart:** It is an open question. I think the Local Government Ombudsman does not have powers of sanction, but is able to investigate and make recommendations, and that is quite effective. I am no expert in that field. I think the likelihood is, and certainly the public mood expects, that the new regulator will have powers of sanction, and I think that Paul Dacre said as much in his speech to the Leveson seminar. I think some form of sanction is on the cards, and I think it will probably help in pushing the pace of change.

**Q158 Mr Bradshaw:** I am not clear about this better self-regulation. Are you suggesting that it would reduce the number of injunctions because it would be able to do what the courts currently do, which is stop or delay publication, which is why injunctions are sought?

**Professor Cathcart:** In terms of clarifying where journalists are coming from, it would be useful. Some of the changes, for example, with journalists trying to comply with the Reynolds defence—you may be aware of these—have forced standards of behaviour among those journalists, in the extreme end of difficult investigations. They document their work much more carefully, they assimilate files much more thoroughly, they check with lawyers as they go along. That sort of care, bred right down through the system, would reduce the number.

**Q159 Mr Bradshaw:** What do the other two think?

**Joshua Rozenberg:** Hugh Tomlinson QC has this idea—I know he gave evidence to you, but I am not sure how much he went into this—for a media tribunal that the media would sign up to and that would issue injunctions and so on, and would subsume all these varied roles. It is quite an elaborate idea, and it is worth thinking about, but ultimately the courts have to have the final decision as to upholding the law.

**Professor Barnett:** I talked about something along the lines of a small claims court, which I think is essentially a variation of Hugh Tomlinson’s idea. I found that rather attractive. The one good thing about the PCC is that it is relatively inexpensive and it is

quick. I think as a complaints mechanism, we must make sure we do not lose that. Nor must we lose the cease-and-desist powers. But we need a lot more than that.

**Q160 Paul Farrelly:** I have just one final question on press regulation, but just before that, Brian, you mentioned the Reynolds defence and libel. Clearly this inquiry is not happening in a bubble. There is a libel reform happening now. You said previously that if there were to be a privacy statute, you could not see the law codifying what the public interest was. By analogy, therefore, surely any defence of responsible journalism in a libel statute is doomed to fail.

**Professor Cathcart:** I may have given a false impression. I think that we can describe the public interest. There are quite clear limits in my mind to how far we can define it. To have something along the lines of the PCC code and those four or five general statements about where the public interest lies clearly enshrined in law would be useful across a whole range of laws for which there is at present no such defence. But I do not think you can go down the line of getting very specific definitions of public interest that would take the burden off the judges in terms of defining how they apply.

**Q161 Paul Farrelly:** The Culture, Media and Sport Committee’s reports last year laid out a blueprint for a press complaints and standards commission that was rejected then, which would be the model for a proactive regulator. Recently Lord Dacre became a partial—not Lord Dacre, yet, is he? Not even a Sir; that was a different Lord Dacre—Paul Dacre seemed to become a partial convert: let the PCC go on as it is, but let us have an ombudsman. But ombudsmen are, by definition, an after-the-fact complaint service. Has Mr Dacre accidentally or deliberately completely missed the point?

**Professor Cathcart:** I don’t think so. I think the after-the-fact role has quite a big part to play, because I think that going back over the disasters when they happen and trying to learn lessons is really very helpful, and I think can bring change and different attitudes and cultures to newsrooms. I think that could be very helpful, so I am not going to do anything else but welcome Paul Dacre’s comments about regulation.

**Professor Barnett:** Let us not forget he also talked about the importance of compelling membership and compliance. I do not know how you compel anything without some kind of statutory backing, and I think that is quite important. On the idea of a press complaints and standards commission, I endorse completely what Brian just said: that ultimately this is about changing a culture of newsroom practices. At the root of all of this is the notion of accountability, which we have not really talked about, and we do not have time to do now. Ultimately there is a sense of unaccountability amongst the press, which the press itself would not tolerate in any other area of professional life. They would be down on everyone else like a ton of bricks if the same kind of lack of accountability existed. For me, if I may say so, now that both these Houses have put their houses in order over the last year or two, there is a fantastic opportunity to say to the press, “We are the people who are going to set the standards and the boundaries of what is acceptable in society; we, Parliament. We are not going to be lectured anymore by the press about what is acceptable.” I have been following this for nearly 30 years now, and I believe that this is a once-in-a-lifetime opportunity, and Parliament needs to grasp it.

Joshua Rozenberg, Professor Steven Barnett, and Professor Brian Cathcart—Oral evidence (QQ 119–161)

**Chair:** I think that is a good note on which to thank you very much and invite the press to participate in our second session. Thank you.

## Schillings—Written evidence

By way of introduction, we observe that this is a developing area of law in respect of which the Master of the Rolls published a comprehensive report in late May of this year. The recommendations made in that report will obviously need a degree of time to be felt. We are not aware of any applications for privacy injunctions being made since its publication. We believe that the issue which is in most need of consideration by the Committee is in relation to the deliberate flouting of court orders by third parties and the fact that such flouting appears to be considered by many to be harmless entertainment for which there is no penalty. In our replies to the Committee's questions we have tried to suggest some practical proposals as to how this issue might be appropriately dealt with.

*The Committee is seeking written submissions on all or any of the following questions:*

### ***I. How the statutory and common law on privacy and the use of anonymity injunctions and super-injunctions has operated in practice***

- *Have anonymous injunctions and super-injunctions been used too frequently, not enough or in the wrong circumstances?*

We do not believe that injunctions are being granted either too frequently or not enough. Nor are we aware of injunctions being granted in the wrong circumstances. Whilst the issue of the granting of injunctions has attracted a very large amount of public debate, a sense of perspective ought to be retained in terms of the number of injunctions granted by the courts. Though no hard and fast figures are publicly available, our best guess would be that the number of privacy injunctions granted by the courts over the last decade is measured in the dozens rather than the hundreds, or greater, with the true figure probably being closer to 50 or 60 in total. Therefore we see no issue with the number of injunctions being granted. The changes implemented by the Report of the Master of the Rolls may reduce the number of applications further, though obviously it will take some time to be able to accurately assess the impact of those changes.

What ought to be of concern is to ensure that adequate protection is given to those claimants who have persuaded the courts that their Article 8 rights outweigh the Article 10 rights of any third party. Our concern is that at present, Claimants in that position are finding their rights eroded through the actions of non-parties to the proceedings.

- *Are the courts making appropriate use of time limitations to injunctions and of injunctions contra mundum (i.e. injunctions which are binding on the whole world) and how are such injunctions working in practice?*

The courts are by and large handling any issues of time limitation well.

In terms of contra mundum injunctions, it is still unclear as to the circumstances in which such orders can be obtained. Recent case law suggests that to obtain a contra mundum injunction a claimant may be required to demonstrate a threat to life or something of

similar gravity. If correct, this means that *contra mundum* orders will be made in only a very small class of cases.

Where we see a wider issue with timing is the risk that in practice (as identified by Mr Justice Tugendhat in *LNS v Persons Unknown*<sup>378</sup>), an interim order is likely to become a permanent injunction (without any trial) binding upon any person to whom the claimant chooses to provide notice that the order exists.

We acknowledge concerns that interim injunctions are, in effect, transforming into *de facto* permanent injunctions, and would certainly favour any sensible procedural changes to speed up the process by which the final status of such injunctions is determined.

We would particularly welcome any changes to the rules or procedure which enable a claimant to make an interim injunction permanent more rapidly and cost effectively. However, there is an anomaly with the current jurisprudence that we respectfully submit could be addressed at the same time, indeed which would encourage, rather than deter, a claimant from seeking to make final his or her interim injunction. This is what we might term the “Buffham<sup>379</sup> Issue”. That case confirmed that the ‘Spycatcher’ principle (pursuant to which a third party who knows of an interim order made to protect confidential and/or private information from being published and publishes the information destroying its confidentiality will commit a contempt of court) only applies to interim orders.

As a result of the Spycatcher principle not applying to final injunctions, in Article 8 cases where a claimant obtains an interim order and then goes on to win their case, third parties (who may have been served with the interim injunction and are then in effect bound by it pending trial) will not be restrained by court order from publishing the information which a defendant has been prohibited from publishing.

To compound matters, those third parties may not have known the information in question before the claimant’s application for an interim injunction and moreover, following service of the interim order on them, those third parties will (subject to any variations ordered by the court) be entitled to receive evidence put forward in support of the application which could include detailed information relating to the facts sought to be protected and evidence as to whether or not the information is true or partially true.

It might be said that following a final order being made, the fact that third parties will know that the claimant and the court deem the information to be protected under Article 8 would deter them from publishing it for fear of a privacy/confidence claim being brought against them. Yet this will not provide any real protection to a claimant, as there is no order against them disclosing the information and the relatively low damages awarded in such cases would not act as a commercial deterrent.

The result of final orders being granted in cases involving interim injunctions, therefore, is likely to be that third party media organisations are provided with private information about a claimant of which they were previously unaware with no sanction against publishing or effective remedy if they do. We would therefore suggest that the effect of

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<sup>378</sup> [2010] EWHC 119 (QB)

<sup>379</sup> *The Jockey Club v Roger Buffham and Others* [2002] EWHC 1866 (QB)

the Buffham Issue is to deny claimants proper access to preventative remedies in cases concerning media publication of private and/or confidential information and deter them from seeking a final order. As stated in cases like *Armonas v Lithuania*<sup>380</sup>:

*“Article 8, like any other provision of the Convention ... must be interpreted in such a way as to guarantee not rights that are theoretical or illusory but rights that are practical and effective.”*

- *What can be done about the cost of obtaining a privacy injunction? Whilst individuals who are the subject of widespread and persistent media coverage often have the financial means to pursue injunctions, could a cheaper mechanism be created allowing those without similar financial resources access to the same legal protection?*

The cost of obtaining an injunction is a significant issue. It is now more expensive than ever to obtain privacy protection. We would welcome any measures to make the process of seeking an injunction simpler. The argument as to whether a claimant's right to privacy outweighs another party's freedom of expression is in most cases quite a straightforward argument, and self-evident.

- *Are injunctions and appeals regarding injunctions being dealt with by the courts sufficiently quickly to minimise either (where the injunction is granted or upheld) prolonged unjustifiable distress for the individual or (where an injunction is overturned or not granted) the risk of news losing its current topical value?*

Injunctions can be obtained or sought 24 hours a day at very short notice. We do not see there is any issue in this particular aspect. Similarly, return dates and appeals can be heard very quickly. The return date usually takes place within about 3 days of the original injunction application date. We have even known the court of appeal to list an appeal within 1 week of the injunction date in appropriate time sensitive circumstances.

- *Should steps be taken to penalise newspapers which refuse to give an undertaking not to publish private information but also make no attempt to defend an application for an injunction in respect of that information, thereby wasting the court's time?*

It is astute of the committee to note the above trend, which has become increasingly prevalent over the last 12 months. It is felt in some quarters that certain newspapers actually prefer to publish this type of story rather than the private information in question.

In most cases this behaviour erodes the protection available to the Claimant. This is because the publication of sketchy details in the press tends to play to human nature, creating an environment in which members of the public wish to find out the identity of the claimant, and in which some of those who actually know the details wish to assist with identification. As the courts have recently recognised, protection from identification isn't the only purpose of an injunction (the details being another), however, in many cases preventing identification is of particular significance to the individuals concerned because damage is done simply by their being named. If anonymity cannot be guaranteed

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<sup>380</sup> 36919/02 (25 Nov 2008) [38]



by the court the combination of details in a judgment together with speculation about the identity online often, in practical terms, makes it easy for all but the salacious details to be published. This might be satisfactory for some individuals in specific circumstances, for others it will not be.

Whilst a lot of online information is incorrect there have nevertheless been leaks of some correct information. This can be damaging not just to the Claimant, of course, but also to his or her family. Whilst penalising newspapers who take such steps may result in eliminating a certain amount of this behaviour, our view (which we hope is shared by the Committee) is that the more important issue is to prevent and discourage the widespread flouting of court orders in this type of case.

**2. *How best to strike the balance between privacy and freedom of expression, in particular how best to determine whether there is a public interest in material concerning people's private and family life***

- *Have there been and are there currently any problems with the balance struck in law between freedom of expression and the right to privacy?*

The problem in terms of balancing is not in relation to the facts. Those are usually clear and the courts mainly carry out the balancing act correctly.

That said, there is a practical difficulty once that exercise has been carried out. That concerns what a defendant is allowed to publish once an interim injunction has been granted, in the interests of free speech.

In some recent cases, the amount of information freely available, even if well intentioned, has caused the degree of protection intended by the court to be eroded. This is not just spin: in one recent case an individual sought an injunction to prevent the publication of private information concerning an extra marital affair of which their spouse was aware. The injunction was not to protect the reputation of the individual: it was to protect the spouse, who wanted to try to rebuild the marriage but felt this would not be possible were the details made public; and their children, who were schoolchildren in their formative years. Publication of such information would clearly make the children vulnerable amongst their peers and jeopardise their wellbeing and academic performance. As it was, an anonymised injunction was granted to the individual (at large cost). This prevented the publication of the information in the tabloids although the possible identity of the individual(s) concerned has been leaked. Therefore, although the court did the right thing, the practical position is that the individual and his family are not being protected in the way that the court intended.

There has been much comment concerning the value of an injunction where there is breaching of the order either online or on an extra-jurisdictional basis. On a practical level, keeping an injunction in the face of a media onslaught can still be of value given that part of the Order is to prevent harassment. We also note that the Buffham Issue as identified above, if dealt with by either the courts or Parliament, will make it much safer for claimants to push speedily to a final injunction. The wider use of contra mundum orders may also help to solve much of the difficulty outlined above; as would any

provision to help lift the anonymity of a person breaching orders online. This might be achieved by the availability of non-party, pre-action disclosure orders. The Committee may also wish to consider some revision to the law concerning online harassment, and its enforcement. One would imagine that the widespread publicity regarding the prison sentence given to the ‘troll’ who posted abusive online messages following the death of a schoolgirl<sup>381</sup> will act as a significant deterrent on such behaviour in the future. The issue of freedom of expression and the ability to monitor the number of injunctions being granted could neatly be dealt with by statistical information published twice a year about how many injunctions there were and the kind of broad areas that they covered. The public would then be informed about the quantity and type of injunctions being granted/refused without a broad range of information being given about the private subject matter.

Though perhaps an obvious point to make, one must also remember that we are only talking about cases in which the public interest has been found to be weak and the privacy rights found to outweigh those of freedom of expression.

We would suggest that one area which makes it easier for such leaks to occur is the manner in which the service of injunctions is dealt with. We understand that at present when a newspaper is served with an injunction, the details of what the injunction concerns are widely circulated within the newspaper organisation. If circulation were to be limited to only those who strictly need to know about it in order to prevent a breach (for example, the editorial and legal teams), the amount of information being leaked in breach of court orders might be immediately reduced without any impact upon freedom of speech. A list kept by each media organisation of who had been served with the injunction internally would also greatly assist with making any breach of a court order easier to identify and for the culprit to be held accountable.

- *Who should decide where the balance between freedom of expression and the right to privacy lies?*

We believe that the right person to decide where the balance between freedom of expression and the right to privacy lies is a judge. It is difficult to see how even a well-intentioned editor could carry out this exercise without his or her own commercial interests playing at least some part in the decision making process. With any decision by a Judge there is the automatic possibility of applying to vary or discharge an injunction, or even appealing, if any party or third party is unhappy with the decision. We believe this is the fairest and most balanced way to deal with the competing rights.

- *Should Parliament enact a statutory privacy law?*

We believe that the existing law of privacy is already sufficient, and clear. It is not clear however what would be achieved by codifying the existing law, given that even with a statutory privacy law the end result will be a similar position to the one that we are in now, namely that a judge will carry out the balancing exercise between the competing interests (the individual’s right to privacy against the freedom of expression of the other party).

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<sup>381</sup> See <http://www.bbc.co.uk/news/uk-england-berkshire-14907859>

We have no objection to the existing law being codified: we only query whether it is a worthy use of Parliamentary time.

- *Should Parliament prescribe the definition of ‘public interest’ in statute, or should it be left to the courts?*
- *Is the current definition of ‘public interest’ inadequate or unclear?*

It is, we believe, probably impossible to construct one definition that could be applied seamlessly to any case – the boundary being dependent on many factors such as the facts of each case and the extent that the person is already in the public sphere.

It may serve to reassure the media and the public but it will not change how the law is applied in the courts – the facts of each case vary far too much to fit them into a “one-size-fits-all” rigid definition.

- *Should the commercial viability of the press be a public interest consideration to be balanced against an individual’s right to privacy?*

We believe that a free and independent press is a very important feature of democratic society. However, we do not believe that the commercial viability of the press should be a consideration when a decision is being taken whether or not to disclose an individual’s private life. The press would also be more ‘commercially viable’ if (to give an extreme example) it had to pay no corporation tax, or could renege on an unprofitable contractual obligation. We see no justification for there being a carve-out specifically in relation to privacy cases.

- *Should it be the case that individuals waive some or all of their right to privacy when they become a celebrity? A politician? A sportsperson? Should it depend on the degree to which that individual uses their image or private life for popularity? For money? To get elected? Does the image the individual relies on have to relate to the information published in order for there to be a public interest in publishing it (a ‘hypocrisy’ argument)? If so, how directly?*

It is quite proper to give consideration to the extent to which a person has waived their right to privacy in respect of some or all of the areas in their private life. However, this should not be automatic and it would have to be (and indeed is) looked at in every case. A judge will always consider to what extent there is information already in the public domain concerning that particular area of a person’s life.

There is an argument that politicians deserve less right to privacy than someone who is not fulfilling a public function. That said, from any reasonable viewpoint even people in public office must have the right to retain some degree of privacy. The danger otherwise is that good candidates for public office will prefer not to enter into public life for fear of press intrusion into their lives and that of their families. One must never forget that a person’s family have rights to privacy too.

If there is to be a loss of privacy in relation to an area of a person’s life it should be limited to the area within which that person has traded in their private life and even then only to the extent it is strictly necessary to do so. For example, the fact that someone is open about their income, say, or even the state of their marriage, does not mean that that their medical history should become fair game. This balancing exercise is already

carried out in each case, with the consideration that anything of a genuine public interest (such as the exposure of a serious crime) may be disclosed and published. Arguably people in the public eye require greater protection, not less, given they are the ones regularly being targeted by the press.

- *Should any or all individuals in the public eye be considered to be 'role models' such that their private lives may be subject to enhanced public scrutiny regardless of whether or not they make public their views on morality or personal conduct (i.e. in the absence of a 'hypocrisy' argument)?*

Very few individuals in the public eye choose to be 'role models'. This is usually a title hoisted upon them by others (often in an attempt to justify some intrusion into their private lives). The 'role model' argument is being used in respect of professional sports people, actors and musicians, but, most of them never put themselves forward as any such thing, nor want the role when they are being branded as such.

It is our view that if someone has come to prominence as a result of their skills in a particular area, that does not mean that their entire life should now be perceived to be in the public domain. If that were not the case, talented people could feel some reluctance to share their talents with the public for fear of their private life, and that of their family, being intruded upon. That would have a greater impact on society than preventing free speech relating to an actresses sex life.

The law already deals with the issue raised by this question. A celebrity for example who has a TV reality show which films intimate and private moments in their life will undoubtedly open up their private life to a much greater extent than a celebrity who lives a much more private life outside of their chosen professional obligations.

It is unfair to allow the dissemination of private information or photographs about people's private lives outside of their profession, absent other countervailing facts.

- *Are the courts giving appropriate weight to the value of freedom of expression in 'celebrity gossip' and 'tittle-tattle'?*

We believe that by and large the courts were getting this balance right. There is very little weight at all in the value of freedom of expression in a case concerning celebrity gossip. This is recognised by much of the press. However, and as noted above, in many of the recent applications for an injunction no attempt has been made to defend a proposed article, but nor has an undertaking not to publish the story been provided when requested.

This would appear to be because it is the current preference of some parts of the press in relation to certain types of article (most often - if not exclusively - a kiss and tell style story) is for an injunction to be obtained in an anonymised format so that they can report on the granting of an injunction and invite speculation upon the identity of the person in question.

We note that this type of injunction is very rarely challenged in the courts, even though any party bound by the injunction could make such a challenge (by way of an application to the court) if they believed there was any public interest in the information in question.

- *In the context of sexual conduct, should it be the case that a person's conduct in private must constitute a significant breach of the criminal law before it may be disclosed and criticised in the press?*

We believe that the above statement is the correct approach. There are however other considerations, as even when there is a significant breach of the criminal law, the impact on the person's family should be considered. By publishing 'sordid' details of someone's sexual conduct (as such conduct is often portrayed by the tabloid press), their entire family may be subjected to frequent harassment and intrusion. Such repercussions cannot be said to be justified regardless of the actions of the person at hand. It also appears that many situations which trigger a sexual scandal being published in the press start by an implicit attempt at blackmail. This is also a factor to be taken into account as it is settled criminal law that victims of blackmail are afforded lifetime anonymity.

In terms of the pressures on those deciding whether to seek help from the court, sometimes this will be an outright request for money failing which an individual will 'sell their story'. In other cases the threat is much more subtle – perhaps not high enough for a Crown Prosecution Service prosecution, or even a complaint to the Police, but nevertheless enough to cause serious concern. Even if there is a sufficiently high level of threat for a complaint to be made to the Police, individuals are often reluctant to do this because there has been a tradition of the tabloid press learning of such complaints (and seeking to publish the details). Therefore, any element of such pressure should also feature very prominently when carrying out the balancing exercise between privacy and freedom of expression.

- *Could different remedies (other than damages) play a role in encouraging an appropriate balance?*

The role of damages in privacy cases is important, but is very much a secondary factor for claimants in this type of case. This is because once private information has been made public, no level of damages can ever draw a veil over the previously private information.

By far and away, the most important remedy for a claimant is on injunctive relief (at the interim and final stages) that is practical.

Whilst damages will never be an adequate compensation in privacy cases and this should be reflected in the relief available to claimants, the threat of large damages or a fine may assist by operating as a check on the worst invasions of privacy. If someone sues after the event it is generally a matter of principle rather than the pursuit of money - one is highly unlikely to make a profit following the trial of any privacy action given that the costs are likely to far outweigh any award of damages.

- *Are damages a sufficient remedy for a breach of privacy? Would punitive financial penalties be an effective remedy? Would they adequately deter disproportionate breaches of privacy?*

Damages are not a sufficient remedy for breach of privacy, as stated above. Once private information is published no amount of money can take that information out of the public domain. At the moment privacy awards (outside of phone hacking cases) are widely considered to have a damages threshold of £60,000 or thereabouts. This is hardly an effective deterrent for a large media group weighing up the potential consequences of publishing private information. Punitive damages would likely go a considerable way towards deterring some of the more flagrant breaches of privacy we see in the press but would still not adequately compensate an individual for having their right to privacy breached.

We suggest that effective interim relief (to protect individuals) combined with introducing accountability for any leaks, together with particularly high awards of damages (if a story is improperly published), may go some way to creating a deterrent effect on those who trade in the privacy of others.

- *Should we introduce a prior notification requirement, requiring newspapers and other print media to notify an individual before information is published, thereby giving the individual time to seek an injunction if a court agrees the publication is more likely than not to be found a breach of privacy? If so, how would such a requirement function in terms of written content online eg blogs and other media?*

As noted above, the irony in the current situation is that advance notice isn't required to be given by the newspapers to the subject of the story, however the rules stated that the person seeking an injunction needs to give advance notice to the newspapers that they intend to serve before they apply for it.

It is important that prior notification is considered. We believe that it could well be beneficial for society as a whole if it became an obligation for a publisher to contact the subject of a story prior to publication of an article, which, if published, would infringe that person's Article 8 rights. This is because once publication has occurred nothing can make that information private again. It is grossly unfair on the individual. The practical considerations about advance notification, together with the provision of practical privacy protection for individuals, the cost of which must not prohibit access to justice, should all be looked again.

- *Should aggravated damages be payable if a media publisher does not give prior notification to the subject of a publication which a court finds is in breach of that individual's privacy?*

Unfortunately, the issue of damages really doesn't help a Claimant who is trying to protect his or her privacy. However, there ought to be some safeguard against publishers wilfully breaching a person's privacy without first giving them the opportunity to take action in respect of a threat of publication. Therefore, significant aggravated damages should be payable in cases where privacy has been breached and no advance notification is given. This will hopefully over time have a deterrent effect. However, this is only likely to be a deterrent when combined with other factors, given that most individuals will not wish to amplify the intrusion into their lives by taking action after the event, which will only lead to further publicity.

- *Is section 12 of the Human Rights Act 1998 appropriately balanced? Should the media's freedom of expression be protected in stronger terms? Or is there a disproportionate emphasis on the media's freedom of expression over the right to privacy? Has Section 12 of the Human Rights Act 1998 ensured a more favourable press environment than would be the case if Strasbourg jurisprudence and UK injunctions jurisprudence were applied in the absence of Section 12?*

We believe the balance regarding section 12 is about right as it safeguards freedom of expression by putting it at the forefront of the judge's mind at the relevant time. This issue should however be looked at in detail. Whilst freedom of expression is extremely important, it has increasingly been used as a justification by tabloids in relation to issues that really do not have any strong public interest. This should be discussed in more detail and we welcome the Committee's interest in the special treatment being afforded to the press.

- *Is the test in section 12 for an injunction to be granted too high a threshold? Should that test depend on the type of information about to be published? Has the court struck the right balance in applying section 12?*

We believe that a uniform standard may not be the right approach. The threshold test should perhaps depend on the type of information about to be published. Something relating to a celebrity's or other high profile person's private life (the subject matter of the vast majority of injunctions) really shouldn't have a particularly high threshold to have to overcome to be successful. Rarely do injunctions relate to matters with a significant public interest.

Perhaps there should be a fast track analysis procedure with a much simpler test and a lower threshold.

- *Is there an anomaly requiring legislative attention between the tests for an injunction for breach of privacy and in defamation?*

We would certainly welcome a review of the position in relation to interim relief for defamation actions. There seems to be no legitimate reason not to have this ability in the right circumstances and we would welcome this issue being reviewed. Whilst damage done by a defamatory allegation is often dampened by the publication of an apology and/or an award of substantial damages, some damage is likely to remain. Therefore there seems to be little logic in a system which doesn't allow, in the right circumstances, for the prevention of damage in the first place, provided safeguards are in place for freedom expression.

### **3. Issues relating to the enforcement of anonymity injunctions and super-injunctions, including the internet, cross-border jurisdiction within the United Kingdom, parliamentary privilege and the rule of law**

- *How can privacy injunctions be enforced in this age of 'new media'? Is it practical and/or desirable to prosecute 'tweeters' or bloggers? If so, for what kind of behaviour and how many people – where should or could those lines be drawn?*

We believe it is possible to provide people with practical protection despite the new media age.

Disobedience of court orders started to occur as the number of injunctions granted in an anonymised form grew.

It is foreseeable that once any information regarding a specific injunction is published (as it is when there is an anonymised injunction and basic details are such as “a Premier league footballer”, “an award winning Hollywood actress” appear widely) then it follows that leaks become more likely to occur. This is especially the case when there is a perception that the leaking of such information will not lead to any sanction.

Any legitimate public interest in injunctions might instead be easily dealt with by way of the annual or biannual publication of statistical information (i.e. 3 injunctions this year, 2 were male celebrities, 1 involved blackmail, 1 was against the press). Allowing the publication of specific details about a particular injunction whilst at the same time ignoring the fact that anonymity is quite clearly at risk through leaks, does not provide practical protection to those who have persuaded the courts that their Article 8 rights outweigh the Article 10 rights of any third party.

- *Is it possible, practical and/or desirable for print media to be restrained by the law when other forms of ‘new media’ will cover material subject to an injunction anyway? Does the status quo of seeking to restrict press intrusion into individual’s private lives whilst the ‘new media’ users remain unchallenged represent a good compromise?*

Any form of media intrusion into someone’s private life is very damaging. However, traditional forms of media are read and watched by many more people and viewed with more credibility than online sites such as Twitter (e.g. it is estimated that only 13% of people online use Twitter, many just occasionally, let alone the millions who don’t go online at all). Therefore, we believe that it is better for the traditional forms of media to be bound by the law even if the matter has been significantly published online amongst a raft of false information. One must not forget that a lot of information online is mere speculation and often false – many members of the public will not consider information online as trustworthy in the same way as they might with traditional media outlets. Also, ending our laws because of disobedience is not the way forward. Imagine if we changed our laws to allow assaults just because people commit assaults. We must find ways of dealing with the issue.

- *Is enough being done to tackle ‘jigsaw’ identification by the press and ‘new media’ users? For example see Mr Justice King’s provisional view in *NEJ v. Wood* [2011] EWHC 1972 (QB) at [20] that information published in the Daily Mail breached the order of Mr Justice Blake, and the consideration by Mr Justice Tugendhat in *TSE and ELP v. News Group Newspapers* [2011] EWHC 1308 (QB) at [33]-[34] as to whether details about TSE published by The Sun breached the order of Mrs Justice Sharp.*

The issue of jigsaw identification is a problem. In practice, we have tried to avoid this by asking the court to dictate what could be said about a case, with some success, but with the risk remaining that the publication of any information about a case (in respect of which the court has already ruled there is no public interest) is likely to lead to speculation about the identity of the claimant.



One might look at super injunctions to see what can be learned from them about possible future practical protection, which doesn't stifle matters of a legitimate public interest. Another important factor to look at is who media organisations can and should inform once they have been served with an injunction. Restricting wide circulation of the information, coupled with the retention of a list of all those to whom the information has been sent, available to the court upon request, will have an immediate deterrent effect on leaks. If there is a possibility of being held accountable, we believe a large amount of the existing disobedience of court orders will largely disappear.

All that is probably needed to ensure compliance is for the injunction to be circulated amongst the relevant people in the Editorial and Legal Departments who can monitor whether any item is likely to fall foul of the injunction. There are surely systems that can be put in place that will alert editorial and legal if a set of words, such as someone's name, is about to be published.

- *Are there any concerns regarding enforcement of privacy injunctions across jurisdictional borders within the UK? If so, how should those concerns be dealt with?*

There is certainly an issue over injunctions with disobedience in Scotland and more recently in Ireland. Preventing the publication of information about an injunction will likely limit the disobedience given it narrows the number of people who know about it, which is evidenced by obedience before 2011. Keeping a list of who has been told about the injunction will also limit disobedience. The reality is that if an individual is required to also obtain injunctions in these other jurisdictions in addition to one in England & Wales, the costs will increase dramatically. The points we make above in relation to making it more difficult for people to breach orders online also apply here.

### **Parliamentary Privilege**

- *With regard to the enforcement of privacy injunctions and the breaching of them during Parliamentary proceedings, is there a case for reforming the Parliamentary Papers Act 1840 and other aspects of Parliamentary privilege? Should this be addressed by a specific Parliamentary Privilege Bill or is it desirable for this Committee to consider privilege to the extent it is relevant to injunctions?*

In relation to Parliamentary privilege it is a matter for Parliament to decide what restrictions to put in place. We would, however, add that the issue of Parliament disobeying court orders is of major concern, given the reality that those Members of Parliament who have done so have very limited information - usually gleaned from only one side of an argument. They are not in a position to decide whether or not something should be private or not. A judge, after hearing all of the evidence, is in a much better position to do so. We would welcome the Speaker of the House providing new guidelines to MP's, and similar guidelines for the Lordships. Further we would add that in very few cases, if at all, should it be acceptable for an MP to purposely flout a court order.

Judges are only interpreting and applying law that has been introduced through Parliament. Parliament decided to introduce the Human Rights Act. It was understood at the time that it would bring about a privacy law.

- *Should Parliament consider enforcing ‘proper’ use of Parliamentary Privilege through penalties for ‘abuse’?*

Whilst it is a matter for Parliament, we believe that this should be considered: firstly to help protect the rights of claimants in these cases and secondly to maintain the credibility of Parliament, and the separation of powers.

- *What is ‘proper’ use and what is ‘abuse’ of Parliamentary Privilege?*

We suggest that it is up to Parliament to define the ways in which its members ought to be governed.

- *Is it desirable to address the situation whereby a Member of either house breaches an injunction using Parliamentary Privilege using privacy law, or is that a situation best left entirely to Parliament to deal with? Indeed, is it possible to address the situation through privacy law or is that constitutionally impermissible? Could the current position in this respect be changed in any significant way? If so, how?*

It is a matter for Parliament.

#### **4. Issues relating to media regulation in this context, including the role of the Press Complaints Commission and the Office of Communications (OFCOM)**

##### **PCC**

- *Do the guidelines in section 3 of the Editors’ Code of Practice correctly address the balance between the individual’s right to privacy and press freedom of expression?*
- *How effective has the PCC been in dealing with bad behaviour from the press in relation to injunctions and breaches of privacy?*

The Human Rights Act and the PCC Code are virtually identical in their wording in respect of privacy. There is therefore no basis for the press to object to the Human Rights Act’s provisions, as they say voluntarily signed up to the same.

Self regulation by a body without power (such as to prevent publication of stories in advance, or to impose financial sanctions) simply does not work. For the PCC to be effective, it would need to be given teeth.

As evidence of how the PCC does not provide effective regulation, compare the way the PCC investigated phone hacking in 2009 with the way the former independent television regulator, the ITC, reacted in 1998 when untrue allegations about a programme on drug-running were made on a TV channel. The ITC imposed a £2m fine after a thorough investigation, led by Michael Beloff QC and the former controller of Editorial Policy at the BBC.

- *Does the PCC have sufficient powers to provide remedies for breaches of the Editors' Code of Practice in relation to privacy complaints?*

The PCC even fails to use its existing limited powers in situations when it ought to. We believe that for there to be effective regulation not only should there be an increased level of sanctions for those that breach any code, but also it should be fairly and properly policed. It cannot be self regulation, as the public have no confidence in the press' ability to regulate itself.

- *Should the PCC be able to initiate its own investigations on behalf of someone whose privacy may have been infringed by something published in a newspaper or magazine in the UK?*

We have no objection to this in principle. We assume that consent to such investigation would need to be given by the individual in question. It would seem absurd if an individual who had been wronged by the press then had to undergo further publicity by way of a PCC enquiry if they would prefer not to undergo that additional publicity.

- *Should the PCC have the power to consider the balance between an individual's privacy and freedom of expression prior to the publication of material – or should this power remain with the Courts?*

We believe it is vital for this power to remain with the Courts. It is the only effective way of guaranteeing impartiality. One cannot limit access to the courts in any event, so if such a suggestion is to be implemented it will not be able to do so.

- *Is there sufficient awareness in the general public of the powers and responsibilities of the PCC in the context of privacy and injunctions?*

The PCC doesn't have any powers in relation to injunctions. In relation to privacy in general we have found the PCC to be helpful to a limited extent by agreeing to forward emails that we have prepared to its signatories to ask journalists to leave an individual's home. Other than this we have found them to be largely impotent.

## **OFCOM**

- *Do the guidelines in Section 8 of the Ofcom Broadcasting Code correctly address the balance between the individual's right to privacy and freedom of expression?*
- *How effective has Ofcom been in dealing with breaches of the Ofcom Broadcasting Code in relation to breaches of privacy?*
- *Is there a case that the rules on infringement of privacy should be applied equally across all media content?*

4 October 2011

Schillings, Carter Ruck Solicitors, and Hugh Tomlinson QC—Oral evidence (QQ 65–118)

**Schillings, Carter Ruck Solicitors, and Hugh Tomlinson QC—Oral evidence (QQ 65–118)**

[Transcript to be found under Hugh Tomlinson QC](#)

John McLellan, Editor, *The Scotsman*, Richard Walker, Editor, *Sunday Herald*, Matt McKenzie, Editor, *The Sunday Sun*, Alastair Machray, Editor, *Liverpool Echo*, and Neil Fowler, Nuffield College, Oxford—Oral evidence (QQ 210–272)

**John McLellan, Editor, *The Scotsman*, Richard Walker, Editor, *Sunday Herald*, Matt McKenzie, Editor, *The Sunday Sun*, Alastair Machray, Editor, *Liverpool Echo*, and Neil Fowler, Nuffield College, Oxford—Oral evidence (QQ 210–272)**

[Transcript to be found under Richard Walker, Editor, Sunday Herald](#)

## Dr Andrew Scott—Written evidence

1. My current position is that of senior lecturer in the Department of Law at the London School of Economics and Political Science. I specialise in media law and regulation, constitutional law, and competition law. Much of my research and teaching concerns the law of privacy. I was the author of six chapters on privacy in the leading text *Carter-Ruck on Libel and Privacy* (6th edn, London: LexisNexis, 2010). Aspects of this work have been cited by the High Court. A research paper I had published in the *Journal of Media Law* was appended to and cited by the UK Government in its submissions to the European Court of Human Rights on *Mosley v United Kingdom* (app no 48009/08). I have also published widely on matters pertaining to the law of libel.
2. In light of the furore over privacy and super-injunctions that played out this spring, I published a brief note on the blog *British Politics and Policy at LSE* which suggested a revised approach to the award of interim injunctions in publication cases that would address a number of the concerns that had been and continue to be expressed in that regard. Members of the Joint Committee may be interested to read that short note in full,<sup>382</sup> but in essence it recommended that Parliament should provide for:
  - (a) an amendment to section 12 of the Human Rights Act 1998 so as to change the threshold test for the award of an injunction in privacy cases. The revised test would emulate the ‘rule in *Bonnard v Perryman*’ that prevails in libel claims such that a promise by the publisher to demonstrate that the privacy interest either (i) did not exist or (ii) was overridden by the public interest in the given story would be sufficient to see an injunction denied.
  - (b) some sanction - punitive damages, costs penalties, or perhaps even contempt proceedings - to be imposed upon a publisher who deliberately misled the court at the interim stage.
  - (c) a workable ‘account of profits’ remedy that would strip the publisher of all revenues generated by the privacy breach, and which would incentivise the claimant to bring a claim after publication.
  - (d) a prior notification obligation backed up by a system of fines for breach that would be administered by the Attorney General where required by the public interest in a manner akin to statutory contempt.
3. In what follows, I offer replies to the questions raised in the Call for Evidence issued by the Joint Committee that are in keeping with the above suggestions. I also include commentary on the state of existing law and practice in this field where I consider that I have something sensible to contribute to the Committee's deliberations. Hence, detailed answers are offered to only the first two heads of the call for evidence. While I do hold views on some aspects of parts 3 and 4, these are relatively under-developed and those aspects of the Committee's business might be best addressed by others more expert than myself. I would add that I am most grateful to have been afforded this opportunity to assist the Committee in its important task.

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<sup>382</sup> <http://blogs.lse.ac.uk/politicsandpolicy/2011/06/29/super-injunctions-and-privacy/> (accessed 4 October 2011).

## Responses to the Call for Evidence

(1) How the statutory and common law on privacy and the use of anonymity injunctions and super-injunctions has operated in practice

a. Have anonymous injunctions and super-injunctions been used too frequently, not enough or in the wrong circumstances?

The practice of the courts at the interim stage has evolved markedly over recent years as judges have grappled with the changing environment in which they perform their task. The increased use of super-injunctions was an understandable first response, but there is little doubt that such restrictions were sometimes imposed unnecessarily. The shift to using anonymised injunctions and confidential appendices since *DFT v TFD* [2010] EWHC 2335 was a welcome development insofar as it recognised the importance of open justice. It would be most surprising if inappropriate orders are made in future given the recent publication of guidance on the matter.<sup>383</sup> It should be expected, however, that super-injunctions will continue to be imposed from time to time, if only on a time-limited basis, in order to meet the exigencies of particular cases.<sup>384</sup>

As regards anonymity injunctions, in general their use has been entirely appropriate. Personally (and with the utmost respect), however, I do hold reservations as to whether the continuation of the existing order by both Mr Justice Eady and Mr Justice Tugendhat in *CTB v News Group Newspapers Limited & Imogen Thomas* [2011] EWHC 1326 (QB) and [2011] EWHC 1334 (QB) was legitimate in the circumstances. It would seem that the basis of their respective decisions was the need to defend an aspect of privacy (freedom from harassment) that is unrelated to a cause of action (the claim for misuse of private information) that is focused on informational privacy. Such an order might have been made under the Protection from Harassment Act 1997, but this claim would require proof of a different kind and was not argued before the court (as I understand it).

b. Are the courts making appropriate use of time limitations to injunctions and of injunctions contra mundum (i.e. injunctions which are binding on the whole world) and how are such injunctions working in practice?

Since *Terry (originally LNS) v Persons Unknown* [2010] EWHC 119 (QB), it has become standard practice for judges to include 'return dates' in interim injunctions.<sup>385</sup> The expectation that this will now always be done was reflected in the Guidance Note published by the Master of the Rolls in the summer.<sup>386</sup>

Injunctions contra mundum are awarded very rarely in privacy cases, and generally only at the culmination of a final trial.<sup>387</sup> They are unnecessary at the interim stage due to the applicability of the *Spycatcher* principle (the notion that disclosure of information by some party other than the addressee of the order frustrates the intention of the court and therefore amounts to a contempt).

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<sup>383</sup> Master of the Rolls, *Practice Guidance for Interim Non-Disclosure Orders*, July 2011.

<sup>384</sup> *ibid*, at [15].

<sup>385</sup> In that case, Tugendhat J derided the notion that 'extensive derogations from open justice should be routine in claims for misuse of private information' (at [107]), and noted that there would seldom be any justification for the award of a super-injunction in cases where the person targeted by the application is a national newspaper (at [109]).

<sup>386</sup> The guidance states that the inclusion of a return date is one element in active case management (above n 2, at [38]).

<sup>387</sup> See *Venables v News Group Newspaper Ltd* [2001] 1 All ER 908; *X (a woman formerly known as Mary Bell) and Y v O'Brien* [2003] EWHC 1101 (QB); *Re KT* [2004] EWHC 3428 (Fam); *Carr v News Group Newspapers Ltd* [2005] EWHC 971 (QB).

The public disquiet that met the imposition by Mr Justice Eady of an injunction contra mundum in *OPQ v BJM and CJM* [2011] EWHC 1059 (QB) was based upon ignorance of the circumstances. Unusually in that instance, the case was shortly to move to a final determination without trial with the award of a permanent injunction (in fact, the rubber-stamping of a settlement reached between the parties). In moving from an interim injunction to a final order, those media organisations that had been covered by the *Spycatcher* principle while the case was ongoing and who knew (at least some of) the details, would be free to publish once the interim injunction was lifted in favour of the final remedy. The judge had concluded that the ultimate balancing exercise that involved an intense scrutiny on the facts of the case came down in favour of protecting the privacy of the claimant and the interests of the family members over the right to freedom of expression of (a) the blackmailing defendants and (b) media organisations generally. The media did not contest this.

Hence, pragmatically, it would seem that the award of the final injunction contra mundum was entirely appropriate. This is not to say that such orders do not remain "an innovation in search of a fully coherent principle or rationale".<sup>388</sup> It may be that they can be justified under the new rights jurisprudence as being necessitated by the need properly to vindicate the Article 8 rights of the claimant.

c. What can be done about the cost of obtaining a privacy injunction? Whilst individuals the subject of widespread and persistent media coverage often have the financial means to pursue injunctions, could a cheaper mechanism be created allowing those without similar financial resources access to the same legal protection? In principle, an alternative, less costly mechanism could be administered by a media regulatory body. Indeed, given the parlous state of litigation funding at present, the introduction of some less costly alternative mechanism is perhaps highly desirable. If this body operated on the basis of voluntary subscription, however, this would introduce strong perverse incentives for publishers to absent themselves from the regime. Moreover, even a statutory regulator would cover only those defendants who fell within its purview.

It should be noted that the revisions to the current regime proposed in the introductory comments above would involve a significant simplification of the task to be performed by the court at the interim stage. Applications could be determined easily on the papers only. This would entail a reduction in cost if a court-based approach was maintained, but would also facilitate the transfer of the task to some other decision-making body.

d. Are injunctions and appeals regarding injunctions being dealt with by the courts sufficiently quickly to minimise either (where the injunction is granted or upheld) prolonged unjustifiable distress for the individual or (where an injunction is overturned or not granted) the risk of news losing its current topical value? Appeals against decisions made at the interim stage in publication cases may be treated as urgent and heard immediately or within a few days in accordance with the guidelines set out in *Unilever Plc v Chefaro Proprietaries Ltd (Application for Expedited Appeal)* [1995] 1 WLR 243. These guidelines prescribe that an expedited hearing may be arranged, inter alia, where a party may otherwise lose its livelihood, business or home or suffer irreparable loss or extraordinary hardship; the appeal will otherwise become futile, or where there would be serious detriment to the interests of

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<sup>388</sup> Stanley, *The Law of Confidentiality: a restatement* (2008) Hart Publishing, at 121.



members of the public. In principle, these rules should allow for the speedy hearing of appeals from decisions on the award of interim injunctions should such be sought by either party. Given the seemingly high threshold of the *Unilever* tests, however, this may not be a frequent occurrence. Personally, I have no experience or knowledge on the question of whether this regime operates satisfactorily in practice. A further factor in the mix, however, must be the question of the affordability of proceeding with an appeal for some litigants.

e. Should steps be taken to penalise newspapers which refuse to give an undertaking not to publish private information but also make no attempt to defend an application for an injunction in respect of that information, thereby wasting the court's time? No. By default, newspapers and other publishers enjoy the right to freedom of expression. They should be placed under no legal obligation to assist, or threat of legal sanction for failing to assist, other parties in their attempts to restrict that right without very good reason. It must be highly questionable whether not avoiding minor addition to the workload of the courts is sufficient in that regard.

(2) How best to strike the balance between privacy and freedom of expression, in particular how best to determine whether there is a public interest in material concerning people's private and family life

a. Have there been and are there currently any problems with the balance struck in law between freedom of expression and the right to privacy?

In general terms, the balance currently struck between competing rights by the English courts is essentially sound. It is always possible, however, to quibble at the fringes.<sup>389</sup>

One area into which the English courts should not be drawn is that seen in the Strasbourg ruling in *Von Hannover v Germany*.<sup>390</sup> In that case, it was suggested that photographs of identifiable individuals will always involve the conveyance of 'private' information where the subject is not engaged in some demonstrably official, public activity. Hence, even where the photograph depicted entirely mundane, or routine information this would be considered private. This is not currently, and should not become, the position in English law, except – perhaps – with regard to photographs of children.<sup>391</sup> To allow individuals to control use of their image by way of the claim for misuse of private information would amount to the bestowing of an 'image right' that is not currently recognised.

b. Who should decide where the balance between freedom of expression and the right to privacy lies?

The answer to this question should depend on whether the court is dealing with the matter at an interim stage or at final trial. It will usually only arise in any significant way if there is more in the balance against the privacy interest than the 'mere' right to freedom of speech alone.

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<sup>389</sup> For example, reservations might reasonably be expressed at the weight accorded by the courts to suggestions unsupported by medical evidence that harm will be caused by publication to third party children of the claimant - see *ETK v News Group Newspapers Ltd* [2011] EWCA Civ 439

<sup>390</sup> (2006) 43 EHRR 7.

<sup>391</sup> *Murray v Big Pictures (UK) Ltd* [2008] EWCA Civ 446.

At the interim stage, the question should be left in the hands of the journalist or editor. As Mr Justice Eady has noted often,<sup>392</sup> when determining whether to make an interim order judges act on the basis of untested evidence. Evidence is generally presented in written form only, discovery and inspection of documents has not taken place, and parties are not cross-examined. In principle, therefore, it does not make sense to speak of a 'balancing of rights' at the interim stage because the content or relative weight of those 'rights' cannot be properly assessed in advance of a full trial. There can be no intense scrutiny on the specific facts of the case. The facts are underdetermined. The rights are simulacrum only at the interim stage.

In those circumstances, there are significant dangers that judges may err in favour of claimants whose contentions will *prima facie* tend to be the more poignant. It must be relatively easy for a judge to empathise with the human predicament presented by a claimant facing the prospect of an invasion of privacy, whereas the contribution that a publication will make to public knowledge on matters of import may be more difficult to gauge. It is perfectly acceptable, indeed preferable, to rely on the journalist's and/or editor's appreciation of the public interest in a given story, and to accept any credible contention from the prospective publisher. Where the public interest is even putatively at issue, it may be best to err in favour of publication. This would avoid any suggestion of the 'judicial licensing' of journalists' stories.

Under this approach, it cannot be avoided that the claimant may ultimately be left only with compensation in damages for privacy harm caused. As the European Court confirmed in *Mosley v United Kingdom*, this is in principle a wholly acceptable outcome notwithstanding the superficially appealing mantra that 'privacy once lost is gone forever'.

The position is different at final trial. At that stage, the court is able to determine the relative weight of the respective rights and interests. It is therefore in a position properly to exercise its function as the arbiter of fundamental rights. The editor's or journalist's, while of evidential value, should no longer be determinative.

c. Should Parliament enact a statutory privacy law?

There is no advantage to be gained in Parliament enacting a new law that might affect the balancing of rights in the substantive law. Where an Act may be of profound utility is in redesigning the scheme by which privacy claims are determined at the interim stage. As noted above in [2], such a law might amend s 12 of the Human Rights Act 1998; introduce a prior notification obligation backed by a system of fines to be imposed where warranted in the public interest; provide for penalties to be imposed upon a publisher who deliberately misled the court at the interim stage, and to provide for a workable account of profits remedy for claimants.

d. Should Parliament prescribe the definition of 'public interest' in statute, or should it be left to the courts?

There would be no advantage to be gained by Parliament prescribing a definition of the public interest. Indeed, any such move would be likely to constrain the courts in an area where flexibility has proven valuable over time.

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<sup>392</sup> In *X and Y v Persons Unknown* [2006] EWHC 2783 (QB), for example, Eady J noted that 'the court... cannot generally avoid coming to a conclusion on the merits' and its decision will 'inevitably [be] at [the interim] stage to a greater or lesser extent inchoate' (at [44]). See also, *Douglas v Hello! Ltd* [2000] EWCA Civ 353, at [10], per Brooke LJ: 'evidence on these matters must be approached with care, prepared as it was on each side with great speed and not tested in cross-examination'.

Insight on the scope of the public interest can be drawn from the deployment of the concept in a number of related fields of law. In decided cases based on copyright, defamation, and breach of confidence, courts have considered there to be public interest dimensions to a diverse range of disclosures. These have included the business of government and political conduct;<sup>393</sup> the promotion of animal welfare;<sup>394</sup> the protection of public health and safety;<sup>395</sup> the fair and proper administration of justice;<sup>396</sup> the conduct of religious groups;<sup>397</sup> discipline in schools;<sup>398</sup> the conduct of the police;<sup>399</sup> cheating and corruption in sport;<sup>400</sup> breach of charitable fiduciary rules;<sup>401</sup> involvement in serious crimes;<sup>402</sup> corporate malpractice;<sup>403</sup> the sympathy of a public figure with extremist dogma, and the correction of prior statements or misrepresentations by others.<sup>404</sup>

e. Is the current definition of ‘public interest’ inadequate or unclear?

There is no definition of the public interest as such. The function of any public interest argument in the law of privacy is clear: it will augment the freedom of expression side of the ultimate balancing exercise. It does not operate in the manner of a ‘defence’. The ability to introduce a public interest argument does not serve as a ‘trump card’. Not only the existence of a public interest argument that the defendant seeks to invoke, but also its relative strength and the extent of contribution of the impugned information thereto must be assessed by the court.

f. Should the commercial viability of the press be a public interest consideration to be balanced against an individual’s right to privacy?

In general terms, the basic interest of a media organisation in freedom of expression is little different to that of any other individual. In consequence, and in the absence of any bolstering by reference to some particular public interest aspect to the message communicated, such freedom of expression in the media should outweigh only relatively weak or non-existent privacy interests.

It is sometimes contended that without the right to publish salacious content that is at the ‘edge of acceptability’, few media publications will remain viable as business propositions. Such stories are said to attract a level of readership without which media products can readily become commercially unsustainable. This point has been

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<sup>393</sup> *Attorney General v Jonathan Cape Ltd* [1976] QB 752; *Reynolds v Times Newspapers Ltd* [1999] 3 WLR 1010; *London Regional Transport Ltd v Mayor of London* [2001] EWCA Civ 1491; *Al Fagih v HH Saudi Research and Marketing (UK) Ltd* [2001] EWCA Civ 1634; *Roberts v Gable* [2006] EWHC 1025; *Galloway v Telegraph Newspapers* [2004] EWHC 2786 (QB); *Henry v BBC* [2005] EWHC 2787; *Malik v Newpost* [2007] EWHC 3063.

<sup>394</sup> *Imutran Ltd v Uncaged Campaigns Ltd* [2001] 2 All ER 385.

<sup>395</sup> *Hubbard v Vosper* [1972] 2 QB 84; *McKeith v News Group Newspapers Ltd* [2005] EWHC 1162; *W v Egdeell* [1990] Ch 359.

<sup>396</sup> *Lion Laboratories Ltd v Evans* [1985] QB 526; *Istil Group Inc v Zahoor* [2003] EWHC 165 (Ch).

<sup>397</sup> *Hubbard v Vosper* [1972] 2 QB 84.

<sup>398</sup> *Leeds City Council v Channel Four Television Corp* [2005] EWHC 3522 (Fam).

<sup>399</sup> *Flood v Times Newspapers* [2009] EWHC 2375; *Charman v Orion Group Publishing Group Ltd* [2007] EWCA Civ 972; *Miller v Associated Newspapers* [2003] EWHC 2799 (QB).

<sup>400</sup> *Jockey Club v Buffham* [2002] EWHC 1866 (QB); *Armstrong v Times Newspapers* [2005] EWCA Civ 1007; *Grobbelaar v News Group Newspapers* [2001] EWCA Civ 33.

<sup>401</sup> *Seray-Wurie v Charity Commission of England and Wales* [2008] EWHC 870.

<sup>402</sup> *Lukowiak v Unidad Editorial SA* [2001] EMLR 46; *Loutchansky v Times Newspapers Ltd* [2001] EWCA Civ 1805; *Jameel v Wall Street Journal Europe Sprl* [2006] UKHL 44.

<sup>403</sup> *Cream Holdings Ltd v Banerjee* [2004] UKHL 44; *GKR Karate (UK) Ltd v Yorkshire Post Newspapers Ltd* [2000] 1 WLR 2571; *English v Hastie Publishing Ltd* (unreported, 31 January 2002) QBD; *Gilbert v Mirror Group Newspapers Ltd* [2000] EMLR 680; *Loutchansky v Times Newspapers Ltd* [2001] EWCA Civ 1805.

<sup>404</sup> *Prince Radu of Hohenzollern v Houston* [2007] EWHC 2328 (QB); *Hyde Park Residence Ltd v Yelland* [1999] EMLR 654, at 663; *Ferdinand v MGN Ltd* [2011] EWHC 2454 (QB).

made forcefully by Paul Dacre, the Editor-in Chief of Associated Newspapers.<sup>405</sup> There has been some judicial recognition of this viewpoint.<sup>406</sup>

At first glance, this is an appealing argument. On closer analysis, however, its validity seems limited, and its relevance to the determination of individual claims for misuse of private information negligible. The argument should not add much weight in the overall balance if what is proposed is the widespread communication of intimate details relating to some other person. It must be possible for media organisations to deliver diverting entertainment for their customers without trammelling the basic rights of individuals in the process. To suggest otherwise borders on the disingenuous. Constraints imposed by privacy law may tilt the balance of power in favour of some celebrity figures in their symbiotic relationship with the media, but there are few individuals who can move entirely beyond reliance on media exposure. Moreover, for every such individual there will be several others who will willingly trade their privacy in the hope of garnering greater fame. The contention that non-consensual, invasive stories are somehow *necessary* rests upon a deliberate turning of face against the extent to which knowing symbiosis is already the business model pursued with relative profitability by much of the print media.

Ultimately, if society at large considers that public interest and investigative journalism makes an important contribution to the democratic public sphere, then it will find its own means of supporting it without insisting on the destruction of some individual lives as an unavoidable externality.

g. Should it be the case that individuals waive some or all of their right to privacy when they become a celebrity? A politician? A sportsperson? Should it depend on the degree to which that individual uses their image or private life for popularity? For money? To get elected? Does the image the individual relies on have to relate to the information published in order for there to be a public interest in publishing it (a 'hypocrisy' argument)? If so, how directly?

h. Should any or all individuals in the public eye be considered to be 'role models' such that their private lives may be subject to enhanced public scrutiny regardless of whether or not they make public their views on morality or personal conduct (i.e. in the absence of a 'hypocrisy' argument)?

i. Are the courts giving appropriate weight to the value of freedom of expression in 'celebrity gossip' and 'tittle-tattle'?

It is difficult to offer a sensible response to this series of questions given the imperative for brevity in a submission of this nature.<sup>407</sup> In a corpus of law based on very many judgments, the courts have developed a sophisticated response that over time has addressed almost every dimension of these issues. As noted above, the approach of the courts to the balancing exercise is broadly defensible and sound. Indeed, it is a most impressive jurisprudence developed by a small number of very able lawyers. The short answers to questions g, h, and i are 'no', 'no', and 'yes'

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<sup>405</sup> Society of Editors, 'Paul Dacre launches conference with explosive speech', press release, 9 November 2008 (includes full text).

<sup>406</sup> In *A v B plc* [2002] EWCA Civ 337, Lord Woolf CJ considered that it is necessary to take into account the ongoing viability of newspapers: "the courts must not ignore the fact that if newspapers do not publish information which the public are interested in, there will be fewer newspapers published, which will not be in the public interest" (at [11(xii)]). In *Campbell v Mirror Group Newspapers Ltd* [2004] UKHL 22, Baroness Hale commented – somewhat agnostically – 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 their intrusions into private grief so that they can maintain circulation and the rest of us can then continue to enjoy the variety of newspapers and other mass media which are available in this country" at [143].

<sup>407</sup> For instance, this subject matter comprises a large proportion of Chapters 19 and 20 in *Carter-Ruck on Libel and Privacy*.

respectively. Beyond this triteness, some general points can be offered. Ultimately, every case will boil down to a close analysis of - an 'intense scrutiny' on - the specific facts presenting in the given case.

As is well known, the claim for misuse of private information rests upon a two-stage analysis. At the first stage, the court asks whether the claimant enjoys a 'reasonable expectation of privacy' over the information concerned. If this is the case, then at a second stage the court undertakes the 'ultimate balancing test' between, essentially, the privacy interest (which can be more or less strong) and the interests of the public in learning the information in question. While the balancing exercise is thus focused upon the primary clash of rights - privacy versus expression - other factors can and generally do also influence this assessment. Points relating to the status of the claimant or the prior availability of information regarding him or her can speak to either stage of this analysis. The queries raised in the call for evidence speak to two general themes: whether the mere status of the claimant as a 'public figure' or 'role model' should bear on the freedom to publish information regarding him or her, and what will be the ramifications of prior publicity regarding the claimant.

The first of these themes - whether the mere fact that a person somehow holds the status of public figure or role model should entail that he or she should necessarily expect a lesser degree of legal protection for personal information than might the average person - was once controversial, but has now been settled by the courts. It is, of course, perfectly legitimate for a member of the general public to be 'interested' in the conduct and opinions of some celebrity or other public figure. Indeed, it would be asinine for such an individual to expect to be free to live their lives as though they had never entered the spotlight of public notoriety. Any public position or popular fame will necessarily expose an individual's life and conduct to closer scrutiny than would otherwise be the case. It is not clear, however, precisely how it is supposed that the public interest might be served by the disclosure of personal information regarding a public figure in the absence of some further, extraneous, validating justification. In the absence of some specific contribution to matters of public importance, such interest cannot justify the disclosure of private facts regarding the individual concerned.

Ultimately, as the courts regularly recognise, public figures remain entitled to a private life.<sup>408</sup> This point has been made forcibly by the Court of Appeal: "the fact that an individual has achieved prominence on the public stage does not mean that his private life can be laid bare by the media. We do not see why it should necessarily be in the public interest that an individual who has been adopted as a role model, without seeking this distinction, should be demonstrated to have feet of clay".<sup>409</sup> Mr Justice Eady has railed against generalisations citing the supposedly reduced protection available for role models or public figures.<sup>410</sup> His point was that sweeping pronouncement can never automatically determine the ultimate balancing exercise between clashing rights. It would require some particular circumstances such as the individual having themselves discussed publicly the same events that form the subject of the proposed publication so that there could be no reasonable expectation of

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<sup>408</sup> *A v B plc* [2002] EWCA Civ 337, at [11(xii)], per Lord Woolf CJ); *Campbell v Frisbee* [2002] EWHC 328 (Ch), at [32], per Lightman J; *CC v AB* [2006] EWHC 3083 (QB), at [52], per Eady J. See also, *Craxi (No 2) v Italy* (2004) 38 EHRR 995, at [65].

<sup>409</sup> *Campbell v Mirror Group Newspapers Ltd* [2002] EWCA Civ 1373, at [41] (per, Lord Phillips MR). See also, *McKennitt v Ash* [2006] EWCA Civ 1714, at [56] et seq.

<sup>410</sup> *Mosley v News Group Newspapers Ltd* [2008] EWHC 1777 (QB), at [12].

privacy therein.<sup>411</sup> More often, prior publicity will be taken into account during the second stage of the analysis, for example, where either (i) the claimant's past conduct indicated that the privacy right was not considered by that individual to be particularly important (and thus might be easily outweighed), or (ii) publication would serve the public interest specifically by exposing some past misrepresentation or by evidencing hypocrisy on the part of the claimant.

j. In the context of sexual conduct, should it be the case that a person's conduct in private must constitute a significant breach of the criminal law before it may be disclosed and criticised in the press?

Private sexual conduct will of course give rise to a reasonable expectation of privacy. Equally, there will always be a public interest in the disclosure of criminal conduct. Both factors, however, can be of greater or lesser weight. The more detailed or graphic the proposed depiction of sexual activity the heavier the weight of the privacy factor in the ultimate balancing test. The more serious the criminal behaviour, the greater the public interest in its disclosure. At a certain point in the descent into serious criminality, privacy will always give way. Until that tipping point is reached, however, this query exemplifies the fact that liability in this areas relies upon questions of proportionality. In *Mosley v News Group Newspapers Ltd* [2008] EWHC 1777 (QB), for example, Eady J saw a profound privacy interest prevail over a public interest argument based upon the value of disclosing low-level criminality. He asked rhetorically, "whether it will always be an automatic defence to intrusive journalism that a crime was being committed on private property, however technical or trivial. Would it justify installing a camera in someone's home, for example, in order to catch him or her smoking a spliff? Surely not" (at [111]).

k. Could different remedies (other than damages) play a role in encouraging an appropriate balance?

l. Are damages a sufficient remedy for a breach of privacy? Would punitive financial penalties be an effective remedy? Would they adequately deter disproportionate breaches of privacy?

An interim injunction is generally the remedy sought as it avoids the expected harm altogether. Other 'discursive remedies' such as mandated apologies or rights of reply are less likely to be deemed valuable.

It is often suggested that damages are inadequate to compensate privacy harm as 'the genie will be out of the bottle'. On one level, this is obviously correct. No claimant would prefer to seek a remedy for the publication of private information *ex post* if a preventative option were available. It is certainly true that the outcome of court cases cannot restore privacy. Everyone can agree that it is best that injury to others is not caused, and that British media organisations – especially the tabloid press – do sometimes wreak tremendous harm on individuals.

Preaching against the sin of injuring others, however, is not the same as demonstrating that a legal remedy in damages provided by the State through the courts cannot be adequate or effective in compensating for privacy harms. In many circumstances beyond cases involving publication, the law is asked to provide compensation by way of general damages for non-monetary losses. No one would argue that monetary compensation for the loss of an eye can restore sight to the

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<sup>411</sup>Insofar as information regarding a celebrity or public figure that might otherwise be considered private is already well-known in the public domain, it will not be protected in law. On occasion, the person concerned may themselves have volunteered the information in which case they might be understood to have 'waived' or 'exhausted' their privacy interest.

victim of such personal injury. Nevertheless, assuming that they were awarded at a sufficiently high level, damages would be generally understood to be fair and just satisfaction, and hence an effective remedy. The claimant would of course prefer that the injury had never taken place. It is not clear why privacy harms should be treated differently to this or other forms of irreversible non-pecuniary loss. The fact that there may be a preferable remedy available does not mean that the damages remedy is somehow ineffective.

That said, it is perhaps the case that the general level of damages awards in privacy claims is too low to compensate for harms caused. It is certainly too low to incentivise individuals to bring claims to the court. One option may be to introduce punitive damages, although it is not clear that this would be warranted in concept. With regard to the proposal noted in [2] above, the suggestion was made that a workable 'account of profits' remedy should be introduced in preference to punitive damages. This would secure adequate compensation for claimants, but perhaps more importantly would serve to deter the intrusion on private life from occurring in the first place. It would link compensation to benefits derived rather than harms suffered.

m. Should we introduce a prior notification requirement, requiring newspapers and other print media to notify an individual before information is published, thereby giving the individual time to seek an injunction if a court agrees the publication is more likely than not to be found a breach of privacy? If so, how would such a requirement function in terms of written content online eg blogs and other media? As per the note above in [2], very real consideration should be given to the introduction of a prior notification obligation. In light of what follows, there would be no need in principle to treat online publication any differently to traditional hardcopy publishing.<sup>412</sup> The advantage to the claimant of a notification obligation is obvious while many of the arguments against are overblown. In its 2010 report on *Press Standards, Privacy and Libel*, the Culture, Media and Sport Committee concluded that a legal or unconditional requirement to pre-notify would be ineffective, due to what it accepted was a need for a 'public interest' exception.<sup>413</sup> In light of the poignancy of the argument in favour of prior notification, this idea - while valid - needs to be unpicked somewhat.

The public interest in question cannot be merely that in the content of the story itself. Rather, it must be something important that is put at risk when prior notification - not publication - occurs. A number of possibilities present themselves. First, the fear might be that notification will allow the claimant to seek an injunction and prevent publication. This may come about either where the claimant is successful thereby killing the story, or where the claimant may ultimately be unsuccessful but inefficiencies in the system will nonetheless see the story delayed beyond its 'sell-by date'. These are real concerns, albeit that in principle at least with a story of public importance consideration by the court should result in no such impediment. Experience may caution otherwise.<sup>414</sup> Notably, should the approach recommended in

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<sup>412</sup> This is not to say that PCC or equivalent body should not inculcate a presumption in favour of prior notification into its code of practice.

<sup>413</sup> [2009-2010] Second Report. HC 362, at [93].

<sup>414</sup> *ibid*, at [86]. During that Committee's inquiry, the editor of *Private Eye* explained "we are involved in a case at the moment where we attempted to run a story in January and we still [in May] have not been able to run it. The journalist involved put it to the person involved, which was an error; there was an immediate injunction; we won the case; they have appealed; we are still in the Appeal Court... so you find yourself unable to run stories because they have invoked confidentiality or bound it up with privacy and that is a real problem... I am sitting on a very good story... not about sex, nothing to do with red tops, a proper public interest story... and it would have been in the public domain if I had not tried

[2] above be adopted - the 'equalising up' of the threshold test to match the rule in *Bonnard v Perryman* - then it would be beyond question that only cases involving no putative public interest would be at risk of being enjoined. The risk that public interest stories would be blocked by the putative claimant would recede to the point of vanishing. Prurient invasion of privacy, however, would be prevented should the subject seek an injunction from the court.

A second possibility is that by notifying the subject of the story, the newspaper provides an opportunity to that person to 'spoil' its impact, perhaps by offering a countermanding story to the newspaper's rivals. In essence, the newspaper may fear being 'scooped' in a commercially damaging manner. Prima facie, this cannot provide the basis for a sustainable public interest unless one is willing to accept that this likelihood would somehow discourage engagement in investigative journalism. This seems not to be a particularly tenable position, although others may wish to make the case more strongly.

A third possibility might be the risk that on notification the subject of the story might act to subvert the story itself, perhaps by destroying evidence or by intimidating sources. At least in principle, this is a real concern that would have to be accommodated within the design of the rule on prior notification. Importantly, there is no lack of clarity, or fuzziness, about the nature of this public interest.<sup>415</sup> As noted in [2] above, one way to do this would be to provide that sanctions for breach of the obligation could be pursued only by or with the consent of the Attorney General as is the case with statutory contempt proceedings. Should the publisher be able to make a sustainable case that notification would have resulted in deleterious consequences, the Attorney General would exercise his or her discretion not to proceed. Importantly, this approach would also allow the Attorney General scope to ignore trivial instances (the neighbours gossiping over the privet, or youths engaged in online chat).

n. Should aggravated damages be payable if a media publisher does not give prior notification to the subject of a publication which a court finds is in breach of that individual's privacy?

As per the above discussion, some form of penalty should be imposed in circumstances where the prior notification obligation was breached without lawful excuse. Whether aggravated damages would be the appropriate route is a moot point. The suggestion above would be for a system of fines in preference.

o. Is section 12 of the Human Rights Act 1998 appropriately balanced? Should the media's freedom of expression be protected in stronger terms? Or is there a disproportionate emphasis on the media's freedom of expression over the right to privacy? Has Section 12 of the Human Rights Act 1998 ensured a more favourable press environment than would be the case if Strasbourg jurisprudence and UK injunctions jurisprudence were applied in the absence of Section 12?

p. Is the test in section 12 for an injunction to be granted too high a threshold? Should that test depend on the type of information about to be published? Has the court struck the right balance in applying section 12?

q. Is there an anomaly requiring legislative attention between the tests for an injunction for breach of privacy and in defamation?

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to act responsibly... essentially it is censorship by judicial process because it takes so long and it costs so much" – see HC362-II, ev190, Q866.

<sup>415</sup> Compare the views of some witnesses in giving evidence to the Culture, Media and Sport Committee - *ibid*, at [88]



As per the above note, in my view the threshold test for all publication cases should be equivalent to that in *Bonnard v Perryman*. On one hand, this would prevent the award of injunctions where a putative public interest argument existed. On the other hand, the shift would facilitate the introduction of a prior notification obligation. Any such change in the s 12 test is not obligated by any form of 'anomaly' however. Neither is the alternative of 'equalising down' the *Bonnard v Perryman* test somehow unavoidable.

There is currently no privileging of Article 10 over Article 8 in the operation of s 12. It has been presumed by the courts that no such aggrandisement would be possible. In my view, this is correct given the language of the current provision (reference to the bipartite 'Convention right to freedom of expression'), but it is wrong as a matter of abstract legal principle for the reasons developed above.

Despite some initial judicial sentiment to the contrary, there is no question that the approach to s 12 adopted in *Cream Holdings Ltd v Banerjee* [2004] UKHL 44 amounts to the imposition of a stricter hurdle than under the pre-existing 'balance of convenience test' as set out in *American Cyanamid v Ethicon* [1975] AC 396

6 October 2011.

The Rt Hon. Sir Stephen Sedley, The Rt Hon. Jack Straw MP, The Rt Hon. Lord Wakeham, and Professor Gavin Phillipson—Oral evidence (QQ 1–32)

**The Rt Hon. Sir Stephen Sedley, The Rt Hon. Jack Straw MP, The Rt Hon. Lord Wakeham, and Professor Gavin Phillipson—Oral evidence (QQ 1–32)**

[Transcript to be found under The Rt Hon. Jack Straw MP](#)

## **Society of Editors—Written evidence**

### ***(1) How the statutory and common law on privacy and the use of anonymity injunctions and super-injunctions has operated in practice***

*a. Have anonymous injunctions and super-injunctions been used too frequently, not enough or in the wrong circumstances?*

In a relatively short period several so called super injunctions came to light following the Traffigura affair. There seemed to be little justification for the latter in terms of the public interest. While others may have been arguable the process quickly became discredited largely but not exclusively because of the internet. In the case of Ryan Giggs for example seemed that every time he touched a ball on the field it provoked chants of “playing away”. Clearly injunctions which appeared to have been granted without deep consideration or argument by the media might restrict traditional media reporting but cannot stop pub or football terrace gossip.

*b. Are the courts making appropriate use of time limitations to injunctions and of injunctions contra mundum (i.e. injunctions which are binding on the whole world) and how are such injunctions working in practice?*

Given the above comments re the internet and social media spreading gossip they seem to be a waste of time money and resources.

*c. What can be done about the cost of obtaining a privacy injunction? Whilst individuals the subject of widespread and persistent media coverage often have the financial means to pursue injunctions, could a cheaper mechanism be created allowing those without similar financial resources access to the same legal protection?*

CFAs can be used and there is not objection to them in principle but there is an objection in practice to 100 per cent uplift fees that bear no relation to the risk that lawyers take and to ATE insurance that is simply a money earner. Premiums are paid by losing media organisations but they are rarely if ever recoverable if media organisations win a case. The PCC system has an informal process that often leads to stories not being pursued to print.

*d. Are injunctions and appeals regarding injunctions being dealt with by the courts sufficiently quickly to minimise either (where the injunction is granted or upheld) prolonged unjustifiable distress for the individual or (where an injunction is overturned or not granted) the risk of news losing its current topical value?*

Need to check responses from MLA

*e. Should steps be taken to penalise newspapers which refuse to give an undertaking not to publish private information but also make no attempt to defend an application for an injunction in respect of that information, thereby wasting the court’s time?*

That is presumably covered by orders for costs – check MLA submissions

### ***(2) How best to strike the balance between privacy and freedom of expression, in particular how best to determine whether there is a public interest in material concerning people's private and family life***

*a. Have there been and are there currently any problems with the balance struck in law between freedom of expression and the right to privacy?*

There appears to have been in several cases a trend to give priority to article 8 as opposed to article 10. This goes against the reason for the introduction of article 12 that was inserted into the HRA after concerns were raised with the then Lord Chancellor. He and other ministers also made it clear that the bar for Article 8 trumping article 10 should be high i.e. freedom of expression should normally take precedence over article 8.

*b. Who should decide where the balance between freedom of expression and the right to privacy lies?*

That is the job for judges but they should clearly take note of Parliament's intentions when the HRA became law.

*c. Should Parliament enact a statutory privacy law?*

NO

*d. Should Parliament prescribe the definition of 'public interest' in statute, or should it be left to the courts?*

It is impossible. The public interest cannot be perfectly defined. It should be considered on a case by case basis with reference to guidelines. The media should always think twice and be ready to justify their reasons for publishing or broadcast.

*e. Is the current definition of 'public interest' inadequate or unclear?*

It is clear but debatable but the principles pretty easy to understand, Do not forget Lord Wolfe's argument that there is a public interest in a viable and indeed rumbustuous press.

*f. Should the commercial viability of the press be a public interest consideration to be balanced against an individual's right to privacy?*

Yes see above but editors should always be prepared to justify their decisions on the basis of the public interest.

*g. Should it be the case that individuals waive some or all of their right to privacy when they become a celebrity? A politician? A sportsperson? Should it depend on the degree to which that individual uses their image or private life for popularity? For money? To get elected? Does the image the individual relies on have to relate to the information published in order for there to be a public interest in publishing it (a 'hypocrisy' argument)? If so, how directly?*

YES, The test should be first that people make money from the public either directly as public servants or indirectly e.g. where their value depends on public support . But everyone has a right to privacy and the test should be when and where they behave a reasonable expectation of privacy, There can be no privacy in iniquity either criminal or moral. Put simply if an individual would not be prepared to justify their behaviour if it became public they should perhaps think twice about doing it.

*h. Should any or all individuals in the public eye be considered to be 'role models' such that their private lives may be subject to enhanced public scrutiny regardless of whether or not they make public their views on morality or personal conduct (i.e. in the absence of a 'hypocrisy' argument)?*  
Yes.

*i. Are the courts giving appropriate weight to the value of freedom of expression in 'celebrity gossip' and 'tittle-tattle'?*

Not always.

*j. In the context of sexual conduct, should it be the case that a person's conduct in private must constitute a significant breach of the criminal law before it may be disclosed and criticised in the press?*

Not necessarily. Moral or ethical behaviour should also be an issue.

*k. Could different remedies (other than damages) play a role in encouraging an appropriate balance?*

The effect of adverse adjudications and apologies should not be underestimated.

*l. Are damages a sufficient remedy for a breach of privacy? Would punitive financial penalties be an effective remedy? Would they adequately deter disproportionate breaches of privacy?*

NO

*m. Should we introduce a prior notification requirement, requiring newspapers and other print media to notify an individual before information is published, thereby giving the individual time to seek an injunction if a court agrees the publication is more likely than not to be found a breach of privacy? If so, how would such a requirement function in terms of written content online eg blogs and other media?*

No. There must not be any form of prior restraint.

*n. Should aggravated damages be payable if a media publisher does not give prior notification to the subject of a publication which a court finds is in breach of that individual's privacy?*

See above.

*o. Is section 12 of the Human Rights Act 1998 appropriately balanced? Should the media's freedom of expression be protected in stronger terms? Or is there a disproportionate emphasis on the media's freedom of expression over the right to privacy? Has Section 12 of the Human Rights Act 1998 ensured a more favourable press environment than would be the case if Strasbourg jurisprudence and UK injunctions jurisprudence were applied in the absence of Section 12? It would be a reasonable balance so long as it was used in the way parliament intended.*

The Human Rights Act is brought into disrepute by the legal industry that has grown up around it. Human Rights are a matter about protecting an individual against authoritarian governments. The HRA has been hijacked.

*p. Is the test in section 12 for an injunction to be granted too high a threshold? Should that test depend on the type of information about to be published? Has the court struck the right balance in applying section 12?*

NO.

*q. Is there an anomaly requiring legislative attention between the tests for an injunction for breach of privacy and in defamation?*

I The courts have referred to this type of information, e.g. "tittle-tattle about the activities of footballers' wives and girlfriends". See, for example, *Jameel v Wall Street Journal Europe SPRL* [2006] UKHL 44, [2007] 1 AC 359 at 147, [2006] 4 All ER 1279, at [147], *CTB v Newsgroup Newspapers Ltd and another* [2011] EWHC 1232 (QB) at [33], *ETK v News Group Newspapers Ltd* [2011] EWCA Civ 439, at [11].

**(3) Issues relating to the enforcement of anonymity injunctions and super-injunctions, including the internet, cross-border jurisdiction within the United Kingdom, parliamentary privilege and the rule of law**

a. How can privacy injunctions be enforced in this age of ‘new media’? Is it practical and/or desirable to prosecute ‘tweeters’ or bloggers? If so, for what kind of behaviour and how many people – where should or could those lines be drawn?

They cannot be enforced.

b. Is it possible, practical and/or desirable for print media to be restrained by the law when other forms of ‘new media’ will cover material subject to an injunction anyway? Does the status quo of seeking to restrict press intrusion into individual’s private lives whilst the ‘new media’ users remain unchallenged represent a good compromise?

No

c. Is enough being done to tackle ‘jigsaw’ identification by the press and ‘new media’ users? For example see Mr Justice King’s provisional view in *NEJ v. Wood* [2011] EWHC 1972 (QB) at [20] that information published in the Daily Mail breached the order of Mr Justice Blake, and the consideration by Mr Justice Tugendhat in *TSE and ELP v. News Group Newspapers* [2011] EWHC 1308 (QB) at [33]-[34] as to whether details about TSE published by The Sun breached the order of Mrs Justice Sharp.

d. Are there any concerns regarding enforcement of privacy injunctions across jurisdictional borders within the UK? If so, how should those concerns be dealt with?

It brings the law into disrepute.

e. **PARLIAMENTARY PRIVILEGE:**

i. With regard to the enforcement of privacy injunctions and the breaching of them during Parliamentary proceedings, is there a case for reforming the Parliamentary Papers Act 1840 and other aspects of Parliamentary privilege? Should this be addressed by a specific Parliamentary Privilege Bill or is it desirable for this Committee to consider privilege to the extent it is relevant to injunctions?

NO. Parliamentarians should not be restrained.

ii. Should Parliament consider enforcing ‘proper’ use of Parliamentary Privilege through penalties for ‘abuse’?

iii. What is ‘proper’ use and what is ‘abuse’ of Parliamentary Privilege?

iv. Is it desirable to address the situation whereby a Member of either house breaches an injunction using Parliamentary Privilege using privacy law, or is that a situation best left entirely to Parliament to deal with? Indeed, is it possible to address the situation through privacy law or is that constitutionally impermissible? Could the current position in this respect be changed in any significant way? If so, how?

NO

**(4) Issues relating to media regulation in this context, including the role of the Press Complaints Commission and the Office of Communications (OFCOM)**

**PCC**

*a. Do the guidelines in section 3 of the Editors' Code of Practice correctly address the balance between the individual's right to privacy and press freedom of expression?*

YES and it should be remembered that it is important to follow the code in its spirit as well as to the letter. Indeed the over precise reference to the words of the code are unhelpful.

*b. How effective has the PCC been in dealing with bad behaviour from the press in relation to injunctions and breaches of privacy?*

It has limited ability regarding injunctions. In all but the most extreme cases, journalists should and do obey the law. The PCC has been active and helpful regarding privacy.

*c. Does the PCC have sufficient powers to provide remedies for breaches of the Editors' Code of Practice in relation to privacy complaints?*

YES.

*d. Should the PCC be able to initiate its own investigations on behalf of someone whose privacy may have been infringed by something published in a newspaper or magazine in the UK?*

Perhaps but only in the most extreme circumstances and with the approval of those concerned.

*e. Should the PCC have the power to consider the balance between an individual's privacy and freedom of expression prior to the publication of material – or should this power remain with the Courts?*

The PCC already offers advice.

*f. Is there sufficient awareness in the general public of the powers and responsibilities of the PCC in the context of privacy and injunctions?*

NO. Those who use the PCC, i.e. complainants and editors, recognise its value while the public and politicians who have not used it do not appreciate either its achievements or the necessary limitations on its remit and powers in a democracy.

**OFCOM**

*g. Do the guidelines in Section 8 of the Ofcom Broadcasting Code correctly address the balance between the individual's right to privacy and freedom of expression?*

*h. How effective has Ofcom been in dealing with breaches of the Ofcom Broadcasting Code in relation to breaches of privacy?*

*i. Is there a case that the rules on infringement of privacy should be applied equally across all media content?*

YES but they should be based on the PCC system.

November 2011

## Paul Staines, Jamie East, David Allen Green, and Richard Wilson—Oral evidence (QQ 326–403)

Evidence heard in Public

Questions 326–403

MONDAY 14 NOVEMBER 2011

Members present:

Mr John Whittingdale (Chairman)  
Baroness Bonham-Carter of Yarnbury  
Mr Ben Bradshaw  
Mr Robert Buckland  
The Lord Bishop of Chester  
Philip Davies  
Lord Dobbs  
George Eustice  
Lord Gold  
Lord Harries of Pentregarth  
Lord Hollick  
Martin Horwood  
Lord Janvrin  
Mr Elfyn Llwyd  
Lord Mawhinney  
Lord Myners  
Ms Gisela Stuart  
Lord Thomas of Gresford

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### Examination of Witnesses

*Witnesses:* **Paul Staines**, editor, “Guido Fawkes” blog, **Jamie East**, Managing Editor, “Holy Moly” blog, **David Allen Green**, “Jack of Kent” blog and legal correspondent of the *New Statesman*, and **Richard Wilson**, blogger, tweeter and author of *Don’t Get Fooled Again*.

**Q326 Chairman:** Good afternoon. This afternoon’s session of the Joint Committee on Privacy and Injunctions is in two parts: first, we are to hear from the bloggers, and second, from media reform campaigners and commentators. I start by welcoming Paul Staines, the editor of “Guido Fawkes”; Jamie East, managing editor of “Holy Moly”; Richard Wilson, who is the author of *Don’t Get Fooled Again* and *Titanic Express*; and David Allen Green, writer of “Jack of Kent”. Since not every member of the Joint Committee is necessarily familiar with every one of the blogs that you write,



perhaps each of you could give a brief description of your blog and what you see as the purpose of writing it.

**David Allen Green:** I write for “Jack of Kent” blog. I am also legal correspondent of the *New Statesman* and media correspondent of *The Lawyer*. I am also a practising media solicitor. The “Jack of Kent” blog became quite well known for following libel cases, especially the Simon Singh libel case, providing information to members of the public who wanted to follow that case in a responsible way and ensuring there were no legal problems about publishing various documents. Since then I have covered a wide variety of legal and other political matters, for example unmasking Johann Hari as David Rose; disclosing the WikiLeaks non-disclosure agreement; and other things. I blog primarily to inform people who are following public debates, and I prefer writing on the internet to writing in print editions.

**Richard Wilson:** My name is Richard Wilson. I would describe myself as a writer who also blogs and tweets. I have written two books. I originally started writing a blog to publicise my book, and that is also how I ended up on Twitter. Shortly after my book was published, a couple of things happened. First, I got a very scary libel threat for something I had written in the book. It never came to fruition, but it convinced me that there was a serious problem about the way that law worked. Second, I found that Twitter had a fascinating dynamic and, through it, I became more involved in freedom of speech issues, which included following closely the Simon Singh case and doing what I could to support it.

Perhaps the reason I am here is that I believe I was the first person to challenge, or possibly even break, a super-injunction on Twitter, because I happened to see the *Guardian* article about the Trafigura case in October 2009. I believe I was the person who figured out most quickly that it referred to a parliamentary question asked by Mr Farrelly—who is a member of this Joint Committee—that had been published on Parliament’s website. I put that information on Twitter, and a lot of other people followed suit. That was part of the chain of events that led to the end of that super-injunction.

I want to declare an interest. I am appearing here entirely in a personal capacity. I am speaking only for myself. For the sake of transparency, I should make it clear that I have a non-public-facing and non-policy-related fund-raising role with Amnesty International. I am not a spokesman for Amnesty and nothing that I say should be taken as any indication of Amnesty’s views.

**Jamie East:** I am Jamie East, founder and managing editor of “Holy Moly”, the world’s most amazing celebrity gossip website. I guess I am here because everybody loves reading about celebrities, whether or not they want you to.

**Paul Staines:** My name is Paul Staines. I edit the “Guido Fawkes” blog, together with Harry Cole, my junior. A number of you have featured in it, so you should be familiar with the output. We have 50,000 to 100,000 readers a day, and we cover politics and the skulduggery that you lot get up to.

**Q327 Lord Dobbs:** Perhaps I may ask, as a naïve fellow, how you make your money and how these blogs are financed. How much do they cost, and from where does the money come?

**David Allen Green:** The “Jack of Kent” blog has probably made about £12 in four years, from Google AdWords. I do it completely voluntarily. It is a template system from Blogger; you basically fill in the gaps and type in the spaces, and it publishes it.

Paul Staines, Jamie East, David Allen Green, and Richard Wilson—Oral evidence (QQ 326–403)

For the *New Statesman*, *The Lawyer* and various other places, you are just paid in the same way as any other freelancer.

**Q328 Lord Dobbs:** So, you do not take any money out of your blog?

**David Allen Green:** No.

**Q329 Lord Dobbs:** Do any of you take money out of your blogs? Mr Staines, reading the biographies, it seems to me that you are probably pretty much a full-time editor. How does the website work, and how much does it cost?

**Paul Staines:** The cost of the hardware, servers, etc, is probably in the order of £5,000 a year, because it is a commercial site. As you can see, there are adverts all over it. When you have a mass-market product, you can make a living. About 50% of our revenue comes from acting as story-brokers. Some of our best stories appear on the front pages of the newspapers without our byline, but our name is on the cheque.

**Q330 Lord Dobbs:** To elaborate, do you get income from various different sources?

**Paul Staines:** I have not looked at it, so these proportions are approximate. Probably half the revenue comes from normal commercial advertising, just as you would see on the *Daily Mail* website, and the other half comes from acting as a story-broker and giving stories to the tabloids. I occasionally write for the broadsheets.

**Jamie East:** My position is similar. I sold half the company to Endemol UK earlier this year. About 60% of the money comes from advertising revenue. We also provide white-label services for third parties who just want some stuff on celebrities and so we write it, again without our byline.

**Q331 Lord Dobbs:** I assume it started off rather like David Allen Green's; it is almost a hobby that has grown into a big business?

**Jamie East:** Yes; I started it on a whim.

**Q332 Lord Dobbs:** Dare I ask how much is taken out by way of salary, not necessarily by you but the people involved in it, in the course of a year?

**Jamie East:** I am not telling you.

**Q333 Lord Dobbs:** Why not? What is your problem in telling us?

**Jamie East:** Because that is my salary; it would be embarrassing.

Paul Staines, Jamie East, David Allen Green, and Richard Wilson—Oral evidence (QQ 326–403)

**Q334 Lord Dobbs:** I thought you were an intrepid searcher after truth. It seems a little strange that you should be coy about your own personal salary.

**Jamie East:** Not really. I do not put myself out there as a public face.

**Q335 Lord Dobbs:** Mr Staines, do you have a different point of view about that?

**Paul Staines:** It is of the order of a six-figure business.

**Q336 George Eustice:** One of the arguments with which we are trying to get to grips is whether it is worth improving the regulation of newspapers, because one thing people say is that bloggers will leak everything anyway. To help us get to the bottom of that, how many unique followers do you have on each of your websites? What is your readership, if you know that information?

**David Allen Green:** About 19,000 people follow me on Twitter, and I average between 300 and 3,000 hits per day, depending on the type of article I follow. A lot of them will be people who just happen to see it because it is particularly newsworthy and has been linked to by somebody else. In my experience, it is not like a newspaper where you have fairly consistent readership levels. It peaks when you have something worth promoting.

As to its relationship with newspapers, Twitter is highly effective in distributing worldwide and immediately information that is provided to it by somebody else. In regard to super-injunctions, the two sources of the information that was tweeted round the world immediately were not tweeters; they were people who put the information there, like meat in a piranha tank, and then realised what Twitter could do to send that information round the world. Therefore, social media tend to peak when there is something interesting, and something highly interesting, like an alleged super-injunction, will lead to a lot of hits.

**Richard Wilson:** I have about 4,000 followers on Twitter and maybe a couple of hundred hits per day on my blog. Twitter is more important to me. I echo what David said. What is significant about Twitter and how it differs from a lot of other media is that it does not take very long to build up a big audience. If you happen to have something of interest to say, you can suddenly find yourself with tens of thousands of followers. That is why I think the regulation problem is such a challenge, because you never know where the next person breaking a super-injunction will come from. If they happen to be the person who has that information at the right time, they can quickly find an audience.

**David Allen Green:** Strictly, the number of followers is irrelevant. If you have a single tweet that is of any interest, it will go round the world very quickly, regardless of how many followers the particular tweeter has.

**Richard Wilson:** I would perhaps compare it to graffiti. Anyone can write graffiti on a wall, but now potentially anyone in the world can see that wall. I think the challenge is to try to control it.

**Jamie East:** I have between 55,000 and 60,000 Twitter followers across a number of accounts. We serve about 6.5 million page impressions a month to 1.6 million people. The size of the blog does not matter because it can go from zero to hero within about an hour, depending on what you are writing about. The same goes for a Twitter account, or

Paul Staines, Jamie East, David Allen Green, and Richard Wilson—Oral evidence (QQ 326–403)

whatever. The scale of the blog is largely irrelevant; what is relevant is the fact that it is a blog.

**Paul Staines:** I used to think that Twitter was a fad that would not last, but I am very enthusiastic about it now I have 50,000 followers. We have 50,000 to 100,000 daily readers and impressions. At its peak, for instance during Smeargate and the Damian McBride emails, it can go to 100,000 an hour. I think my traffic is comparable with that of *The Spectator* or *New Statesman*.

**Q337 George Eustice:** You have intrinsically quite low levels of readership. Is it fair to say that, when you get those big spikes, they are driven largely by mainstream media? For example, in the case of Damian McBride, that was somebody on Sky News; it was run on the broadcast bulletins and was in all the newspapers, and therefore that drove traffic. Is it right that, in the case of a footballer with an anonymised injunction, the fact that it exists creates a hunger you then step in and fill?

**Paul Staines:** I think search engines are the biggest source. People will search for Damian McBride, or whatever is the story of the moment, and they will find it that way. Google is very intelligent and knows where to go. When we have those kinds of spikes, it is usually the keyword that is the cause. Sometimes the keywords may be “Guido Fawkes’ blog” because people have seen us on television and so on.

**David Allen Green:** In my experience, peaks arise when we cover stories that the mainstream media are not. For example, in libel cases, where newspapers invariably go silent, I will responsibly publish the materials relevant to it and will often be the only source in a libel story. That is the same for other legally sensitive matters. It is the opposite of what you suggest in your question. Some bloggers have peaks because of things not being covered in the mainstream media, not as a knock-on effect of things being in the mainstream media.

**Q338 Chairman:** Can you define the word “responsibly” in that context?

**David Allen Green:** Yes, of course. One has obligations under the general law of the land. I have specific obligations as an officer of the court. When publishing court material, I make sure that it is something that I have obtained, or could obtain, from the Public Record Office. I publish within the laws of contempt and libel and, like many other legal bloggers, we are extremely responsible about how we present legal material. We are often more responsible than tabloid journalists.

**Q339 George Eustice:** Another point related to whether it is worth trying to improve the regulation of newspapers is that, quite often, it is said that there is a pecking order of credibility: broadcast media are the most regulated but also the most trusted by a country mile; newspapers are not trusted as much, but they have the wild west culture and a more flexible regulatory environment; and bloggers do not have any real constraints at all, but the levels of trust are even lower. Would that be fair?

**Paul Staines:** It is not quite as low as for politicians, though, is it? My blog is not Reuters, so we have a lower threshold for reporting some things. The nature of gossip, which is what we specialise in, is that often you have to go with one source, but, to take

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blogging in general, science bloggers have more credibility than generalist science reporters for broadcasters.

**David Allen Green:** Absolutely.

**Paul Staines:** Much as it pains me to say it, I think Dave Allen Green is quite good at legal reporting, and better than some generalist reporters in the law courts, so it is not always the case.

**David Allen Green:** The blogosphere is very similar to how one would imagine the City to be in the 19th century. A lot of it is based on reputation. It is not an enforceable reputation; you do not have a right of action to credibility; you cannot go to court and defend and vindicate your reputation. It can be lost in an instant if you do something misconceived. But the one thing that bloggers can do routinely, especially legal and science and, increasingly, policy bloggers, is link to sources. That helps credibility. If you do not believe what I am telling you about a case, or the CPS guidance, you can link and look at it for yourselves.

You are right that there is a hierarchy. People feel more comfortable with broadcast media and then newspaper media, but there are certain bloggers who have a great deal of credibility, which can be lost in an instant. That credibility is often built up by bloggers doing things that only they can—namely being transparent about where they get the information from and allowing the interested reader to follow the links to see that information.

**Richard Wilson:** I echo that. I think it is about track record. People also trust the BBC because it has been around for a very long time and has a very impressive track record to which it can point. I think you will see certain bloggers, perhaps a couple of those sitting beside me here, building a reputation for credibility through their own efforts over time.

**Q340 Mr Bradshaw:** Paul Staines talked about the growth of his relationships with newspapers. Does it also work the other way round? This is a question mainly for Paul and maybe Jamie East. Are there sometimes stories that papers will not print, and do individual journalists or papers come to you knowing that you are more likely to put them on your blogs and get them into the public domain?

**Jamie East:** Yes, absolutely. It is very much a working relationship, from editors and showbiz reporters, for my part anyway, down to just newsroom people. It happens less and less nowadays, but four or five years ago “Holy Moly”, “Popbitch” or similar websites would be used as the testing ground for a story, which papers would then report on because the nasty internet people had done it. They were able to write about it because we had written about it, which worked well for both parties for quite a while.

**Paul Staines:** Quite often, when journalists have problems with their editors, they give us half the story to keep it alive from one Sunday to another, or encourage us in some way to focus on something so they can turn to their editor and say, “Look, the bloggers are on it.”

**Q341 Mr Bradshaw:** What is the financial relationship when it is that way round?

**Paul Staines:** There is no financial relationship. I might buy them a pint.

**Jamie East:** I won’t even do that.

**Q342 Lord Thomas of Gresford:** Mr Green, I am quite interested in your comment that you are always within the law. You will know that disclosure in a legal case is for the purposes of the case only. Do you keep within that?

**David Allen Green:** Absolutely.

**Q343 Lord Thomas of Gresford:** What about copyright judgments? Do you keep within those?

**David Allen Green:** I usually link to judgments rather than set them out myself. There is an excellent site called BAILII, which allows you to link to almost all judgments. One has to be quite mindful of it, but I am not unusual in that. There are at least two or three dozen legal bloggers, many of whom are qualified and experienced lawyers in their own right, who do very similar things. It is just somebody who would like to inform the public debate, especially over libel and privacy. I have written quite widely on privacy and tried to explain the nature of some of the injunctions and why it is important to have them. It is possible to self-publish and add to a debate when you have experience and are willing to put in the effort to put the story into the public domain.

In answer to a previous question, journalists come to me but not for cash. I am not interested in that. There are a number of people who are well-known serial libel abusers; in fact, you cannot mention them without having a claim form. I will not take advantage of parliamentary privilege now to name them, but they exist. On a number of occasions I have allowed stories to get into the public domain that could not go through a newsroom's legal department because of the sheer commercial risk of publishing that story. In a way, bloggers can help the mainstream media, not just brokering stories on a commercial basis.

**Richard Wilson:** Since my relatively marginal involvement in the Trafigura case, a number of journalists contacted me to say they wanted to write and say more about it but they could not do it, hoping that as a blogger I might be able to do something. Bloggers are subject to the law just like anybody else, so I have not always been able to do that, but there is a clear sense that bloggers could be helping to fill a gap that is created by the messy regulatory system that we have.

**Q344 Lord Thomas of Gresford:** Do either of you have leaks from lawyers?

**Richard Wilson:** Not from lawyers.

**David Allen Green:** No.

**Richard Wilson:** I would be very surprised. All the lawyers I have dealt with, including David in that capacity, I believe behave themselves quite well.

**David Allen Green:** I have never once had a lawyer approach me to leak a story. It is clients who want to see if they can get it into the public domain.

**Richard Wilson:** Usually, it is very frustrated journalists who cannot get something past their editor because he is too scared of libel law, or whatever.

**Q345 Lord Myners:** I want to ask a little more about legal complaints. How often have your organisations been the subject of a legal complaint, or, as Mr Wilson said, legal threat, regarding what you have blogged, or have indicated an intention to blog? What were the outcomes of those complaints? What are your observations on the process? Finally, what, if any, actions have you taken to protect your blog from being seriously undermined by legal intervention, such as location or capitalisation?

**Jamie East:** Over the past five or six years I have received perhaps 30 to 40 threats in some form, ranging from a sarcastic letter to the issuance of proceedings. You have to take each one on its merits. For a blogger without any financial backing, as I was originally, it is quite a scary thing to go through, because you do not understand what the rules are. There is nowhere to go to find out what you were supposed to have done, or what you do now, but you learn very quickly.

I have been through the mill quite a few times. I have never been sued. I have made donations to charity, or reached an agreement with certain people perhaps not to talk again about a particular thing, but generally you have to think on your feet and try to do it in a way that does not bankrupt you. The second that you put “without prejudice” in the subject line of your email, you are heading down the slippery cul-de-sac of remortgaging your house.

**Paul Staines:** During the seven years we have been going we have had dozens of letters before action; lawyers’ e-mails; legal complaints and so on. I should say at the outset that if on reflection we believe that we have got it wrong, we take it down. That usually solves the problem for most complainants. We have never been successfully pursued through the courts. Zac Goldsmith and Jemima Khan—obviously, this was before she was a campaigner for freedom of the press—did injunct me in three different jurisdictions. On an ex parte basis in Dublin, they convinced a high court judge that I had hacked their e-mails. They did not produce any evidence of that. The judge gave their counsel a severe telling off.

I should say that in Ireland you are not allowed to get a “to whom it may concern” injunction as you are here. In Ireland you must name the person you are injuncting for a specific reason. Ireland has in its constitution article 6 of the European Convention on Human Rights, just as we have, which seems to be the basis of all these privacy injunctions. Those injunctions have fallen by the wayside, so we have never been successfully sued.

**David Allen Green:** In four years I have never had a letter before action. I have had only one bare legal threat, and I referred that person to the hallowed case of *Arkell v Pressdram* straight away. In the case of bloggers, often powerful individuals go after the internet service provider that hosts the blogs and get posts taken down, without even engaging meaningfully with the blogger to find out whether there is a right of reply or anything that would be a constructive approach. Firms of claimant lawyers who commercially tout themselves as dealing with so-called reputation management sell this as a service. It is illiberal, and the draft Defamation Bill should attack this problem by making it more difficult to threaten a libel case. Therefore, libel and legal threats are a problem for bloggers. That said, almost all responsible bloggers, even on political and legal matters, can write responsibly and are not threatened by libel claimants.

**Richard Wilson:** I have had three libel threats: one from an arms dealer; one from a former employee of Carter-Ruck; and one from the Member of Parliament for North Oxfordshire. I have always taken information down. If I had to fight a case, I would go bankrupt; that would be the end of the story. The most serious threat I received was about something I wrote in my book. I would have been prepared to fight that one, even if I had gone bankrupt. Happily, I did not have to.

**Q346 Lord Janvrin:** I think most of this is your reaction to the law of libel. I return to the law of privacy and whether, as the law has developed, it has affected the way you operate; whether at any stage you take legal advice on issues to do with privacy; and whether you have ever pulled a story for reasons of privacy, as opposed to libel.

**Paul Staines:** I am not aware of Parliament ever debating a law on privacy. Can you explain that to me?

**Q347 Lord Janvrin:** I am thinking of the impact of the Human Rights Act.

**Paul Staines:** Article 6?

**Q348 Lord Janvrin:** Articles 8 and 10.

**Paul Staines:** The right to family life?

**Q349 Lord Janvrin:** The right to privacy.

**Paul Staines:** You will have to help me. I am not aware of the right to privacy. Which law is it?

**Q350 Chairman:** The right to privacy is now established in law as a result of legal decisions.

**Paul Staines:** As a result of judges making rulings from the bench?

**Q351 Chairman:** As a result of Parliament passing the Human Rights Act, incorporating the European Convention on Human Rights.

**Paul Staines:** I am not a lawyer, but I do not remember Parliament ever debating a right to privacy.

**Q352 Chairman:** It did come up in the debate on the Human Rights Bill, which was why Parliament passed section 12.

**Paul Staines:** As you can see from my answers, I do not pay any attention to the right to privacy.

**Q353 Lord Thomas of Gresford:** Does it follow that, if Parliament were to debate it and pass a law, you would obey it?

**Paul Staines:** I do not think so. There is no public interest in keeping the truth from the public.



**David Allen Green:** For once, I share Paul Staines' view. There is not a law of privacy. There is the tort of misuse of private information. I think the House of Lords in *Wainwright v Home Office* made it absolutely clear there is no self-standing law of privacy. For example, there is no way anybody can defend their own personal space using the tort of trespass to the person. But there is the tort of misuse of private information, which is basically the old law of confidentiality supercharged by the Human Rights Act. That Act gave further effect to the European Convention and recognised that it would have effect by enacting section 12 of the same Act. Therefore, you do have misuse of private information.

Super-injunctions, supposedly, are a new thing, but the jurisdiction of the Court of Chancery to give injunctions to protect confidence was always wide ranging. The only difference is that article 8 made it possible to grant one of these in respect of rights to privacy, but the problem for bloggers, unlike newspapers, is that they are not given notice of the terms of those injunctions. Therefore, a blogger or anybody who self-publishes is in the awful situation of knowing, suspecting or perhaps being told there is a super-injunction and if he publishes something he might be in breach of it, but without being given any notice of the terms of that injunction. That must be unsatisfactory, because it inhibits free speech without people being able to regulate their own conduct by knowing what to publish and not publish.

We have a strange situation where we have a sort of privacy law that sort of protects privacy rights and is sort of effective, but only if you have notice of the terms of privacy injunctions. As more and more people self-publish, it seems to me that is not a sustainable situation.

**Q354 Lord Thomas of Gresford:** So, what is your answer?

**David Allen Green:** The answer is that I have never been threatened with a privacy action because I do not write about people's private lives—so it has never been a particular issue for me—but I have written a great deal about privacy law and followed the super-injunction debate quite closely. I have realised that it is an unsatisfactory position for the blogosphere, because how do people know they are breaking the terms of a court order?

**Q355 The Lord Bishop of Chester:** Many countries signed up to the European Convention, which grants, in article 8, a right to privacy to everyone. How is the right to privacy enjoyed by everyone qualified by the attribution of so-called celebrity status?

**Jamie East:** If a person has used part of their private life to become a celebrity or maintain celebrity status, I tend to ignore that right to privacy, to put it quite frankly. To give an example, if a celebrity has got married and sold the publication rights of their wedding for thousands of pounds, I find it a bit hypocritical if I am not then able to discuss the fact that, for example, they have been caught having an affair, or something like that.

**Q356 The Lord Bishop of Chester:** I can see the issue of hypocrisy that can arise in those circumstances, but if somebody who is a celebrity because they are a well-known footballer, pop star, politician—or whatever—has not engaged in that sort of activity but purely private activities not directly connected with their public role, on what basis, given the Convention's right to privacy, does one have the right to publish it? Take the classic case of Princess Caroline. She was simply photographed in the street, and the

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European courts upheld that she had a right to privacy, even though she was known as a prominent member of a royal family.

**Jamie East:** I argue against that. If you are with your children, fair enough. There are more people who manage to maintain a private life by not being public celebrities than celebrities who choose to engage in tit-for-tat with the tabloids, blogs and websites to maintain the illusion of being amazing. You do not see people like Brad Pitt, Tom Cruise or whoever complaining about being photographed in the street, because they just get on with their lives. The people who complain about being photographed in the street are generally those who have things to hide, or are missing out on commercial opportunities from which they would otherwise be gaining.

**Q357 Mr Bradshaw:** At the moment, Hugh Grant is in the news. Just because he grants an interview to a newspaper to publicise a new film from which he, the film company and the newspaper benefit, does it mean he has made himself fair game for every aspect of his private life?

**Jamie East:** No, not really, because he has taken a very public stance for many years that he does not like tabloid intrusion, paparazzi or press photography. Kate Moss is another very good example of a huge celebrity who maintains, believe it or not, quite a good private life, with the very rare exception when she gets caught on the wrong foot. Her child has never been photographed in public, except at her wedding, when the mother chose to allow it because she was part of the wedding party. You can make that decision.

Hugh Grant is an example of someone who makes that decision right from the off, whereas, for many other celebrities, you cannot do a magazine spread in your home, with your kids smiling sweetly for the cameras and then cry foul when a photographer takes a picture of you walking down the street. It does not work like that, unfortunately. Make the decision from the beginning, not halfway through when it stops you making money out of it.

**Paul Staines:** I deal with celebrity politicians. There is often a public interest case for looking into their private lives. Tom Watson complained that News International's *News of the World* has followed him around.

**Q358 Chairman:** I do not want to go into individual cases under the guise of parliamentary privilege, unless it is of direct relevance.

**Paul Staines:** He is complaining about the gross invasion of his privacy in being followed around.

**Chairman:** I do not want to use this Joint Committee to air allegations that you would not want to make outside the Committee.

**Q359 Baroness Bonham-Carter:** Mr East, at the beginning of the session you said that, because you were not a public person, you were unwilling to tell Lord Dobbs your salary. Then Mr Staines said he did not believe there was any such thing as privacy. Would Mr Staines publish Mr East's salary?

**Jamie East:** Of course he would.

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**Paul Staines:** I do not think my readers are interested in it. They are interested in your expenses, but not his salary. It would not fit my audience.

**David Allen Green:** I think a better way of looking at it is not to consider the celebrity or otherwise of the person affected, because that is not how the law works. Although article 8 has effect in English law, it has no direct effect; it has to hook itself on to a part of substantive law, either civil law, such as confidentiality and misuse of private information, or even the criminal law, like harassment. Those areas of law attach themselves to the information.

I suggest that the question is not the celebrity of the person affected but the type of information that is to be disclosed, regardless of the celebrity of the individual. You will then be able to protect core privacy. Almost everybody would agree that people are entitled to private life. I do not think that considering the celebrity of the person affected is the right way of looking at it; you have to look at the information that is to be published.

**Paul Staines:** I do not agree.

**Q360 Baroness Bonham-Carter:** Mr Staines does not agree.

**Paul Staines:** The Baroness is right. Nigel Griffiths was cavorting with a prostitute on the parliamentary estate and he got a partial injunction; I thought that was a disgrace. He should not have been allowed to get away with that. The public have a right to know what their politicians are up to.

**Q361 Chairman:** From the answer you gave earlier, you appeared to suggest that you should be able to publish whatever you like on the basis that it is true. It is up to you to decide whether or not it is publishable, and no individual has a right to suppress anything that is true. Is that correct?

**Paul Staines:** I do not agree exactly with what you say, but, broadly, if it is true and there is a public interest, I do not think that freedom should be curtailed.

**Q362 Chairman:** And the public interest is determined by you?

**Paul Staines:** No. There are standard criteria for determining the public interest that come up in court all the time.

**Q363 Lord Thomas of Gresford:** What definition of public interest do you use?

**Paul Staines:** You have a working definition of the public interest. If there is public money at stake, or if a public servant is doing something wrong, the presumption is that exposing wrongdoing by a public servant with public money on public time is in the public interest.

**Q364 Lord Thomas of Gresford:** Suppose that you deliberately breach an injunction because you do not agree with it; you think there is a public interest in breaching

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it. Do you think it is in the public interest, on your definition and understanding of it, to breach court orders?

**Paul Staines:** I do not think it is against the public interest to tell the truth.

**Q365 Lord Thomas of Gresford:** Surely, as a member of society, you have a certain regard for the law under which you live and conduct your relations with everybody else. If you breach an injunction knowingly, just because you think it will interest your readers, do you not think that undermines the public interest in the broadest, most general sense?

**Paul Staines:** When we have knowingly breached an injunction, it is a calculated risk. Some of these injunctions are quite trivial.

**Q366 Lord Thomas of Gresford:** A risk of what?

**Paul Staines:** All the injunctions to stop us naming footballers' mistresses were quite trivial. I do not think any public interest was served in that. I do not think that in the 1950s the drafters of the European Convention on Human Rights, which was designed to protect people in Soviet countries who were being persecuted by oppressive governments, ever imagined in their wildest dreams that it would be used as a fig leaf to cover up extramarital blushes. It is ridiculous.

**Q367 Lord Thomas of Gresford:** Never mind about Soviet countries. In this country we have a legal system, to which no doubt you ascribe, and a judge has the job in a particular case on a set of facts to balance the freedom of expression in article 10 against the right of privacy in article 8. He comes to a decision on all the facts he knows. You are prepared, as I understand it, to say he has got it wrong, even though you do not know everything, you are prepared to breach an injunction, and you still consider that you are acting in the public interest. I do not follow the logic or morality of it.

**Paul Staines:** Then we will agree to differ.

**Q368 Lord Thomas of Gresford:** In other words, you cannot answer that question.

**Richard Wilson:** What is the alternative? For example, in the *Trafigura* case the judge passed an order suppressing a confidential leaked company report, which appeared to show the company knew that its toxic waste could have caused deaths. At the same time, the company denied it was causing deaths, even though it was widely reported that there were 15 deaths in connection with the dumping incident. A judge imposed an injunction saying nobody is allowed to talk about it, and then there is a news story on *The Guardian* website saying, "We have been gagged from reporting Parliament." Are ordinary people supposed to sit there and nod and say, "Well, the judge knows best"? I think that is not the tradition of our country. I can see the conflict you are highlighting, but what do we do if the judge makes a decision that appears to be a poor, unjust and illiberal one?

**Q369 Lord Thomas of Gresford:** It appears so to you when you have not heard all the evidence, nor do you know the length of time for which that injunction has been imposed. The *Trafigura* case is a very interesting one, and it gets us away from footballers. In that case a judge imposed an injunction that was breached by a Member of Parliament who, unfortunately, is not with us. Do you not think it is the judge who should decide?

**Richard Wilson:** You are absolutely right. One of the most interesting questions that arose before the session was to do with the public interest and the rule of law. I shall make an embarrassing admission. I looked up the rule of law on Wikipedia and it referred to some other sources, including the International Bar Association and the UN. The UN definition of the rule of law makes it very clear that open, transparent and accountable justice is integral to the concept of the rule of law. One of the reasons we have this problem is that the super-injunction phenomenon is an example of secret justice. Arguably, a judge who passes an edict in a secret hearing is undermining the rule of law more than a blogger who finds out about it and seeks to challenge it.

**Q370 Lord Thomas of Gresford:** You talk about open and transparent justice, and we all run up the flag for that, but you must admit there are exceptions to it, for example when dealing with children. Once you admit there are exceptions to it, is it not for someone who knows all the facts, has heard the evidence and knows the legal principles to come to a conclusion? I would be interested in Mr Green's view.

**David Allen Green:** The best way of looking at this is to realise that people on Twitter and in the blogosphere do not breach court orders by themselves. I am not aware of any example where a tweeter or blogger has found out the terms of a court order and has proceeded to breach it of their own volition. In all the examples of which I am aware it appears to me that somebody, possibly within the mainstream media, has leaked that information, or put it into the public domain in the form of a jigsaw, and then left tweeters and bloggers to get on with it. It may well be that in respect of certain tweeters and bloggers you will have arguments like, "I know the public interest better than you", but the simple fact is that, once the decision to put this information into the public domain is made, that will instantly follow, because that is what Twitter and the blogosphere are like. They will take this information, publicise it and analyse it.

The key question is the responsibility of those individuals who are passing that information to the blogosphere and Twitter, or publishing articles that it takes about 30 minutes at most to decode, such as the *Trafigura* story. I did not breach the *Trafigura* injunction, but once I saw the article published by *The Guardian* I was able to work it out for myself, possibly quicker than Richard published it. Therefore, putting the onus of justification on the bloggers and tweeters may be misguided. That is what will happen if somebody breaches a court order, or attempts to frustrate a court order by putting that information into the public domain in one way or another.

**Q371 Mr Llwyd:** If I correctly understood it, Mr Wilson said earlier that there was no tradition of accepting that judges are right most of the time. Would I be right in thinking that, as far as you are concerned, there is never a justification for a so-called super-injunction?

**Richard Wilson:** I do not think that is a fair characterisation of what I said. We do not place blind absolute faith in figures of authority. We question, criticise and debate. On

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the question of whether there should be a super-injunction, on balance a society where there can be such things, which can be abused in the way they have been so horribly in the last couple of years in this country, is worse than a society that does not allow courts to pass secret rulings in this way and then deals with the consequences. It is the lesser of two evils. I accept that there are cases where it can be harmful for information to get into the public domain. We need to do what we can to try to prevent that, but I do not think that a super-injunction is an appropriate solution.

**Q372 Mr Llwyd:** When you acted in a manner that appeared to breach an injunction, whether or not you realised it, what was your motivation? How were you sure that you would not be prosecuted for what you did?

**Richard Wilson:** I was not at all sure that I would not be prosecuted. It is very important for the Joint Committee to understand that, along with many other people who took the decision to publish that information, I was aware there was a risk I would find myself in court. My thought process was that, if somebody wanted to put me on trial for publishing the text of a parliamentary question on Twitter, so be it. Maybe I would be wrong, but I think that was the case. From speaking to other people that knew, it just seemed an outrage and completely absurd, and that was the motivation.

**Q373 Mr Llwyd:** Are you referring specifically to the Trafigura case?

**Richard Wilson:** Yes, very specifically that case. I think that case stands out. I think this is a case of confidence rather than privacy. I accept there are important distinctions. I am more concerned about cases of confidence. We are not talking about an individual person but a large company trying to prevent embarrassing information coming out. I have a lot of sympathy for the desire to protect people's family life. I would take a slightly different view on that from others on this panel, but even in those situations I do not believe a super-injunction is appropriate.

**Q374 Martin Horwood:** I want to go back to a potentially important point made almost in passing. You seemed to suggest in the case of the footballers that the public interest test should not be applied to the revelatory stories but to the injunction; in other words, you would ask somebody trying to bring one of these injunctions to prove not just that they had a right to private and family life, which is the phrase in article 8, but that the granting of the injunction was in the public interest on a wider basis. Is that really what you mean?

**Paul Staines:** You have summarised it quite succinctly. Everyone recalls the Trafigura case. I wonder whether people remember the Merrill Lynch memorandum about Northern Rock. Merrill Lynch produced for the Treasury a memorandum saying that saving Northern Rock might cost £50 billion. The *FT* published it and within an hour it was injunctioned and removed. I think that when £50 billion of public money is to be spent, it is in the public interest to know about it.

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**Q375 Martin Horwood:** Forgive me, but that goes back to the matter on which we all agreed, namely that the story itself was clearly in the public interest.

**Paul Staines:** The judge did not agree, did he?

**Q376 Martin Horwood:** Indeed. That is a genuine issue, and I suspect you would have a lot of sympathy for that view here. But the case you previously mentioned was one involving footballers. I think you said it was not sufficient to prove that they had a genuine private interest in keeping something confidential but that there had to be a public interest in keeping it secret. Is that right?

**Paul Staines:** Yes; you have summarised my position.

**Q377 Martin Horwood:** In that case, perhaps I may ask a follow-up question. If we manage to define the public interest sufficiently generously so that it clearly excludes skulduggery, hypocrisy and so on, and limit our interpretation of privacy so that even you are happy there are some stories that should not be made public, because they are clearly private and not in the public interest, do you think it is right to have any statutory or legal framework to protect stories from publication?

**Paul Staines:** I would look at the First Amendment in the United States, which would prevent any suggestion of privacy injunctions. That country seems to function quite well, even though it has the First Amendment. I do not accept that there should be privacy injunctions to protect people from embarrassment. There are loads of things I do not want my wife to find out, but I am not going to take out an injunction to prevent her from finding out. There may be an argument for it in cases of family law where it would be prejudicial to children, or maybe cases involving sexual offences, but that is a different argument. In most circumstances I cannot imagine a privacy injunction being in the public interest.

**Q378 Martin Horwood:** Even in the very narrow set of circumstances where children and the interests of a completely innocent family are involved, would you support some sort of statutory or legal framework to enforce it?

**Paul Staines:** If it was very narrow, but the ECHR was originally drafted with something very narrow in mind. I do not know whether the Joint Committee has studied the situation in Ireland. Although Ireland does not have as great a body of law and cases as here, it applies that provision in the ECHR to journalists who steal pictures from a mantelpiece following a death, or hack into voicemails and such things. The right to privacy and family life is not said to include the right to hide from the public that you have cheated on your wife.

**Q379 Lord Gold:** What is troubling me is that there will be worthy cases, and you have given a couple of examples—Trafigura and Merrill Lynch—where it is easy for us to listen to you and see how you justify going out on a white charger to bring information into the public domain for the public good. You are not elected to do that; you have chosen to put yourself in that position, but you have also told us this afternoon that you are used a bit. You have tremendous power. Sometimes the press give you stories that they do not feel

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able to publish for one reason or another, and if you have found a good story, it will go round the world immediately, however many followers you have. In one case, you chose to ignore a decision made by a judge who had heard the case. If somebody complains, we hear that you take it down. What we have not heard is whether you then publish an apology or statement that the original story was wrong. It is all very well putting forward a position of responsible blogging, but what if you are not responsible and you use this phenomenal power for your own interests; you just go out on a cause of your own? How do you protect people from that without any kind of regulation whatsoever?

**Paul Staines:** We have the laws of defamation.

**Q380 Lord Gold:** It might be too late.

**David Allen Green:** It sounds to me that you are very closely describing the conduct of John Hemming MP, who has great power and no responsibility; also in the press there is great power and sometimes little responsibility. It is wrong of you, if I may say so, to characterise the blogosphere in such a general way. I have never broken a court order, knowingly or unknowingly. The vast majority of bloggers are responsible. Yes, we get our sources from somewhere else and we act responsibly, but there is no way you can characterise the blogosphere in a way that is not also true of the politically correct class and the mainstream media.

**Q381 Lord Gold:** But we are not looking at that right now; we are looking at what has happened with super-injunctions and considering blogging and the ability of social media to open a new frontier. We want to think about whether there is a need for some sort of regulation or rule.

**David Allen Green:** I suggest that of the three estates—the political class, the mainstream media and the blogosphere—the blogosphere has done the least to break the terms of super-injunctions, and has done so only when one of the other two of those estates has done so. As to regulating social media and the blogosphere, you will know that the origin of confidentiality is the law of equity, which never acts in vain. It is futile to try to close the stable doors once the mainstream media or political class have decided to use the blogosphere and put the story into the public domain.

**Richard Wilson:** I think there is a comparison between what happened on Twitter with super-injunctions—when a large number of people, not just me or a couple of us, decided that a particular ruling was so absurd and unjust that they were prepared to risk the wrath of the law to break it—and other occasions in history when large numbers of people chose to break the law specifically with the intention of highlighting problems with it. In a very small way—I do not claim that we are anything like as significant—I would compare it to the mass trespasses of the 1930s, when people marched on to the land and said, “We would like to be able to go for walks in the countryside, please”, which was civil disobedience. I agree that is never taken lightly, but I think that is what you have seen in some way online. People are trying to open up the public space for freedom of expression, in the same way people were trying to open up public space for freedom of movement in the 1930s.



Paul Staines, Jamie East, David Allen Green, and Richard Wilson—Oral evidence (QQ 326–403)

**Q382 Lord Gold:** I am not being judgmental. All I am trying to do is see whether we have the right balance.

**Richard Wilson:** We could be prosecuted. I could be sued for libel; I guess—I do not know—we could have been put on trial for contempt of court in breaking a super-injunction. I do not think we are in a weird legal black hole outside the reach of the law. That is a mistaken perception.

**Q383 Lord Gold:** But that does not mean you provide protection for the person whose name or activity has already been published. If somebody sues you for libel, you might be worthless.

**Richard Wilson:** I would be.

**Q384 Lord Gold:** So, what good is that?

**Richard Wilson:** That is a problem with libel law.

**Q385 Lord Gold:** But you are praying in aid the libel law to protect the public, and now you say it does not work.

**Richard Wilson:** Yes; it is a messy situation.

**Q386 Lord Gold:** Then you are not helping me. How do you get the balance right?

**Richard Wilson:** I think there should be a small claims court for libel to deal with people who have smaller audiences. I think you could deal with it and improve it. It is true that you have to deal with injunctions and libel together, because they are part of the same picture. I agree that it is a regulatory mess. In a situation where you have a regulatory mess, people sometimes find themselves having to make crazy judgment calls about whether or not to put a parliamentary question on Twitter. We appear to be in a bit of a crisis.

**Q387 Lord Mawhinney:** We started with what must have sounded like an accusation that people writing blogs got away with things that people writing newspaper articles would not get away with. I am still not clear in my own head how much truth there is in that. Paul Staines, you ended your article in *The Times* in September by saying that, when in doubt, you would pray in aid what Kelvin MacKenzie would do. I know Kelvin; it is an interesting question. Looking back on what you have written in the last year, how many times have you put something in a blog that you would not have been allowed by Kelvin's lawyers to write? Even though you and Kelvin might have had a fairly similar outlook, his lawyers would not have let you write it. Can you estimate how often you have written something in the last year that Kelvin's lawyers would not have let you write, if you had been employed by him?

**Paul Staines:** Knowing lawyers, I would say quite often.

**Q388 Lord Mawhinney:** You understand the question I am asking?

**Paul Staines:** Yes. I think the main thing we do that would not get past lawyers is accept a single source. Lawyers would say to the editor and journalist concerned, “We need a second source to verify this.” We are more willing to go with one source.

**Q389 Lord Mawhinney:** Humour me by having a stab at it. Help us because I doubt that any of us have a clear idea of the answers.

**Paul Staines:** If it is a big story, rather than a trivial story about something overheard in a cafeteria downstairs, we will be more cautious and check it out. If it is to be a career-ending story, as some are, we will take steps no different from a newspaper to verify it. If it is something trivial or tittle-tattle, we are more willing to go with one source.

**Q390 The Lord Bishop of Chester:** One of the relatively few things on which you are all agreed is that where we are now is not very satisfactory in legal terms for different reasons, in particular the role played by judges through case law in determining what the law of privacy is today. Is there not a strong case for a parliamentary look at the whole law of privacy to see whether a more democratically agreed framework can be provided, within which you can all responsibly, I hope, attempt to work?

**David Allen Green:** I think the key answer is transparency. A number of people have mentioned this afternoon the breach of super-injunctions and court orders. The fact is that almost all bloggers have no notice of the terms of those court orders and it is impossible for them to regulate their publication to know whether or not they are in breach of them. They may know there is a super-injunction but they do not know whether what they do will be in breach of it. Therefore, until self-publishers—self-publication can now go round the world instantly—are able to regulate their conduct by knowing the terms of a super-injunction, or an injunction of any kind, there will be judgment calls and people will decide whether something is or is not in the public interest, because they do not know what the terms of that court order are.

**Richard Wilson:** It definitely needs to be looked at by Parliament, and that is one reason I am so happy you are holding this inquiry. It is definitely a mess. The other matter on which many of us agree is that there needs to be stronger emphasis on freedom of speech. The balance has been wrong, and in part that is from where some of the disobedience of these rulings has come. It seems as though freedom of speech is in trouble in this country. I share Paul’s view about having something comparable with the First Amendment to the US Constitution. That seems to work much better. To give an example, if you compare the coverage by *The New York Times* of Trafigura with that of any UK newspaper, you see a marked difference. It appears that the States have succeeded in protecting freedom of speech far more effectively and happily than here.

On that front, I use a blogging platform called WordPress. The big blogging platforms are US-based. Part of the reason is it is very difficult for businesses that want to be internet providers in this country to function in the current environment because the protections are not there.

Paul Staines, Jamie East, David Allen Green, and Richard Wilson—Oral evidence (QQ 326–403)

**Jamie East:** I agree it would be good to know the rules of the game while we are playing it. It is a bit like herding cats at the moment; it is very difficult to manage. We endeavour to act as if we were mainstream media. As Paul says, if you have a big story that is potentially damaging to the individual concerned, you take certain steps. There is a right to reply; you approach them beforehand; you look for more than one source; but there is not much mutual respect coming back from the individuals concerned. If there are to be injunctions and super-injunctions flying round willy-nilly, everyone needs to get it. In the case involving the footballer, I got it two days later than the mainstream newspapers, which really is not much use to anybody.

**Paul Staines:** When we talk about privacy, what we are really talking about is censorship. Do you want judges to be censors? I do not want to live in a society where judges are censors. Privacy is just a euphemism for censorship.

**Lord Thomas of Gresford:** I disagree with you there.

**Q391 Ms Stuart:** When the name Kelvin MacKenzie was mentioned, all I remember is that his first approach was that you should never let facts get in the way of a good story. I hope that is not your basic approach. I am intrigued by your line of reasoning. You appeared to say that newspapers gave you stories that their editors would not publish because they did not pass their legal departments, but you then prayed in aid great compliance with all the rules, inasmuch as you could find them out. Are you trying to tell this Joint Committee that you should be differently regulated from standards applied to other outlets?

**David Allen Green:** I would not characterise it in that loaded way. What I would say is that, if you are to seek to regulate the blogosphere and social media generally, there are two questions. First, what information are you going to give those who blog and tweet so they can inform their own conduct? Second, will this regulation be effective?

**Q392 Ms Stuart:** The starting point for me is whether newspapers, radio, television and the blogosphere are part of a media that may or may not be regulated, or are you saying you should be treated differently from those other outlets?

**David Allen Green:** I would not say “should”, but you may find you need different regulatory mechanisms to regulate social media from broadcast and publication media.

**Q393 Ms Stuart:** But the basic approach should be the same?

**Paul Staines:** I do not agree with my friends. I think we should all be regulated in the same way and we should be protected. Effectively, I think the only regulation should be the law of defamation. We do not need the Media Standards Trust, the Press Complaints Commission and all of these kinds of quangos. I want to have a press that is as free as possible. I believe that is in the public interest. When we get it wrong, we should pay the consequences in the court.

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**Q394 Ms Stuart:** But as you have no money, there are no consequences to pay. If I may turn to the other two witnesses, do they believe they should be subject to the same rules as everyone, whatever the rules are?

**Paul Staines:** Saying I have no money I find a little slanderous.

**Q395 Ms Stuart:** Richard Wilson said there would be little point.

**David Allen Green:** To clarify, the general law of the land on copyright, contempt and defamation in almost all circumstances will serve the purpose you want it to, so, yes, it should be the same law for everybody, but if you are to have any specialist media regulation you will find it very difficult to apply in the same way to social media as you do to mainstream media.

**Q396 Lord Gold:** It is not quite the same law for everyone, because it is very expensive to bring proceedings. Therefore, it may be that those who can bring defamation proceedings are wealthy. Regulation might help those who cannot go to law.

**David Allen Green:** The experience of the blogosphere is very different from what you have just suggested. The libel cases that have caused the most problems are ones brought by litigants in person—one of them is before the High Court at the moment—where there is no commercial reason behind the decision, but, because it is ridiculously easy to bring a libel case in this jurisdiction, they can make bloggers' lives hell for years and lead to loss of houses, income and capital. The biggest problem for the blogosphere at the moment is often not the people who are rich but those who are litigants in person at the High Court and cause mischief in that way.

**Jamie East:** I have never been sued by a rich person.

**Paul Staines:** I have.

**Jamie East:** Good for you.

**Q397 Lord Hollick:** I want to return to Lord Gold's point about redress. "Guido Fawkes" is established offshore, which seems to me rather to impair the right that anybody has to redress. You can publish a blog that breaches their privacy and, by virtue of its single source, may be inaccurate; it can ruin their reputation; and yet they have no right of redress. Are you comfortable with that?

**Paul Staines:** They do have a right of redress under the law, obviously. I have not made it easy for them, though, and that is a feature, not a bug, as I see it. We have a ruinous libel culture. The reason I adopted the obstacles I did was that we wrote a story about somebody dyeing their hair. They went to Carter-Ruck. This was over mocking someone's hair colour. It caused great expense. I thought this was not going to work. People tell me that the reason there is no City or finance version of "Guido" doing gossip is that rich people in the City will send off lawyers' letters easily. That is why the diary columns and the City pages are all press releases. The libel laws of this country are too easy for plaintiffs to come after us. If I did not have the protections I have, I simply would not be able to function.

**Q398 Lord Hollick:** But by choosing to locate yourself outside the jurisdiction, effectively you give yourself carte blanche to write whatever you wish to, whether or not it is accurate.

**Paul Staines:** As I have explained, Zac Goldsmith and Jemima Khan managed to get me in court. It is not impossible, but you have to be pretty determined. I do not give in easily. I have to take the measures I think are appropriate. The physical hosting of the blog is in the United States of America because I have First Amendment protections there, and the hosting company has given me assurances that, if they get letters from Schillings or Carter-Ruck, they will protect my First Amendment rights.

**Q399 Lord Hollick:** So, if you publish an article that is inaccurate and destroys somebody's reputation, what right of redress do they have against you?

**Paul Staines:** They can sue me.

**Q400 Lord Hollick:** But you are outside the jurisdiction.

**Paul Staines:** If you do business across borders, it is the case that you have to take action across borders.

**David Allen Green:** If it is published within the jurisdiction there is liability. It would be difficult to enforce, but there is still liability within this jurisdiction.

**Q401 Mr Llwyd:** I should like to make the general point that an injunction is meant to be an interlocutory proceeding; it is a pro tem proceeding until there is a full hearing of the case. It may be that in due course this Joint Committee will consider shortening the period between an injunction being granted and a full hearing. Do you think that would be more satisfactory?

**Paul Staines:** The only injunction granted against me was ex parte; I was not even aware it was being sought.

**Q402 Mr Llwyd:** That is not the issue. An injunction is meant to be a temporary proceeding leading to a full hearing. If, for example, the period between the date an injunction is granted and the full hearing of the arguments in the case is shortened, would it not be a step forward?

**David Allen Green:** That would be good if it could happen, but claimant solicitors in the City are very good at getting those interim injunctions, which effectively become a remedy in themselves, because everybody then gives up and the substantive case falls away. If you could get to a final disposal of the case with speed it would be very welcome. There are problems with interim injunctions because people, especially self-publishers without legal departments, are not able to regulate their conduct because they do not know the terms of those injunctions. Therefore, a shorter period to the final disposal of a privacy case would be very welcome.

**Q403 Mr Bradshaw:** Paul just said that people in the City had money and that created a chilling effect, which slightly contracts Jamie’s evidence that he had not been sued by a rich person. Is Lord Gold right that, whether one is talking about libel or privacy—which is what we are supposed to be talking about—it is a law that protects wealthy people in practice?

**Jamie East:** The difference between what Paul and I said is that most celebrities have ambulance-chasing solicitors who proceed on a no-win, no-fee basis. Therefore, to start firing it out is no skin off their nose. We do not have that luxury in replying to it. Paul is saying that in the City they do not need no win, no fee; they just dish it out willy-nilly, so to speak.

**Chairman:** We must move on to our next session. I thank the four of you very much.

The Rt Hon. Jack Straw MP, The Rt Hon. Lord Wakeham, The Rt Hon. Sir Stephen Sedley, and Professor Gavin Phillipson—Oral evidence (QQ 1–32)

**The Rt Hon. Jack Straw MP, The Rt Hon. Lord Wakeham, The Rt Hon. Sir Stephen Sedley, and Professor Gavin Phillipson—Oral evidence (QQ 1–32)**

Evidence Heard in Public

Questions 1–32

MONDAY 17 OCTOBER 2011

Members present:

Mr John Whittingdale in the Chair  
Mr Ben Bradshaw  
Lord Black of Brentwood  
Lord Boateng  
Baroness Bonham-Carter of Yarnbury  
Mr Robert Buckland  
The Lord Bishop of Chester  
Baroness Corston  
Philip Davies  
Lord Dobbs  
George Eustice  
Paul Farrelly  
Lord Gold  
Lord Harries of Pentregarth  
Lord Hollick  
Martin Horwood  
Lord Janvrin  
Eric Joyce  
Mr Elfyn Llwyd  
Lord Mawhinney  
Penny Mordaunt  
Lord Myners  
Ms Gisela Stuart  
Lord Thomas of Gresford  
Nadhim Zahawi

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**Examination of Witnesses**

*Witnesses:* **The Rt Hon. Jack Straw MP**, Home Secretary during the passage of the Human Rights Act 1998 through Parliament, **The Rt Hon. Lord Wakeham**, Chairman of the Press Complaints Commission during the passage of the Human Rights Act 1998 through Parliament, **The Rt Hon. Sir Stephen Sedley**, Lord Justice of Appeal, 1999–

The Rt Hon. Jack Straw MP, The Rt Hon. Lord Wakeham, The Rt Hon. Sir Stephen Sedley, and Professor Gavin Phillipson—Oral evidence (QQ 1–32)

2011, and **Professor Gavin Phillipson**, Durham Law School, University of Durham, examined.

**Chair:** Can I welcome to the second part of this session this afternoon the two architects, I suppose, of Section 12, Jack Straw and Lord Wakeham, as well as Sir Stephen Sedley and Professor Gavin Phillipson?

**Q1 Ms Stuart:** Thank you very much, Chairman. We started the last session looking at this tension between Articles 8, 10, 12 and this notion that certain rights were beginning to trump others, which was quite a novel concept in British judicial thinking. I just wonder whether either Lord Wakeham or Jack Straw would like to comment on the thinking behind Articles 8 and 10, and then Section 12 was introduced as a kind of sweetener. How does this fit in with our framework?

**Lord Wakeham:** I am very clear about that. As far as I am concerned, free speech, press freedom and self-regulation are absolutely fundamental in a democratic society, and therefore I accept them. If you go back to the time when the Human Rights Act was passed, both the Government and the Conservative Opposition said they did not want this to create a privacy law. One of the ways that some of us felt that this might be dealt with was to take the jurisprudence that had occurred in Strasbourg up to that period of time, where, in a whole range of their decisions, they had actually given the benefit of the balance towards freedom of the press. For example, one of the cases when I was chairman of the PCC was one where Earl Spencer took the British Government to Strasbourg, and lost on just this issue. That would be my view as to where the balance should be: of course privacy is very important, but I think freedom of speech is fundamental to a democratic society.

**Q2 Ms Stuart:** Before we move on, Lord Wakeham, can I just press you on whether you were satisfied that the British judiciary was actually prepared for rights trumping rights in a way that the Americans are quite used to, but I do not think the British judiciary was?

**Lord Wakeham:** I am the only one sitting here who is not a lawyer, so you will not get good legal advice from me.

**Ms Stuart:** That is why it is so important we hear from you.

**Lord Wakeham:** I am disappointed that Section 12 has not achieved what we hoped it would achieve when it was brought in. I do not actually think there is going to be any serious change of the law whatever you may say in your report, or whatever Lord Justice Leveson says. In my judgment, there is a very real possibility that, whoever is the Government of the day, when it comes to taking very statutory control of the press, they will not do it. That is why I want to see strongly reinforced self-regulation in this country, which is not happening because we will not get the other, in my judgment.

**Mr Straw:** The provenance of Section 12, which I think is well known, Mr Chairman, was that there was anxiety, as Lord Wakeham has pointed out, about how the courts,



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without any further guidance, would interpret their duties following the incorporation of Article 8. So the press, in the person of Lord Wakeham and his colleagues, made very strong representations to Lord Irvine of Lairg and myself, as the two sponsors of the Bill.

On our side we had no commitment to introduce a statutory law of privacy—I will come back to what we did think would happen—and I certainly wanted, if it was possible, a political consensus on the introduction of the Act. That was my overwhelming preoccupation, because I thought, with an issue like this, it was going to be absurd to end up in a situation where we got this on the statute book and then a successor Government made it a manifesto commitment in the following manifesto to repeal it—the whole exercise would have been nugatory from the start. It is for that reason that there were very detailed negotiations with the churches, which found their way into what is Section 13, and with the press, which found their way into Section 12.

To answer Ms Stuart's question directly, there was never any question that by virtue of this particular section we could give the courts, as it were, a trump card in respect of Article 8, which in all circumstances could trump the exercise of rights under Article 10. There was never a suggestion of that. It would have been dishonest to imply that, because the whole purpose of the Act was to incorporate the Convention articles, and to require under Section 2 the courts to take account of the jurisprudence. Even if our Human Rights Bill had failed, we would still of course be subject to Strasbourg, so we were clear about that.

The special anxiety of the press was about interlocutory injunctions in privacy cases. Lord Wakeham's view is that the section has not worked out as intended. I take a more sanguine view about this. Although there have been some highly publicised cases of so-called super-injunctions, the numbers are relatively small. That became evident in the report which Lord Neuberger of Abbotsbury produced, although as his report makes clear, there is a real problem about the data. For those of you who have not entertained yourself with this, the fact of the injunctions, and their terms, are confidential, and the Ministry of Justice's database was not recording them at all. Steps have now been taken to ensure that they do, but even so we know that numbers are relatively small. Looking at the way in which Section 12 has been interpreted, for example in *Cream Holdings v Banerjee*, a Law Lords' case, which is one of the leading cases on this, I think they came out with a common-sense approach to the issue.

My final point is that, although Lord Wakeham is correct to say that Ministers made it clear at the time of the passage of the Human Rights Bill that we were not in the business of creating a statutory law of privacy, we were well aware of the fact that incorporation of Article 8 with the other articles would lead the courts to do that, and so were the courts. It is interesting that in the *Douglas v Hello!* case that Lord Phillips of Worth Matravers, then Master of the Rolls, recites the fact that Parliament said it was not going to pass statutes on this and then says, "The courts have not accepted this role with wholehearted enthusiasm", because it is really difficult. But it is one they have taken on, and I think on the whole, have managed to navigate with some facility.

**Q3 Ms Stuart:** Sir Stephen, do you have a particular view on trumping rights? Is that something that the judiciary was prepared for?

**Sir Stephen Sedley:** I am not clear from Lord Wakeham's answer whether he favours any protection of privacy or not, but looking at it from a lawyer's point of view and

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the point of view of loyalty to Parliament’s own legislation, one starts not with Section 12 but with Section 3, which begins by saying, “So far as it is possible to do so, primary legislation”—of course that includes the Human Rights Act itself—“must be read and given effect in a way that is compatible with the Convention rights.” That immediately throws you on to what the Convention rights are.

When you turn to the Convention, Article 8 and Article 10 are coordinate and equal in their status. They are both qualified rights, qualified in various public and private interests, and they have to be married up with each other in any one case, so that although when you give effect to Article 8, you give effect to the right of free speech so far as it is relevant, and when you give effect to Article 10 you give effect to personal rights such as privacy so far as relevant, you have to come to the same answer under both, and that is what the courts have regularly done. Lord Wakeham may object to the balance that they have struck, but that they are striking a balance between two values—the value of free expression and the value of privacy—is beyond doubt. I think it is very plainly what Parliament intended—Jack Straw will confirm this I imagine—when it passed the Act.

Section 12 itself is not actually substantive in its content; it is procedural. It tells you what is to be kept in mind when the court is being asked to issue an injunction. It says at subsection (4), “The court must have particular regard to the importance of the Convention right to freedom of expression”, but it has never been very clear what “particular regard” meant. It does not say “overriding regard”. The courts have had particular regard, in fact, to all the Convention rights when they have applied them. One of the difficulties has been that the Convention right to freedom of expression is itself a qualified right. If you look at Article 10, it says that the exercise of the right of freedom of expression, “since it carries with it duties and responsibilities, may be subject to...conditions” and so forth “prescribed by law ... and ... necessary in a democratic society, in the interests”, among other things, of “the protection of the reputation or rights of others”. You are therefore not taking your stand on a solid rock when you take a stand on either Article 8 or Article 10; you are taking the stand on a right that is itself conditional on respect for other rights and interests.

**Lord Wakeham:** As I was mentioned several times in there, I would like to say that is exactly my point, but put much more eloquently than I meant it. The fact of the matter is the lawyers and judges take Article 8 and Article 10, and Section 12 they look upon as something not too important, and that is a pity.

**Mr Straw:** Sir Stephen is right in his description of the Act. The earlier sections in the Act set the framework for the incorporation of the Convention articles and for the courts to take account of Convention jurisprudence. I recall the discussions that took place at the time, and the discussions we had with Parliamentary Counsel, about various drafts of what became Section 12, which Lord Wakeham and his colleagues have put forward. I do remember, as it happens, a discussion about the phrase “particular regard” and whether it meant anything.

The earlier subsections were intensely procedural, particularly subsection (3), which has been the subject of detailed examination in our higher courts. It requires that no relief—an interlocutory injunction—is to be granted before trial unless the court is satisfied that the applicant is likely to establish that publication should not be allowed. There has been debate about what exactly “likely to establish” means, but put that on one side. We could not do what we wanted to do with subsection (4), and the press representatives knew this: we could not rewrite the effect of Article 8, nor could we say that Article 8 was an absolute right that trumped Article 10. In my recollection, there was never any suggestion that we could.

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What we were trying to do, however, was first of all raise the bar in terms of interlocutory relief, and I think broadly that has been successful. Then we wanted to say to the courts and to judges like Sir Stephen Sedley, “When you come to consider this matter, you need to think very carefully and explicitly about freedom of expression within the terms that are laid down by subsection (4).” To a degree it is quite substantive in its effect, because not only does it talk about having particular regard to those items, but it talks about the extent to which the material is likely to be in the public interest, so it imports into the considerations of the courts this whole issue of public interest, which is the whole basis of the various tests in the PCC Code. Then, ironically for those who take a purist view about no statutory regulation of the press, we then included in paragraph (b) of subsection (4) a direct reference to “any privacy code”, which meant the Press Complaints Commission Code. So indirectly that has been the subject of legislation.

**Q4 Ms Stuart:** Professor Phillipson, I am still not entirely clear whether we have struck a balance given that, before incorporation, we did not have a judicial tradition of giving weight to competing rights of equal status. In your view, has Article 12 struck that right balance? And if more so, have the judges taken that balance more rather than the politicians?

**Professor Phillipson:** The Human Rights Act as a whole ensures that neither Article 8 nor Article 10 has priority over the other, for all the reasons that have been given. If you want to have the American system of definitional balancing, where if one right applies the other gives way, which some of the press want, you do not want the European Convention on Human Rights. It is very difficult to incorporate the Convention and then start tinkering around with it and trying to change its meaning.

The one thing that Section 12 did was change the test for interlocutory injunction, and that has been done successfully. It was followed loyally by the courts in the *Cream Holdings* case that has been referred to, and it has made it harder to obtain an injunction than it was before, but I do not think simply saying “have particular regard to freedom of expression” was a serious attempt to give one right priority. Indeed, the Government quite clearly explained to Parliament that the Bill itself could not be made incompatible with the Convention. That would be the ultimate irony, because we were trying to incorporate the Convention and we were laying on all public authorities, including the courts, a duty to act compatibly with it. I think Parliament was clear that this was not an attempt to radically change the balance between the two rights.

English law had not had to strike a balance between privacy and expression simply because there had not been a traditional common law right of privacy, but it was said many times—I have a quote from the former Lord Chancellor, Lord Irvine of Lairg—“The judges are pen poised ... to develop a right to privacy to be protected by the common law”, and would probably now do so under the impetus of Article 8, which the Human Rights Act made applicable by the courts in common law adjudication for the first time. That was why Section 12 came about, because everyone knew this was going to happen; it was the whole reason we had Section 12 at all, and why Lord Wakeham put forward his amendment which did not succeed, to try and stop the courts being public authorities when both parties were private bodies. It was precisely because everyone saw this coming. Section 12 is designed to make sure the courts remember freedom of expression, and to particularly tackle the issue of interlocutory injunctions. It was not intended to make one right or another paramount,

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and indeed it could not have done so. You would have to have the American First Amendment if that is what you want, not the European Convention on Human Rights.

**Q5 Ms Stuart:** If you had to explain to an undergraduate class in two sentences what the effects of Section 12 were, would you say it protected the freedom of expression or that it gave more power to the press?

**Professor Phillipson:** I would say it made it harder to obtain injunctions against the press, which it does, and directed the courts to have particular regard to certain matters, including the public interest, but it was designed to do what we have said.

**Q6 Lord Thomas of Gresford:** May I ask Lord Wakeham this: the claimant brings the action relying upon the right to privacy in Article 8; was it your intention, however it came out in the end, that the Article 10 freedom of expression should be a superior right, or were you simply trying to balance the fact that the claimant is relying on Article 8?

**Lord Wakeham:** I think I am going to answer this in an unsatisfactory way to you. My concern was to stop privacy cases by and large coming to the courts at all. I wanted people who felt they were done down by the press to go to something less than court. You only have to look in the papers the other day; it cost a footballer half a million pounds to bring a privacy action, which he lost. That is of no use to the vast majority of my old constituents, and I suspect most of you. It is a total and complete waste of time.

I am not saying it should be abandoned. What I wanted was something better than that for ordinary people, so I wanted Section 12 to try to encourage the use of the Press Complaints Commission and I wanted the judges to take more notice of the Code that we had at the Press Complaints Commission, and therefore people would not come to court nearly as much so we could deal with it. The vast majority of the cases I had to deal with were local newspapers revealing things about people, for example, the name and address of a warder of a prison in Birmingham where there were IRA prisoners, in order that their IRA friends could throw bricks through their window. That was an invasion of privacy for which an ordinary person had no possibility of going to court. I wanted to achieve that. That is what I was after. I was not interested in all these millionaires and villains.

**Q7 Lord Thomas of Gresford:** Did you think you had succeeded in making freedom of expression superior to the right of privacy?

**Lord Wakeham:** No, I do not. I think there was a balance, but the balance was not absolutely even-steven. There are two things really. What I thought I had achieved was what Jack Straw said in the House of Commons when he introduced Section 12; I thought he got it exactly right at that time. It has not worked out like that, and I am disappointed. I hope that the Clerks can send you round what he actually said. That is what I thought we had achieved. However, we have not, and I am not saying that the privacy law is going to disappear because we have got it. I just want to find some way of dealing with ordinary people.

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**Mr Straw:** Lord Wakeham kindly reminded me outside of what I said. I think he has the exact quotation in front of him, but it was words to the effect that the introduction of Section 12 should make these interlocutory injunctions pretty rare, and people in general would go to the Press Complaints Commission. We can argue about the extent to which they are relatively rare. There has been a lot of publicity about individual ones, but they are fewer in number than is imagined.

The second thing is that I certainly hoped and believed—on good evidence—that the Press Complaints Commission would be able to take on a more active role. I set out why I believed this in a lecture I gave in July, so this is not just soft soap for the man sitting next to me. I believed that because I had seen Lord Wakeham operate as chairman of the Press Complaints Commission and thought that he was doing a first-class job. He had the skills and the gravitas to ensure that PCC did take on this role. Sadly in my judgment, since he went the PCC has become a shadow of what it was at the time he was running it, and it has not been able to fulfil the expectations that were there. That is one of the reasons why we now face these serious problems and one of the reasons why this Committee has been formed.

**Professor Phillipson:** Can I just add there was nothing in Section 12 to suggest that cases should be steered off to the Press Complaints Commission? Section 12 tells the courts what to do. It does not say anything about whether or not someone would prefer to go to the PCC and there is nothing in it to say that injunctions will be rare. It simply says that injunctions will be granted only if the court thinks that the claimant has the stronger case. If the claimant has the stronger case they will get an injunction.

**Q8 Lord Thomas of Gresford:** Nor is it limited to interim injunctions, of course. It is any relief.

**Professor Phillipson:** Indeed, it could be damages.

**Mr Straw:** Can I just add this caveat to what Professor Phillipson has said? The purpose of the reference to any privacy code at the end of subsection (4) of Section 12 was to allow the courts to make a judgment about whether the defendants—the press—had intruded unfairly on someone's privacy. To that extent, we were drawing the PCC Code into the adjudication of these matters even before the courts. I thought that was a very good thing.

**Q9 Lord Harries of Pentregarth:** Lord Wakeham, given all that has been said and the fundamental agreement about the need to make a judgment to balance two qualified rights, is there not some danger in pressing so strongly the fact that freedom of expression, which you equate with freedom of the press, is fundamental to a democratic society? Is it not true that protection of individual privacy is equally fundamental to a democratic society that is based upon the value of the individual and respect for the dignity of the individual; and respect for the dignity of the individual demands respect for their privacy?

**Lord Wakeham:** Of course both are very important, and the whole of this argument is about where the balance has struck. My own view is the balance has been struck in not quite the right place. I do not believe the legislation is likely to end up changed, as I said to you at the beginning. We have got Section 12. I am sitting next to somebody who knows a

lot more about this, but my instinct is the judges feel they are asked to administer Article 8 and Article 10 of the Convention, and to some degree they look upon Section 12 of the Act as something they were landed with that they did not really need, so it does not quite register the way that it should.

Secondly, I think the PCC has changed dramatically. Jack said some nice things about me, but I feel several things have changed dramatically. I do not know if it will be helpful to the Committee to describe some of the things that have changed. First of all, in my day judicial review was not something that worried me too much. Today the chairman of the PCC would be worried stiff that he would be taken to judicial review if he rang somebody up and said, “Look, for God’s sake stop being so silly. Why don’t you stop what I am hearing rumours about?” and so on. I did not worry about that. Only one person ever took me to judicial review, Anna Ford, and we saw her off in about 20 minutes, so that was not of any great consequence at all. I told these people how to behave if I got the slightest hint they were likely to misbehave.

**Sir Stephen Sedley:** And if they were subscribers to the Press Complaints Commission.

**Lord Wakeham:** No. Oh, no, that is another thing. As far as I was concerned I dealt with the press. It was up to the press themselves to collect the money from the members; if the newspaper did not pay the money that was not my problem. I dealt with them in exactly the same way. If I was still there, I would have dealt with the *Express* in the same way as the others. As far as I was concerned I was looking after the public interest in the press; who paid for it was for somebody else to deal with.

The next thing that happened, of course, was the judicial review that I have mentioned. Secondly, the Press Complaints Commission started talking as if they were a regulator. They were never a regulator; never ought to have been a regulator; never should have claimed to be a regulator. My job was to raise standards in the press. I assumed that newspapers were behaving in accordance with the law of the land. If I had still been there, I would have had nothing whatsoever to do with phone hacking. I would have said, “That is a criminal offence, go down to the police station and sort it out there.”

When I had an editor of a newspaper who was alleged to have bought shares in a company that his paper was going to tip the next day, I told the editor, “This is nothing to do with me or with what is in the newspaper. It is to do with you and your staff, and you had better sort it out.” When a solicitor rang me up and said, “It is outrageous, my client’s privacy is about to be invaded by a newspaper”, and then I discovered that he was actually trying to make an exclusive deal with another newspaper and he thought his exclusive deal was going to be lost, I rang up the Law Society and said, “I do not believe this is the way a lawyer should behave.” I was in favour of high standards, but I was never an enforcer of the law. I made sure those who were dealt with it. That is what I did and it worked pretty well.

**Q10 Mr Llwyd:** When Lord Wakeham said that the Section 12 was not welcomed by the judges, I could see that Sir Stephen was anxious to have his right to reply. I wonder if he has any comments on that?

**Sir Stephen Sedley:** Yes. If it were true, as I noted Lord Wakeham’s remark, that Section 12 is regarded as something that the judges were landed with that they did not really need, it would be true of quite a lot of the statute book. *[Laughter.]* The fact is that judges do not ask themselves whether they really need it. We are remarkably loyal to the law laid

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down by Parliament, and we do our best to make sense of it. We do not refer to *Hansard* because if you did, you would find contradictory and sometimes unhelpful explanations. We refer to the text of the statute and make the best sense and application of it that we can. The *Cream Holdings* case, to which Jack Straw has referred, is a very good example of how loyally the courts do that. Anybody, including Lord Wakeham, is entitled to their own view as to whether the courts have done it correctly, but that the courts do it loyally and pay considerable attention to the wording of the statute is, I hope, beyond dispute.

One particular aspect of that is the requirement of Section 12, subsection (4)(b), for the courts to have particular regard to “any relevant privacy code”. If you have a look at the PCC’s Code it is very good on paper on privacy. Nobody has any problem about the courts having regard to it. What it does not say is that the courts are to defer to the PCC or hand over to them issues that are actually questions of law, nor would one want it to. Anybody who, like myself, has had to deal with the PCC, polite and helpful though they are, will know exactly why they are not regarded as a great deal of use when it comes to violation of human rights.

**Lord Wakeham:** One sentence: Lord Woolf did not quite agree with that. He was very supportive of Section 12 and the PCC when he was doing it, and one or two of his judgments were extremely helpful, but standards have slipped since then.

**Q11 Chair:** You say that Section 12 is not achieving what you intended and you would like the PCC to have had a more active role, so that people would not have to resort to law, so what is your prescription now?

**Lord Wakeham:** My prescription—I will write you a paper for it, if you like, but I cannot give it to you in five minutes—is that there is a lot that needs to be changed in the PCC; a considerable amount. If we get it right, then I would like to see the position that where these things arise—I am not in favour of legislation—I would take away the rights of the courts to deal with it as it is, but I would expect a judge to say, in all normal cases, “Have you been to the PCC with this case? Have you tried to find out what they have to say about it? If not, I will have to take that into account when I come to make my judgment.” I think in those circumstances, a changed PCC would be a great help to the courts. It would not take the power away, the judges could still do what they want to do, but a PCC operating properly would mean that most people could be able to get reasonable justice at no cost to themselves

**Mr Straw:** Could I just demur from Lord Wakeham on this? In respect of actions that would otherwise be taken for defamation, I think Lord Wakeham has a strong point. If someone is defamed what has happened is that an untruth about them has been uttered. That is relatively straightforward to correct after the event by correction and apology, and sometimes by damages. The fundamental flaw in his argument, and of those who argue similarly—that there should be no law buttressing what the PCC is doing in respect of privacy—is this: what you are dealing with is not the publication of untruths about somebody, but publication of truth about them where, however, there is another—and it would be said overriding—argument that those truths should be kept private.

The reason why great debate about interlocutory injunctions has arisen in respect of privacy cases is very straightforward. If you look behind the headlines, it emerges that the mere fact that a newspaper is about to publish details about someone’s private life can of itself be very damaging—yes, maybe to the expensively paid footballer or pop star, but

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usually if you go behind the cases, you find that the courts are not so much trying to protect the expensively paid footballer or pop star as the jilted lover who is left with a love child; all she and the child have left is their privacy, and that too is about to be blown apart. In those circumstances, it seems to me entirely right for the courts to have the power to make an injunction in advance of publication, and in certain cases—limited ones—to provide as part of that order that there should be no publicity of the fact of the injunction. I do not know how any PCC could operate that system unless it was actually a body with statutory powers, essentially operating as a court.

**Lord Wakeham:** I would expect the judge to do that. I agree entirely with what Jack has just said, and under the proposals I will send you in writing, it is covered completely. I have no difficulty about that—it is an absolute real point.

**Chair:** We look forward to it.

**Q12 Lord Gold:** Is it not the reality that the newspaper telephones the victim at 4 o'clock on a Friday afternoon and announces that they propose to publish a particular piece? Is it possible for the PCC to come in and do anything in those circumstances? If there is a remedy at all, is it not to go to the judge?

**Lord Wakeham:** Are you asking me?

**Lord Gold:** I am asking both of you.

**Mr Straw:** That is my view. There is also this issue about whether there should be a prior publication rule, which arose in the Max Mosley case. I do not think you can have a prior publication rule, by the way, because I think there are cases where it is in the public interest for the newspaper, or media outlet, legitimately to ambush the person, because what they are exposing is serious criminality or wrongdoing. The provisional view I came to in that case, which I set out in a lecture in June, is that there should be a presumption in favour of prior notice. Where the courts subsequently find in favour of the claimant, it should be open to the claimant, and obviously to the court, to award exemplary damages if there was no reasonable grounds for ignoring a prior notice presumption.

**Lord Wakeham:** I do not disagree with that. Of course the Code already has in it a requirement on the newspaper to be accurate in what it says, so if the newspaper does not tell the full story or the right story, then there is an action against it. On the question of how I would deal with the prior thing, which is dealt with in the changes I want, which can be done without legislation, I would be perfectly happy for a judge to say to somebody who went to the court, “I will give you an injunction to give you time to go to the PCC to deal with it.” That seems to me a perfectly reasonable thing to do.

**Q13 Lord Thomas of Gresford:** Will the two progenitors of Section 12 now agree that the context has changed so much that Section 12 should be changed, altered or dispensed with? The context in which both of you were talking was that the PCC was a strong body, ably chaired. That is no longer the situation and may not be the situation in the future. Should we not look at it again and scrap Section 12?



**Mr Straw:** Personally, I would not scrap Section 12. I am open to recommendations, including from this Committee, about how it should be changed. These provisions are never the last word. May I just say this about the context? As has already been referred to by Professor Phillipson, the reason the press were concerned about this was that they anticipated, correctly, that the incorporation of Articles 8 and 10 would lead to the development of a law of privacy. There has of course been a very large debate going back decades about having a law of privacy. In his first report Sir David Calcutt says, “Leave it to the PCC”, then two years later in his second report says that the PCC is not working and there should be a tort of infringement of privacy. We were alive to all of that, and that was only a few years before we produced the White Paper and then the Human Rights Bill.

Since Lord Wakeham left it, I think the PCC has proved inadequate to the task. What would I do? I would seek to codify the current law on privacy that the courts have developed into a tort of infringement of privacy. I think in a sense we owe it to the courts; it is no good blaming the courts for the fact they have done that, because we passed the parcel to them quite explicitly. Everybody had their eyes open. This was an issue on all sides of the House because we did not want to get criticised by this newspaper or that newspaper. We knew what we were doing, so did the PCC and so did the editors. We said we were going to pass it to the courts.

I think Lord Phillips of Worth Matravers was entirely right to say that it was not a task that the courts have accepted with wholehearted enthusiasm, but to support what Sir Stephen has said, in my long experience the courts have been very loyal indeed to the intentions of Parliament, even where—and sometimes it has happened with me—one of the senior judges would say, “Well if this is the drafting, Jack, it is going to make my life difficult”, and you might have to say, “Well I am sorry about that, but I have to get it through the House”, and that is the reason. I would have a tort of infringement of privacy; it would not be that different from where the courts have got to. I would also have a framework of law under which the PCC would operate. I think it is perfectly possible to have that without all the anxieties that Paul Dacre adumbrated the other day.

In the absence of some statutory enforcement, albeit given to a freestanding, independent PCC, if you have an *Express* newspaper, which simply walks away from paying the PCC, or from accepting its writ, at the moment there is absolutely nothing you can do about it—there is no way at all. There has to be some way of saying, “If you are providing print or internet media services you are subject to this PCC.”

**Lord Wakeham:** Can I just say that I am not in favour of a change in the law? I accept that we have to live with Section 12. We have got it and that is the position, but I believe that a PCC that is up to standard could make a very big difference to the situation. I have given one reason why I am not in favour of legislation; another is that the technological changes that are happening in the communications industry are now so fast that any Bill produced, debated, consulted upon, and finally enacted will be out of date by the time it becomes law. An example of that is the Communications Act 2003, which does not even mention the internet. I am not in favour of legislation years behind the game. I am in favour of doing what we can to deal with the situation.

**Sir Stephen Sedley:** Will you permit me to sound a note of caution about Jack Straw’s answer to Lord Thomas of Gresford? Codifying the law, the tort of privacy, sounds like a pleasant and easy enterprise, but it will probably be a disaster. Not long ago I had the task of helping to advise one of the Australian states about enacting a privacy law. What started as a simple two-line formula had reached two and a half pages of definition of unbelievable tortuousness by the time I bailed out of it. It seems to be beyond the

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parliamentary drafter in this country anyway, and elsewhere in the Commonwealth, to do anything simple, apart from the Human Rights Act itself, which was a model of concise and lucid drafting. Unfortunately that is not the way that things are usually done.

**Professor Phillipson:** I do not know what else you would like Section 12 to do. As some of us keep trying to emphasise, if you have the Convention incorporated, you either have to broadly go along with it or you put the judges in the impossible position where you instruct them to act incompatibly with the Convention, which they will not do. They probably would then declare the Human Rights Act incompatible with the Convention, which would be an unfortunate outcome. Essentially, I do not understand what else could be achieved unless you want to make it even harder to get injunctions.

**Q14 Lord Thomas of Gresford:** Would it make any difference if you got rid of it?

**Professor Phillipson:** I think subsection (3) of Section 12 has made an important change. It has made it harder to obtain injunctions, and that was certainly a change of some significance. The Press Complaints Commission is not an alternative to giving people their legal rights: it does not enforce legal rights, it has no powers and it does not give damages or injunctions. In some cases someone may be happy with an apology, but in many cases they will want their legal rights enforced, and however good the chairman of the PCC is, I frankly do not see that that is relevant. It does not have powers; it is not a substitute for the law.

**Q15 Mr Bradshaw:** In recent evidence to the Liaison Committee, the Prime Minister said the following—I imagine this must have been one of his motivations for setting up this Committee—“The problem is that judges have been trying to write a privacy law because Parliament has not really opined about what it thinks is right and wrong.” Was the rejection of Lord Wakeham’s amendment back then not Parliament opining on that very thing?

**Professor Phillipson:** Yes, it was. Parliament was given the chance to say that they did not want the courts to have regard to Articles 8 and 10 in private litigation. Parliament rejected that option and said, “In fact, yes, we do want the courts to apply both Articles 8 and 10, which we know will mean them developing a law on privacy.” They then catered for that with Section 12, which, if you like, is Parliament’s opinion on the matter.

**Lord Wakeham:** I am quite sure what the Prime Minister said when he said it was that they were faced with the consequences of the balance between Article 8 and Article 10. We have been spending most of the time talking about that, and that is the problem. The only way to avoid that is what I said in my letter to *The Telegraph* recently, about what was originally proposed in the Convention on Human Rights. Most of us will have forgotten, but the Convention on Human Rights was originally a convention to protect individuals’ rights against the state. The only absolutely clear way to deal with this issue is to go back to that original intention of the Human Rights Act and remove the media from it completely. I guess that would be unacceptable so I am not advocating that, but that is the way to do it.

**Professor Phillipson:** It would also mean the media lost the protection of Article 10 in defamation cases and cases where people sued them for breach of confidence and so on. I am not sure the media would like to lose the protection of Article 10 in private litigation.

**Lord Wakeham:** It is not going to happen.

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**Mr Straw:** Mr Chairman, the truth is that, for all of us in our lives, there is a balancing all the time of freedom of expression with a demand that we have for our own privacy. These conflicts are inherent in the way we live our lives, and it is therefore unsurprising that they should sometimes be the subject of serious argument and dispute in the courts, but the courts are there to try and resolve them. No magic wand exists, unless you want a society where rich press barons have total license or there is no freedom of speech at all. You think you can pass a law saying there will not be the equivalent of Article 10 or Article 8. We can come out of the Convention, we can have a British bill of rights, but that almost certainly would seek the same balance between rights of privacy and rights of freedom of expression.

**Q16 Baroness Bonham-Carter of Yarnbury:** We have been hearing a lot about halcyon days when the PCC worked, and indeed the Bishop seemed to think that there was a time when it was some kind of convention and nobody's privacy was invaded, whereas actually if you go back to the 19th century and throughout there have been invasions of privacy. Dickens and Trollope wrote about it and so on, and I think it has got a certain amount to do with who is actually running the newspapers, but that is maybe another point. You did state a very important point, Lord Wakeham, which is that any laws passed are going to be redundant because of the fast-moving state of technological change and so on. How do you see the PCC, or the PCC as you imagine it being reinvented, dealing with new media?

**Lord Wakeham:** I started when I was there by persuading all the newspapers that were subscribers to the PCC to agree voluntarily to the PCC's jurisdiction over anything they sent out on the internet, which is not the same as they put over on paper, which is quite often different. That was a start, and I think that it is beyond my capacity to say how we can do that worldwide, but I think it would be very difficult to do it by legal procedures, although we might get some of the way there by it. All I am saying is that, if we think we can produce a law that will become an Act about five years from now, it will be out of date before it comes. That is why I am saying we stand a better chance of getting things moving in the right direction if we try to get some voluntary agreement about these different, very difficult issues.

**Q17 Paul Farrelly:** There seems to be a general agreement that the bar that was supposed to be set high by the Act, and which after *Cream Holdings v Banerjee* is generally working, is generally set high enough, given that injunctions are relatively few and far between. Is that the general consensus?

**Sir Stephen Sedley:** Yes, but if I can add one footnote, I suspect that we would be doing exactly the same in the courts even if Section 12 had not been passed. We would still be giving high value to the rights involved.

**Q18 Paul Farrelly:** I just wanted to stray on to confidence for a moment, Chair, which is mentioned by Professor Phillipson. Does the panel agree that in the area of confidence, where courts also grant injunctions, super-injunctions and anonymised injunctions, the bar is being set at a sufficiently high level in terms of weighing the

public interest and the opportunity of the press to present its own case to contest, bearing in mind the high costs of the law courts?

**Professor Phillipson:** It is just the same. Section 12 applies when a court is considering giving any order which would affect freedom of expression. Confidence is always about stopping someone revealing something. A breach of confidence case is always about stopping someone speaking, or awarding damages when they do, so the test would be applied in the same way, in that it should be just as hard to obtain an injunction in a commercial confidence case. If anything, the media would be favoured where there is no competing right of privacy because confidentiality itself has not the same status as privacy in the Convention. Confidentiality is a mere exception to Article 10, but it is not a primary right. The primary right is Article 8, which is privacy rather than confidentiality

**Sir Stephen Sedley:** I would very warmly commend to the Committee the Master of the Rolls Lord Neuberger of Abbotsbury's report on super-injunctions. It seems to me, and to most people who have read it, to lay this issue pretty much to rest. They are very rare, and the report has emphasised how rare they should be, but there must be some residual category in which an injunction can be granted that forbids the publication of the name of the person who has obtained it, as without that the injunction may be wasted. Very rarely, there may be injunctions the very existence of which cannot be disclosed, but only in the most exceptional circumstances. I respectfully suggest that this is probably the best answer that one is going to arrive at.

**Q19 Paul Farrelly:** You bring me very neatly on, Sir Stephen, because I put down the Trafigura question that led to that very useful report. I have read that report and I have read your piece in the *London Review of Books*. Your piece, which is in the Committee's papers, would seem a priori to rule out any justification, whatever the circumstances, for a parliamentarian like me putting down a question like Trafigura. It would also seem to rule out any campaign within Parliament in any case of miscarriage of justice, such as with the Birmingham Six, because, on simple utilitarian grounds, it ran the risk of questioning a very happy constitution.

**Sir Stephen Sedley:** You speak from the moral high ground, I suspect. The Trafigura issue is probably the most difficult and contentious and, like everybody else, I do not know all the facts. That is one of the problems.<sup>416</sup>

The question of MPs or peers being able to raise issues like the Birmingham Six does not arise. There is no court order that forbids that being done, and there is no rule of constitutional law which says that MPs or peers cannot do it. The difficulty that arose in the cases that I have mentioned in the *London Review of Books* article was that two members, one of each House, used parliamentary privilege to escape what would ordinarily be the consequence of a deliberate contempt of court by making a revelation in the House that had been forbidden by a court order, individuals having obtained an injunction. That did seem to me and still seems to me, after the controversy that arose and has settled to some extent, to be a very serious constitutional matter.

The deal that was arrived at at the end of the 17th Century by Article 9 of the Bill of Rights was that the proceedings in Parliament, which includes members disclosing matters, could not be questioned in any court or place out of Parliament. The quid pro quo for that

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<sup>416</sup> Note by the witness: The judgment is now published: [2009] EWHC 2540 (Q5)/

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was that Parliament itself has for 300 years refrained from interfering with court orders. If it does not like what the courts do, it changes the law. That is its sovereign power. While the courts are there to administer justice, Parliament has always respected how they administer justice even if they do not like it. That is where the naming of Giggs and Goodwin violated a constitutional norm, and did not meet with the reproach of either Speaker. That seems to me to be serious, if I may say so, within the four walls of this room, as well.

**Mr Straw:** Can I just say that I entirely agree with Sir Stephen on this, and just draw to the Committee's attention that, as Lord Neuberger of Abbotsbury's report brings out, Mr Farrelly in no way breached any requirement of the order? That is spelt out in some detail, and I was the Secretary of State, Mr Farrelly will recall, on the other end of this. In the other two cases, however, where Mr Hemming and a member of the House of Lords decided quite deliberately to undermine orders of the court, I thought that it was outrageous. It would lead to a breakdown of the rule of law, and I frankly think the Speakers of both Houses should have intervened. It is inevitable that the subjects of these cases are often going to be tendentious people who lack easy moral justification and so on, but that is beside the point. We have given the courts these powers and duties, and if we do not respect them, who else will?

**Lord Thomas of Gresford:** If I remember, Lord McNally did protest.

**Chair:** As did John Bercow.

**Lord Wakeham:** Absolutely. Can I just say, as the only living person who has been Leader of both Houses of Parliament, I absolutely deprecated what went on, and I believe overwhelmingly that members on both sides in both Houses thought so at the time. The only thing I would say, just to make sure we get it right, is that the Lord Speaker has absolutely no powers whatsoever to intervene and could not do a single thing about it. The House is self-regulated; the House could have done something, and it did not in these circumstances. It was something that I hope will not happen again.

**Q20 Martin Horwood:** I just feel I should point out that, actually, John Hemming maintains that he certainly did not deliberately break an order and did not set out to do so. His view was that tens of thousands of people already knew the identity of the footballer in question, and that he was applying the *Spycatcher* defence, that actually it was already in the public domain.

**Mr Straw:** I was there, I saw what happened. I think you have to be incredibly naïve to believe Mr Hemming.

**Q21 Martin Horwood:** Well it was already on Twitter. That is the point, so thousands of people already knew. But he certainly did not say that he was doing what you said he was doing.

**Mr Straw:** Just as in the old days, Mr Chairman, there was a difference between somebody putting up a poster or distributing paper flyers and announcing the same in the House of Commons. These days, there is a difference between somebody sending round a Twitter message and announcing it in the House of Commons. Just because there is some leakage, it does not mean that you should empty the whole reservoir.

**Martin Horwood:** I think the difference might be that more people follow Twitter than the House of Commons.

**Q22 Paul Farrelly:** I am glad, Sir Stephen, that you say that *Trafigura* may have been a little bit more difficult and more nuanced. Your opinion in your article did not give much scope for nuance because it was all circumstances and all the facts, but can I just say that the whole issue with *Trafigura*, as explained in the Master of Rolls' excellent report, was all to do about how the courts were operating on issues to do with confidence and whether the courts were masters of the process or were responding to very smart lawyers who would present injunctions off the word processor with the latest bell and whistle attached.

**Mr Straw:** Mr Farrelly, do not forget something: there is a key fact about the *Trafigura* super-injunction that *The Guardian* forgot to mention. Their lawyers had agreed the terms of the injunction—and this is brought out in Lord Neuberger of Abbotsbury's report—which is why the courts were not able to examine its detail. They were presented with agreed terms of an injunction. *The Guardian* needs to get its lawyers to explain why they did that, but that is what happened.

**Paul Farrelly:** That was not known to me.

**Q23 Baroness Corston:** This is addressed to Sir Stephen about what could be developing trends with the interpretation of Section 12. A few years ago, Lady Justice Hale gave the Longford Memorial Lecture, and she said that courts do not operate in a vacuum; they are influenced by public opinion and the media. You only have to look at what happened in the courts after the riots in August to know there must be some truth in that. If one looks at the disparity of the judgments in the Ryan Giggs and the Rio Ferdinand cases, do you think there is a possibility now of a rowing back by the judges on Section 12 after the drubbing they have received over super-injunctions?

**Sir Stephen Sedley:** When you say “rowing back” on Section 12, do you mean more rigorous use of it to deny injunctions?

**Baroness Corston:** No, I am suggesting that they might be taking fright. I cannot think of any other reason for the disparity in treatment of the two footballers' cases.

**Sir Stephen Sedley:** I can only speak for myself, and Baroness Hale of Richmond has spoken for herself. Of course judges inhabit the same world as everybody else—we read the same newspapers and we value the good opinion of neighbours and all the rest of it. That means that nobody, whatever judicial office they hold, is impervious to public criticism. There are times when you have to steel yourself against that and to say, “This is ill informed, to give in to it would be contrary to my judicial duty.” There are other times when I suspect you cannot help being influenced, or even more so, you may think it better or right to go along with what appears to be public opinion.

I say “what appears to be public opinion” because nobody knows what public opinion really is in this country, or in most free countries. You have a press whose comment

columns are very largely an echo chamber inhabited by public moralists and editors, who can make a great deal of noise and who can either pass for public opinion or themselves condition public opinion. One can never be sure what is going on. On sentencing, for example, I think that over the 20 years or so since I first became a judge a relentless campaign of accusing judges of being soft on crime and under-sentencing has led to the escalation of sentencing, which has now filled our prisons to bursting, and about which it is recognised something needs to be done. It is insidious; it is very difficult to put your finger on any one newspaper article or case in which it has happened, but as a trend it undoubtedly has happened.

**Professor Phillipson:** A brief point on developing law, as it were: looking at the Ferdinand case next to the John Terry case, they are very similar on the facts because they both concern the England football captain. The Terry case happened before the injunction farrago, and they both went the same way. The point is that in these cases there is a very fine balance to be drawn between freedom of expression and privacy, and it will depend to quite a large extent upon the facts. And while there is now a fair amount of guidance from judgments of the higher courts, nevertheless these things are expressed in terms of fairly broad principles, often concerning the degree of the public interest in the story. Therefore, with two cases with fairly similar facts you may see different outcomes, but that is simply because one judge may decide it differently from another judge.

I do not believe in this thing of holding particular judges responsible for developing the law in the way that Paul Dacre has tried to do with Justice Eady, but you may get very fine gradations within the judiciary and also one case will turn upon its facts. I would not say that academics that are observing this area of law see a clear trend. For one thing, individual first-instance judgments cannot be reliably used to say that the law has definitely moved because they themselves cannot strictly change the law; they are simply applying the law. The law itself is fairly flexible, though, so you will see a little bit of variation in how these cases are decided.

**Q24 The Lord Bishop of Chester:** I think we are up to Section 12 and the reference to privacy codes. Presumably “any relevant privacy code” means essentially the PCC privacy code; though it could refer to other codes, it refers to that one.

**Lord Wakeham:** The broadcasting one as well.

**Q25 The Lord Bishop of Chester:** The PCC code has no statutory weight as a privacy code at all; it is simply drawn up independently of the legal process. Is it not drawn up by practitioners—by editors—almost entirely? Is that not intrinsically an unsatisfactory state of affairs?

**Lord Wakeham:** No, I do not think so. It has a far better chance in self-regulation of working. If you get standards set by the practitioners you are more likely to be able to get them to enforce them. I used to frequently say to them, “These are your standards, they are not mine. This is what you said should be done.” And they recognised that they had a great responsibility for it. I never once, in the seven years I was chairman of the Press Complaints Commission, had a newspaper editor who would seek to refute me on the ground that he did not accept the code. He would argue about the code, and maybe say I had interpreted it wrongly, but they were absolutely adamant that this was the code that

they had agreed to, and their responsibility was to live by it. I think part of it strength was that it was originally drawn up by the editors, but also approved by the lay members of the PCC, so both have a say in it.

**Q26 Lord Dobbs:** Following on from the Bishop’s question, when you are talking about the PCC having more powers and more influence in your brave new world, Lord Wakeham, does it actually need more powers of punishment in order to enforce its code? Does it need further financial or indeed other powers to get what it needs?

**Lord Wakeham:** I saw, or I heard, that the new chairman of the PCC says he is going to start with a blank sheet of paper, which meant that he has not come out with a view as to what he thinks. I will tell you what I thought at my time—of course it is now nearly 10 years since I was there. First, if you had powers of fining newspapers or something on the PCC, you would almost certainly have to give up the balance between a majority of lay people and a minority of newspaper people, because you could not have the editor of one newspaper being party to fining another one, particularly if they might be commercial rivals. That was the first difficulty I had.

The second difficulty I had was a fine to one newspaper might put it out of business; a fine to another newspaper would be something that they would put across the headlines of their newspaper. You want to look at some of the newspapers in France. They put across the headlines how much they have paid in fines under the privacy law in order to bring you the stories that you want to hear. That is what they do. This was not in my view a practical way forward. It would not have helped raise standards. What I needed was a full commitment of the industry to it, and if I could not get it from the editors I rang the proprietors and said, “Your people tell me they are supposed to be behaving according to the Press Complaints Commission. I don’t believe it. What are you going to do about it?” On the very first occasion, the proprietor said, “The conduct of this young man is unacceptable”, and he said it publicly. That shakes things up a bit.

I do not think financial penalties were much use in my day, but the new chairman of the PCC, who I believe has a chance of getting the thing back on a steady road, has said he will look at it with a blank sheet of paper. I think he will probably come down against it at the end, but I do not know.

**Q27 Lord Dobbs:** Are the only alternatives moral outrage on the one hand and financial punishment on the other?

**Lord Wakeham:** If you get, as I did, total, complete support from all the papers that really mattered—and there were a few odd ones that did not—that is what you need. That is what you want. You want them absolutely determined to try. They do not get it all right of course; they get it wrong sometimes, but I did not have any deliberate breaches of the code where the editor was not prepared to argue with me on the interpretation of the code.

**Q28 Lord Black of Brentwood:** Lord Wakeham referred earlier to the PCC over the years having dealt with very large numbers of privacy cases, quite a lot of



them about the regional press. There have been possibly hundreds, maybe even thousands, a year of these sorts of things. I obviously have to declare an interest: I was around at the time that he was chairman.

**Mr Straw:** And very good you were too.

**Lord Black of Brentwood:** Thank you. It helped give it a sort of deft touch in terms of dealing with privacy cases. Is part of the problem with what has happened since the Human Rights Act came in actually that the courts have not had that many good cases to deal with? If you look back to Sir Stephen's first case, *Douglas v Hello!* and so forth, it was not actually a very straightforward case because it involved the selling of commercial rights and so forth. We then go through Naomi Campbell, which was not a particularly edifying case, and a range of footballers, most of whom I have long since forgotten, but actually there has not been one particularly good case for the courts to be able to come to a proper balance between Article 8 and Article 10.

**Sir Stephen Sedley:** The Ferdinand case was a pretty skilful balancing act, which came down on the side of the media, but I am very grateful to you for mentioning the *Douglas* case. It was certainly complicated in the end by the fact that the Douglases had sold their privacy rights, and that was why my court said, "No injunction, it has to be a claim for damages." We were later disagreed with by Lord Phillips of Worth Matravers about that when the case finally came on for full determination.

The other thing that I think may matter to this discussion is that, at least in my judgment, I suggested that you did not need the Human Rights Act to establish a privacy law because the common law was getting there. It would take only one more step to turn what was an action for breach of confidence into an action for breach of somebody's privacy. Lord Nicholls of Birkenhead now has done much the same thing in the human rights field by describing it as an action for—what is it, Gavin?

**Professor Phillipson:** Tort of misuse of private information.

**Sir Stephen Sedley:** This is the way the common law works. It goes one very small step at a time, pretending that it is not moving, but in fact it keeps up with society rather well.

**Professor Phillipson:** It scores its runs in singles rather than boundaries, certainly no sixes. That is how it has been put. That is what you are saying.

**Q29 Lord Harries of Pentregarth:** Lord Wakeham, doesn't everything you have been saying so vividly about your willingness to ring up solicitors and proprietors underline the need to have a Press Complaints Commission whose structure and powers are such that it will be effective whether there is a strong chairman or a weak one?

**Lord Wakeham:** I think that there are changes that are needed to the structure. I would always think a strong chairman is probably better than a weak chairman, but I want to change the rules so that there are no inhibitions on some part of that body trying to keep things on the straight and narrow. I think then the judges will have more respect for what the PCC does, and more times when a case comes they will say, "Look, if the PCC think this was a breach we are absolutely sympathetic to that case." We do want rules that are better, and I would be in favour of better, but I am not actually advocating weak people instead of strong people.

**Mr Straw:** Could I just add to that? I was struck when I was dealing with the PCC when Lord Wakeham was there, and Guy Black was the then chief executive, that it was effective, but it was very much ad hominem—it depended on their personalities, not on the structure. That is shown by subsequent events in the absence of Lord Wakeham and Guy Black. That is the truth. I do not think you can have a body that fulfils such an important role in society simply depending so critically on the personality and skills of the individuals; though they will always be important.

I think that far too much was left to the personal clout of the chairman. It is not a strong institution is really what I am saying. To make it a strong institution you have to underpin it with some statute; which should not cause Mr Dacre any loss of sleep. For example, if I may say so to Lord Dobbs, I think there may be a case sometimes for fines, but I don't think we need to worry about that. What is much more important is the requirement for, as opposed to a requirement on, the wording of, an apology and retraction, and its prominence. A few retractions and apologies put on the front page of the newspapers in the same position as the original story would of themselves raise standards very rapidly.

**Lord Wakeham:** And there is something very important about that. I had that problem, and when I and Guy were there, we insisted on an apology and we laid down where it had to be in the newspaper. The trouble is a lot of apologies were put together by solicitors without much experience in these matters: they got the newspaper to apologise and they did not insist upon where it should appear. Then people were starting to blame the PCC because the apology appeared on page 14 at the bottom in small type, and that was nothing whatsoever to do with the PCC.

I absolutely agree that it should appear with due prominence, but you cannot expect the editor to say it will absolutely be where the original thing was, because they used to say me, "Oh, if the Queen dies we'll put that on page 2 so that we can put your apology on page 1?" They have to have some discretion, but the chairman of the PCC of the day needs to be able to say, "That is reasonable, and we accept that."

**Professor Phillipson:** Can I just remind the Committee of a very important point? If we are talking about giving the PCC additional powers, whether it is ordering apologies or indeed fines, the PCC would then have legal powers to interfere with newspapers' right to freedom of expression. It would then probably have to comply with Article 6, the right to fair procedure under the Convention. Either it would have to introduce court-like procedures into itself, which would then get rid of the very informality that we want to keep, or you would have to have very, very close and careful judicial review by courts to ensure that it was deciding cases essentially as it should do. You need to be very careful. The PCC is a public authority, but it does not interfere with rights at the moment essentially because it has no powers. It can just advise newspapers or make findings that are non-binding.

**Lord Wakeham:** It has never been established as a public authority, as far as I know. The case of the Aga Khan and the Jockey Club is the main case there, and that was one of the issues that we did not deal with. Whilst Professor Phillipson is absolutely right, that is one of the reasons why I do not want legislation because I think the flexibility of our negotiations are better.

**Chair:** We are aiming to finish at half past four, but I have got three last quick questions.

**Q30 Lord Janvrin:** Just picking up this last point about apologies and their prominence, et cetera, surely that is beside the point in privacy cases because it comes back to Jack Straw's point that you are dealing with truths? Apologies are fine if you are dealing with untruths, but if you are talking about a privacy issue, an apology is far too late and has no effect. It is too late. In that kind of case how does the PCC have some kind of action or sanction?

**Lord Wakeham:** The newspapers took the criticisms that were made of them very seriously. If you criticised them for anything, including a breach of privacy, and you made sure that it was given due prominence in the newspaper, which I used to do, they took it very seriously indeed. For it to appear at the bottom of page 14 is not acceptable.

**Mr Straw:** If I could just add, it is of little comfort to the individual subjects, but a very prominent apology and recognition that it is a breach of privacy might change behaviour for the future. Also, of course, they will lose revenue and all sorts of things; it would be humiliating. It has a purpose, therefore, but much less of a purpose than in the case of defamatory statements.

**Professor Phillipson:** I agree very much with Jack Straw that the remedy of a quick apology and correction for defamation would be the kind of thing that we very much want in many defamation cases, but in privacy cases I think it is a very poor remedy indeed.

**Q31 Lord Hollick:** In your letter to *The Telegraph*, Lord Wakeham, you focus on unfairness. I think you make a very strong point that the Press Complaints Commission is likely to give fairer and more ready access to justice on these matters for those without deep pockets. I think that is a point well made. However, your main point is the unfairness that you interpret in what the Prime Minister says: that courts inevitably err on the side of the applicant and not the side of the newspaper. Is not the thrust of your argument that if the matter could be dealt with by the PCC, it would be slightly more in favour of the press's right to freedom of expression rather than of the individual's right to privacy?

**Lord Wakeham:** We have talked a great deal, and I wanted a moment to say this. I am not so much interested in the right of the press as I am in the right of the public to know the truth of what is going on. That is what the freedom of the press is about. It is a right in a democratic society.

What I was worried about—and the experience over that period—was cases where a judge comes in from his round of golf on a Saturday to a big telephone call about him giving an injunction against the Sunday papers or something, and he hears the terrible story about what is going to happen to this poor fellow and his children and so on. Inevitably—I would be the same—he has a great deal of sympathy with that person. However, there isn't the same chance for the newspaper to deploy the fact that this individual—whatever he might be—is going to be exposed as having been with a prostitute or something, and the fact that a newspaper can then produce 11 or 12 other highly documented cases where he has also been with prostitutes, and they think it is time this chap's way of living—his private life—

The Rt Hon. Jack Straw MP, The Rt Hon. Lord Wakeham, The Rt Hon. Sir Stephen Sedley, and Professor Gavin Phillipson—Oral evidence (QQ 1–32)

should be exposed because he is not the sort of person who should be collecting large sums of money for advertising his good, clean living by advertising shirts and all these other things.

It is the exposure of the hypocrisy that I want. The injunction happens, and in my experience—I go back 10 years because I have not been involved with it since—a judge understandably gets the sob story from the lawyers representing the person who wants the injunction and does not have chance before he has his shower after his golf to listen to the other side of the story

**Mr Straw:** These are interlocutory proceedings designed to hold the line before there is an action. What you are saying would be different if it was the end of the proceedings and there was some completely egregious case that the court had ignored, but this is just to hold the line. I went to the courts a few days before the publication of the Lawrence inquiry to get an order, on which I was successful, to prevent *The Sunday Telegraph* from disclosing contents of the Lawrence inquiry in advance of its publication to Parliament. I was in the lavatory of a train trying to organise this; my private secretary, who happened to be Clare Sumner, whom you just saw in a different guise, was standing in a shop doorway in Essex Road, Islington, on the way to a dinner, which got completely aborted; and I have no idea where the judge was—but those are the circumstances in which these things arise. I had just been to a game at Blackburn Rovers. I was phoned on the train coming back and got this information saying, “We need to have an injunction because ...” This was not a breach of confidence, and other matters; it was directly about privacy. That is what you have to do. Yes, you could send it all up, but there was a public purpose in what we were doing.

**Professor Phillipson:** That is what Section 12(3) does. It makes sure the judge does what it says: you must consider the public interest. It precisely corrects the previous tendency in which judges perhaps did err on the side of preserving the confidentiality of the information on the basis that once it was revealed it would then be lost forever. Section 12(3) precisely shifted the balance, so that now there is balance between the two. Whoever is most likely to win at trial will win at the interlocutory injunction stage. That is what Section 12 does.

**Q32 Mr Bradshaw:** Just a quick one for Professor Phillipson and Sir Stephen, if I may? Jack Straw said earlier that he thought on balance he was against an absolute requirement of prior notification, and that should be dealt with by damages. Do you agree?

**Professor Phillipson:** Yes.

**Sir Stephen Sedley:** Yes, I think I do. Perhaps I could also say that in relation to the PCC—I know this does not relate to your question, forgive me—the freedom to tell the truth is of course very important. Where the press is also free to tell untruths, as it is, there needs to be some sort of corrective mechanism. One of the problems about the PCC that has not been mentioned is that a number of the newspapers—one in particular I have had more than one run-in with—are adept at tricking out the PCC’s procedures for months and months and months. First of all they feign innocence about what they have done wrong. Then ultimately, on the eve of an adjudication, when you finally lose your patience, they say, “All right, we will correct it.” By then every reader has forgotten what it was all about in the first place. The correction, even if it was on page 1, would have no effect at all. That is another of the problems that I think you might want to bear in mind.

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**Lord Wakeham:** Can I say that I agree with that? I did everything I could when I was chairman of PCC to prevent such things from happening. However, I also remember many years ago when I was a magistrate I saw some of these sort of things happening in court cases as well.

**Sir Stephen Sedley:** I bet you did.

**Chair:** We are going to have to draw to a close. I thank our four witnesses very much for giving up so much of your time. Colleagues, we are reconvening half an hour later, at 2.30, next Monday in the Boothroyd Room, over in Portcullis House, because there are competing demands for the rooms at this end. Thank you.

Richard Walker, Editor, *Sunday Herald*, John McLellan, Editor, *The Scotsman*, Matt McKenzie, Editor, *The Sunday Sun*, Alastair Machray, Editor, *Liverpool Echo*, and Neil Fowler, Nuffield College, Oxford—Oral evidence (QQ 210–272)

**Richard Walker, Editor, *Sunday Herald*, John McLellan, Editor, *The Scotsman*, Matt McKenzie, Editor, *The Sunday Sun*, Alastair Machray, Editor, *Liverpool Echo*, and Neil Fowler, Nuffield College, Oxford—Oral evidence (QQ 210–272)**

Evidence heard in Public

Questions 210–272

MONDAY 7 NOVEMBER 2011

Members present:

Mr John Whittingdale (Chairman)  
Lord Black of Brentwood  
Lord Boateng  
Mr Ben Bradshaw  
The Lord Bishop of Chester  
Lord Dobbs  
George Eustice  
Lord Gold  
Lord Harries of Pentregarth  
Lord Hollick  
Martin Horwood  
Lord Janvrin  
Mr Elfyn Llwyd  
Lord Mawhinney  
Penny Mordaunt  
Lord Myners  
Ms Gisela Stuart  
Lord Thomas of Gresford  
Nadhim Zahawi

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### Examination of Witnesses

*Witnesses:* **Richard Walker**, Editor, *Sunday Herald*, **John McLellan**, Editor, *The Scotsman*, **Matt McKenzie**, Editor, *The Sunday Sun*, **Alastair Machray**, Editor, *Liverpool Echo*, and **Neil Fowler**, Nuffield College, Oxford.

**Chairman:** Good afternoon. This is a further session of the Joint Committee on Privacy and Injunctions. We have two sessions this afternoon, the first looking at local, regional and Scottish press and the second at broadcasters. For the first session, I welcome Alastair Machray of the *Liverpool Echo*; Richard Walker of the *Sunday Herald*; Matt McKenzie of *The Sunday Sun*; and Neil Fowler, a former editor of a large number of regional

Richard Walker, Editor, *Sunday Herald*, John McLellan, Editor, *The Scotsman*, Matt McKenzie, Editor, *The Sunday Sun*, Alastair Machray, Editor, *Liverpool Echo*, and Neil Fowler, Nuffield College, Oxford—Oral evidence (QQ 210–272) newspapers and now of Nuffield College, Oxford. We are expecting John McLellan, who is delayed on his way here but should arrive shortly. Lord Janvrin will begin.

**Q210 Lord Janvrin:** Perhaps I may ask you to set the scene for this session by explaining the kind of privacy issues that you, representing local and regional titles, have come up against and the people involved, whether they are well-known or unknown local figures? Tell us about the kind of privacy issues with which you have to deal.

**Alastair Machray:** I think it is important context that I have been in the regional press for many years, and privacy issues are few and far between. We have never been the subject of an application for an injunction with regard to privacy. Very occasionally, privacy matters that arise are dealt with effectively through the PCC. The types of privacy issues that have captured the nation's attention are based on kiss-and-tell stories, for want of a better phrase. These are not the stock in trade of the regional press for several reasons: first, they are hard to get; second, they are hard to substantiate once you get a tip; third, they are resource hungry as one tries to track down the facts; fourth, they are very expensive if you get it wrong; and, fifth, critically the readers of the regional press—I hope I am able to speak broadly for it—do not go to our papers for sensationalism or voyeurism. Our brand DNA is localness and trust in the local paper. We do very well out of reader loyalty, and that is far more important to us than the casual sale based on a big kiss-and-tell story. By the very nature of the regional press, privacy issues rarely trouble us severely.

**Richard Walker:** As to the Scottish press, the *Sunday Herald* and *The Scotsman* regard themselves as national papers in Scotland. We have fought injunctions but not very often in regard to privacy. The sorts of stories our newspapers carry are not really of a sexual nature, so we do not deal with kiss-and-tell stories. We do not really have to fight on those grounds.

**Matt McKenzie:** I echo what Alastair said about their rarity. We generally do not get them. We have had a few complaints, which I think we will get on to later, and they come in the form of complaints to the PCC. We have never been the subject of an injunction. *The Sunday Sun*, more than most regional papers might do a little more celebrity-type news, be it specifically from the north-east probably, but never kiss and tell; it is more in co-operation with the celebrities; or occasionally, if they have been before the courts, we will do stories about them, but that is an entirely separate issue. Generally speaking, they are rare and we never have long-lens photography complaints. We would not be offered those type of pictures, and would not accept them if they were offered to us. Occasionally, there is a case involving a local celebrity. There is one case, which we will get on to later, where somebody had complained against us, unsuccessfully I might add, but that does not happen very often.

**Neil Fowler:** When I was editing and we had complaints they tended to arise from people's misplaced belief that they had a right to privacy, for example in a court case or road traffic accident that we reported from information given to us by the police. Those kinds of things happen on a reasonably regular basis, especially with court cases, where people did not like the fact that the incident had been reported in the local paper. On one occasion when I was editor of a paper in Cardiff we were looking at a story about a council leader who might be going to hospital. He contacted the PCC. We debated it with him and the PCC, and did not run the story as we felt it was not the right story at the time. When those

Richard Walker, Editor, Sunday Herald, John McLellan, Editor, The Scotsman, Matt McKenzie, Editor, The Sunday Sun, Alastair Machray, Editor, Liverpool Echo, and Neil Fowler, Nuffield College, Oxford—Oral evidence (QQ 210–272)

sorts of things come up, we aim to deal with them behind the scenes to prevent any form of conflict.

**Q211 The Lord Bishop of Chester:** Given the evolving law of privacy both in the UK and Europe in the last 10 years, from your editorial seats would you feel confident that you know what is and is not private?

**Richard Walker:** I think the question would be: what is in the public interest? I think that is vague.

**Matt McKenzie:** As a matter of course, if there was any debate about it we would liaise with the PCC pre-publication. That happens quite a lot, not necessarily just on privacy issues but across the board. Nowadays, editors will think more frequently than perhaps they once did, “What would the PCC say about this?” That is not a bad rule of thumb with which to start your editorial discussions, and that is a fairly common theme throughout the industry.

**Neil Fowler:** I think most of us who work in the regions would agree but would also take a view about what our readers and public would think. You have to walk among them; you live in the patch; you know your readers; they know you; and they know where you were. Local newspaper readers are very keen to come forward. As to the whole debate about privacy, if senior executives on the newspaper felt something was a little contentious, they would debate it thoroughly beforehand. In regional newspapers you want to scrutinise what is happening in local courts, local authorities and local businesses, but at the same time you know you have to deal with those people the day after. It is not a question of one big story where a national may come in, do it and go away and not come on to your patch for months or years again. You are there the whole time. There will be a continuous debate among the senior team on what is right and wrong. As I think you will see from looking at PCC adjudications on privacy against the regional press, there have been very few cases.

**Q212 George Eustice:** I want to probe a little further the difference between regional and national newspapers. Some of the evidence we have received suggests that national newspapers have pushed the public interest defence beyond reasonable bounds in order to cover certain stories. From what you have said, do you think there is any truth in the suggestion that, because of the culture you describe, regional papers adhere more closely to the PCC code than national newspapers?

**Alastair Machray:** I go back to the point I made earlier. We are in the business of keeping our readers onside for the long term, not inflating sales through casual purchase. That makes us far more aware of the PCC code and the need to be seen to be responsible in our communities. The ability of the PCC to provide pre-publication advice has been most helpful. At the moment the regional press is going through a very difficult time. We cannot go around shattering reader confidence by publishing stories that irritate one person: he speaks to his family; they speak to their friends; and all of a sudden there are 200 people who will never buy the *Echo* again. We simply cannot afford such a cavalier approach to journalism.

**Neil Fowler:** It is important to stress that good regional and local papers do not shy away from doing a hard story when necessary, especially when it comes to scrutinising a local authority or particular court cases. There is greater awareness that, if you want to do a



Richard Walker, Editor, Sunday Herald, John McLellan, Editor, The Scotsman, Matt McKenzie, Editor, The Sunday Sun, Alastair Machray, Editor, Liverpool Echo, and Neil Fowler, Nuffield College, Oxford—Oral evidence (QQ 210–272)

kiss-and-tell story, for which most people would not turn to a regional paper anyway, in broad terms good news about local celebrities tends to sell a local newspaper; bad news probably would not do so, especially if you kept doing it. The way local and regional papers work is that they will focus on things in which they believe their readers are interested, which is important in keeping the local area under scrutiny and in check, whether it is local authorities, local MPs or whatever. Regional and local papers concentrate on that element, rather than going for something lighter. It does not mean they do not like human-interest stories; clearly they do, but they would not go for a story that involved breaching privacy in the way that perhaps the Committee feels national newspapers do.

**Matt McKenzie:** To back up what Alastair was saying, readers are quick to tell you if they think you are rubbishing the area or not showing enough confidence in the place they live. More generally, that is something we need to bear in mind. If you do lots of negative stories, be they about individuals or the place, they will be quick to tell you. Given the present state of the industry, we need to avoid alienation at all costs, so we would be ultra-responsible.

**Q213 Lord Mawhinney:** Not wanting to upset local people is a short step away from saying that, if you want protection against your local or regional newspaper, the best thing to do is take out some advertising. Is that too cynical for you?

**Neil Fowler:** Yes. I am sure there are such occasions, but most advertising managers I have worked with, of whom there have been many over the years, would say to the advertisers, “You do not buy the space for what is in the news pages but for the pairs of eyes the newspaper gives you.”

**Q214 Lord Mawhinney:** I am sure that is what they say. I can quite believe that. Is that what is said in private in the editor’s room when stories come up that pinpoint a serious businessman who is a good advertiser? I know the answer to this question in at least one respect. I am wondering whether any of that resonates with your experience.

**Matt McKenzie:** We have a columnist who will do two pages every week dealing with specific consumer complaints. He checks out countless stories, many of which are not published. It is an issue in terms of how you deal with stories that relate to a big advertiser, but I have never refused to carry one.

**Richard Walker:** These people are selling their integrity. If you are censoring the news because of advertising considerations, that becomes known and your integrity is undermined. Therefore, your ability to do the job and sell your newspaper is undermined, so it would be self-defeating.

**Alastair Machray:** Your point is well made and sensible, but, without wishing to sound holier than thou, when a story breaks about an advertiser, one’s heart sinks because one knows one has to run it and that there will be consequences, but never in my 33 years have we not run a story.

**Q215 Lord Myners:** Mr Machray, you point out the risk of alienating 200 people in the community by one poorly judged article, but is there not equally a temptation to say that

Richard Walker, Editor, Sunday Herald, John McLellan, Editor, The Scotsman, Matt McKenzie, Editor, The Sunday Sun, Alastair Machray, Editor, Liverpool Echo, and Neil Fowler, Nuffield College, Oxford—Oral evidence (QQ 210–272)

in a world of vigorous competition the occasional salacious story that goes not just to the margin but beyond it makes the newspaper a compelling read, and that judgment is often left in the hands of low-paid people with very little experience whose natural inclination will be to overwrite the story? Is the representation that you have given us altogether too honeyed a view of what actually happens in real life?

**Alastair Machray:** What happens in newsrooms? There are people who are not paid terribly well. They will not make the decision on what is published; people at our level of seniority and experience do that. I have absolute confidence that we do not publish salacious material for the very best of reasons. What will gain you 100 sales one day will cost you those same sales through people losing faith in your product. When we print stories that perhaps are a little risqué and slightly sexy, for want of a better word, we will get calls and letters saying, “That is not why I buy my *Echo*.” For the next 100 years we need them to use the phrase “my *Echo*”. It is very dangerous for us to mess with that.

**Q216 Mr Llwyd:** I suspect this question is for Mr Walker in the light of earlier responses. You mentioned that you had experiences of injunctions at the *Herald*. Could you give us some examples of stories that were not published because they were the subject of anonymised injunctions?

**Richard Walker:** In the history of the paper there have been a number of cases. We did a number of stories about agents of the British state in Northern Ireland, and they were subject to injunctions. Eventually, we managed to publish one of those. More recently, we have had a story, the details of which I cannot go into because we are still subject to an injunction. There was an attempt to make that a super-injunction, which would have meant we could not even have reported the existence of that injunction. That attempt failed, although the injunction itself is upheld. That was an academic story.

**Q217 Mr Llwyd:** From what you have just said, one takes it they are few and far between; you do not have many of them?

**Richard Walker:** We do not have many of them.

**Q218 Mr Llwyd:** You have not had any experience of the big-time footballer or superstar getting involved in extramarital activities?

**Richard Walker:** Apart from the fact that we named him.

**Q219 Mr Llwyd:** But you have not been subject to the kind of proceedings that we are seeing now.

**Richard Walker:** If we are talking about Ryan Giggs, we were not subject to that injunction because there was no such injunction in Scotland.

**Q220 Mr Llwyd:** My understanding is that in Scotland an injunction is called an interdict. Is that right?

Richard Walker, Editor, Sunday Herald, John McLellan, Editor, The Scotsman, Matt McKenzie, Editor, The Sunday Sun, Alastair Machray, Editor, Liverpool Echo, and Neil Fowler, Nuffield College, Oxford—Oral evidence (QQ 210–272)

**Richard Walker:** Yes.

**Q221 Mr Llwyd:** It is an entirely different proceeding.

**Richard Walker:** You need to have a separate proceeding to cover Scotland.

**Q222 Mr Llwyd:** How easy would it be in a case similar to that of Giggs, where there had been an injunction in the courts in England and Wales, to obtain a parallel injunction or interdict in Scotland?

**Richard Walker:** It would be easy to apply for one. Whether or not that application would be successful would be down to the judges. It would be even more difficult to extend it to forbid any mention of the interdict or injunction. As far as I know, there has not been anything approaching what you might call a super-injunction granted in Scotland.

**Q223 Mr Llwyd:** What considerations would you have in mind in deciding effectively to break an injunction made in another jurisdiction?

**Richard Walker:** We did not break it because it did not apply. In the case of Ryan Giggs, we named him because, on the Saturday, as we were putting the paper together, it became more difficult not to know his identity than to know it. It was even on the player's Wikipedia page—it was all over the internet. It seemed to us we had to point out there was an inconsistency here, and the way the injunction was being applied south of the border no longer made sense. We were able to do that because there was no such interdict or injunction in Scotland.

**Q224 Chairman:** You said that you were subject to an injunction but there was a failed attempt to make it a super-injunction. Did you therefore publish the fact of the injunction?

**Richard Walker:** We did, but not in a massive way. We published the fact that there was an attempt to apply a super-injunction in Scotland and that that attempt had failed.

**Q225 Chairman:** Did you name the person who had applied?

**Richard Walker:** No<sup>417</sup>.

**Q226 Lord Mawhinney:** Perhaps I may ask a question of the three English regional papers. I think we have heard more enthusiasm for the PCC in the last 15 minutes than one would normally expect to hear from national newspapers in a much longer period of time. Can you help us to understand why that is?

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<sup>417</sup> Note by witness: the report on the interdict hearing published by the *Sunday Herald* did name the organisation which had pursued the interdict but not the person involved who was covered by the terms of the interdict”.

Richard Walker, Editor, Sunday Herald, John McLellan, Editor, The Scotsman, Matt McKenzie, Editor, The Sunday Sun, Alastair Machray, Editor, Liverpool Echo, and Neil Fowler, Nuffield College, Oxford—Oral evidence (QQ 210–272)

**Neil Fowler:** Of course, I also represent the Welsh press.

**Lord Mawhinney:** I beg your pardon.

**Neil Fowler:** In my experience of nearly 20 years I never met a regional editor who did not see it as a matter of professional pride not to have a PCC adjudication against them. We were first in the regions to make sure that all our members of staff had the code of conduct as part of their contract. Most editors would seek to avoid going to the PCC. They would know virtually straight away if they had got something wrong and would do their best to get it sorted before it got to the PCC. If it went straight to the PCC, you would either own up and put it right or fight it because you did not want the adjudication against you.

**Q227 Lord Mawhinney:** But my question was: why is there much more enthusiasm at regional level than national level?

**Neil Fowler:** Ian Beales, who wrote the code of conduct, was a former regional editor and very well respected in the industry. I think there is more enthusiasm because we believe in it. I know that cynical politicians might find that difficult to believe, but when I was in the industry most of my colleagues believed in the editors' code of conduct, the way the PCC worked and did their best to work alongside it to make sure that, if readers did have genuine complaints, they were sorted out quickly.

**Q228 Lord Mawhinney:** Mr Machray, do you want us to believe that you pay more attention to the PCC than the national press either because you are better boys or you knew the guy who wrote it in the first place?

**Alastair Machray:** I am not going to speak for the national press but the regional press. Are we better boys? Yes, for the reasons I gave earlier. We have to co-exist with our communities and cannot do our journalism on an in-and-out, hit-and-run, special ops-type basis, like some of our colleagues in the national press, so we behave. We also think that the PCC works. If there is an issue, it is people's awareness of what the PCC can do for them. If I may give an example, I am sure all of you will remember the little boy Rhys Jones who was shot and killed in Liverpool. His parents were very anxious that we should attend the funeral but take no graveside pictures of them. They spoke to the PCC, who spoke to us. They said it was fine if we attended the funeral, but it would be an intrusion into grief if we took pictures. We said we understood and would abide by that. They did not need to go to Schillings, Carter-Ruck or someone like that to take out an injunction, which would have cost a lot of money; they were able to do that through the PCC. I am not sure people sufficiently understand that the PCC can mediate, arbitrate and offer a lot of pre-publication advice, so I would wish it to have more profile.

**Matt McKenzie:** I think the vast majority of the PCC's work goes unseen, except to the public who are involved in cases with the PCC and us. The PCC's role in arbitration, as a middle man and in discussing what pushes the boundaries and oversteps the line works very effectively. We see it at work. It works efficiently and, more to the point, is free for readers to use. They also seem to be satisfied with it. I think general satisfaction levels among readers are also quite high, but that is for the PCC to say.

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**Chairman:** We are going to come back to the PCC; we have jumped ahead a little. Perhaps I may bring in Lord Dobbs.

**Q229 Lord Dobbs:** I am interested in the changing influences upon you in recent years on editorial decision making. Quite clearly, the regional industry has suffered a lot financially and the pressures are growing. Let me deal first with the privacy code. You have all said that you rarely come across it. Have any of you ever been disinclined to publish a story because of the threat of an injunction, one which you felt for all sorts of reasons, possibly financial, you could not defend?

**Alastair Machray:** Personally, no, but hypothetically it would be an issue for us. Some years ago we were subject to a non-privacy injunction based on confidentiality. The injunction was granted to a nightclub in Liverpool over a story that we wished to publish. We went to the Court of Appeal and lost, and won ultimately in the House of Lords. Had we lost in the House of Lords our estimated costs would have been £500,000. That is what it would have cost us about eight or nine years ago. As it was, we won and the cost to us was still considerable; it was about £60,000. Eight or nine years ago we would have dug in and fought it. I think that we would be less inclined to fight now given that a few hundred thousand pounds for a local newspaper company can literally mean the difference between profitability and loss. I am convinced that Trinity Mirror would fight on points of principle in which they believed, but certainly we would be hawkish.

**Richard Walker:** We have fought on points of principle but we would certainly have to think hard about whether or not it was worth it in all cases. There would certainly be cases when we would weigh it up and think it would not be worth the money, and we would have to make an editorial judgment and in some senses also a commercial judgment.

**Matt McKenzie:** I do not think it is confined to injunctions; the threat of any action is an issue. You may have published something about which you are completely confident and are able to demonstrate it is right, but there would be a cost to fighting it through the courts. I am not saying you would not do it, but it would be a consideration across the piece, even if it was a libel case as much as an injunction. When it comes to small publishers these are very real concerns.

**Q230 Lord Dobbs:** It sounds as if you have become more reluctant to take risks in those areas not because of the development of the law but because of the increase in costs.

**Neil Fowler:** The rise of conditional fee arrangements has had a big effect on regional newspapers. If you were to fight an action against someone in the days before CFAs, or if someone was not under one, you would see a certain level of costs. Under a CFA the costs can double, or even more. CFAs have had that chilling effect. In my experience, you would look at an issue and decide whether it was worth fighting. If it was worth fighting you would do so, but if there was a 50–50 chance, you would also have to take a financial view of the matter. That is not just true of regional newspapers; I am sure it is true also of nationals.

**Q231 Lord Dobbs:** I am very impressed by the unanimity we have here. As Lord Mawhinney says, your relationship with the PCC seems to be much more positive than

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many of the nationals, but is that relationship with the PCC, and the fact you rely on and listen to it, all part of the same story? You are under pressure and often you want a way out of what would otherwise be considerable expenditure of time, money and effort in pursuing a story.

**Neil Fowler:** There is a difference between a PCC matter and a libel. My colleagues would probably say that since the summer there has been a big increase in the number of people making complaints about what has appeared in all kinds of newspapers. Most people who use the PCC realise that the turn-round time is very quick and they get satisfaction if there is a complaint. I have a friend who is pursuing a claim with the insurance ombudsman. Three years on, he is nowhere near resolution. The PCC used to have a 54-day turn-round. I do not know whether it is still that. If it is a legal matter, however, people would tend to go to solicitors first. If they did not want that expense, or perhaps appreciated that it was not a legal issue, they would go to the PCC.

**Richard Walker:** I would not underestimate the amount of time it takes to deal with PCC complaints, which is considerable, partly because we also have to do it so quickly. We do it because it is important to us to comply with the code and the ethics it imposes on us. We are happy to do that, but it takes time.

**Alastair Machray:** I would be very concerned if the Joint Committee felt we were all for one, one for all for the PCC, because it is quite cosy and suits us and something tougher would not. I want to be absolutely clear that editors hate to apologise. The PCC can make us apologise; it can determine how we apologise and where in the paper. That very public apology damages our brands and papers in the eyes of our readers and will ultimately be financially costly. Please do not get the idea that we think the PCC is just a nice option for us. I think the PCC works and has real teeth.

**Neil Fowler:** Lord Mawhinney mentioned advertising. As an editor, you are part of the local business community and you are out with them all the time, because you are the brand manager. You do not want to be seen having your peers in the industry judging you in a way that affects your professional reputation.

**Q232 Lord Mawhinney:** Do all three of you have mediators or mediating businesses to which you would first turn before expensive lawyers, or the PCC with its 54-day turn-round? In most cases you could probably sort this out by mediation very quickly. Is that part of your panoply?

**Matt McKenzie:** Is this after a complaint has been made?

**Q233 Lord Mawhinney:** Yes.

**Matt McKenzie:** Once the complaint has been made?

**Alastair Machray:** The first attempt at resolution would be between the editor and complainant. We would endeavour to have a telephone conversation and meet them, and then have a letter or email exchange, to head off a more formal complaint. That is the way it has always worked and works best.

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**Q234 Lord Harries of Pentregarth:** Can you give us one or two examples of complaints about breaches of the code of privacy that have been upheld and those that have been rejected?

**Matt McKenzie:** I am pleased to say that in my time I have not had one that has been upheld.

**Q235 Lord Harries of Pentregarth:** None at all?

**Matt McKenzie:** I can refer to two that were rejected. One was a straightforward one where a man had been in court and was convicted. It was a follow-up court case. He took issue with his address appearing in the newspaper, and that is fairly straightforward. We have a right to report it in the interests of open justice, and so on, and the PCC ruled in our favour on that one. The PCC receives quite a number of complaints from people who are shocked to see their address in the paper after they have been through the court system, or during it. They are the most straightforward ones.

Another case that we won involved a local radio presenter who had been suspended. He had been sending suggestive emails, shall we say, to a listener on air from his work computer. We published the text of those emails. Interestingly, he complained about our publishing the text of the emails, not about the story itself. He thought it was an intrusion because they were designed to be seen only by those involved. We countered that he was a prominent local figure who had referred publicly to his wife and children previously, and he had used his work email account to send the messages. The PCC agreed that the code had not been breached. They ruled: “The allegations about inappropriate behaviour in this sort of professional context could be justified in the public interest.” It was a public interest defence, and the PCC upheld it.

**Q236 Lord Harries of Pentregarth:** Does anybody else have other examples?

**Neil Fowler:** I have sketchy details. It is not a case of which I am fully aware. It involved a company in Wolverhampton that was the subject of a story by the *Wolverhampton Express & Star*. It was the subject of an injunction by a company called Green Corns, a care company looking after disturbed and abused children. It succeeded in preventing details of the proposal to open a home in a residential area from being published. I have been briefed on it by a solicitor. That is the case of *Green Corns Ltd v. Claverley Group Ltd* in 2005. In that case an injunction was used against a significant local newspaper. Those are the only details I have of that.

**Q237 Lord Gold:** To deal with mediation, the reason applicants rush to courts for injunctions is that they fear that, unless they take that course, newspapers will publish and their privacy is immediately lost and damages do not compensate. If there were some sort of mediation procedure, a code of conduct, where a claimant who knows there is likely to be publication comes to the newspaper and the PCC gets involved very fast, just to test whether or not there is some validity in the application, and the newspaper, to be a member of the PCC, were required to abide by that decision, thus avoiding the very costly procedure

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of going to court and obtaining an injunction, would such a thing work, or would newspapers bypass it by leaving the PCC?

**Alastair Machray:** I think it is open to tactical abuse. I am struggling to think of a better example, but, with the greatest respect to many of you in this room, a politician at election time may seek to get the PCC to stall for three or four days. That would be a risk. I think most editors would be against the idea of the PCC editing their newspaper for them. We should not forget that there is still the law of defamation and the ability for people to sue us if we get things wrong.

**Q238 Chairman:** To ask a quick and simple question of each of you, how many PCC complaints have been upheld while you have been editor of your respective newspapers?

**Matt McKenzie:** Do you mean across the board, not just privacy cases?

**Q239 Chairman:** Across the board, and then privacy in particular.

**Alastair Machray:** I have been an editor for 17 years and I have lost one.

**Q240 Chairman:** One complaint across the board?

**Alastair Machray:** Yes.

**Richard Walker:** I have been an editor for seven years and I do not recall losing any.

**Matt McKenzie:** I have been in place for a year. There have been some complaints but we have not lost any.

**Neil Fowler:** I was editor for 17 years and I cannot remember losing one.

**John McLellan:** During 14 years I have never had an adjudication against me.

**Chairman:** I am astonished. I have won occasionally against my local newspapers.

**Q241 Lord Harries of Pentregarth:** We have been struck by the positive relationship that you have with the PCC. To ask a slightly naughty question, do you have any advice to offer about the national scene, which is clearly a worry? What you have said about the success of your relationship with the PCC and the community and financial constraints makes a lot of sense. We can see why what applies to you does not apply elsewhere. Do you have any advice about the national scene?

**Alastair Machray:** The trouble with editors is that they have opinions, do they not?

**Q242 Lord Harries of Pentregarth:** We would like to hear them.

**Alastair Machray:** I have thought a lot about this in the last few days. I think injunctions and super-injunctions can be granted too readily. Public interest kicks in when



Richard Walker, Editor, Sunday Herald, John McLellan, Editor, The Scotsman, Matt McKenzie, Editor, The Sunday Sun, Alastair Machray, Editor, Liverpool Echo, and Neil Fowler, Nuffield College, Oxford—Oral evidence (QQ 210–272)

the person seeking the injunction is an influencer of the lives or behaviour of the general population. I think it is wrong for people like footballers and *X Factor* stars to be granted even temporary injunctions when people are rushing out to buy their records or shirts with their names on the back. That is something that could be tightened up.

**Q243 Lord Harries of Pentregarth:** The PCC seems to work well with you for the reasons you suggest, but it is often said it does not work very well in relation to national newspapers, partly because of its limited powers. Do you have any thoughts about the possibility of strengthening its powers; if so, in what way?

**Neil Fowler:** Often, the people who say that the PCC does not work with nationals have not been involved in dealing with actual PCC cases. Politicians and those outside are quite keen to say that clearly the PCC does not work. Even the Prime Minister said after the Murdoch events of the summer that the PCC did not work well. That was a case of a criminal investigation not working, not the PCC. I think most of us would agree with that.

It is important that in your investigation you look at what complainants who have had to deal with the PCC and national newspapers feel. They are the important ones. We as editors would look at what our readers and those in our community feel about how we deal with local people. That may be the case for the nationals, but hearing how complainants feel about the PCC is really important.

**John McLellan:** As a current Press Complaints Commissioner, I can testify about the extent to which national newspapers attempt to comply. They do not always get away with the things that are published. You will all be aware of the recent case involving the *Daily Telegraph* and the Liberal Democrats. That resulted in a very large adjudication having to be published in the *Daily Telegraph*, which was something they absolutely would not have wished to do. They fought that case and believed, and still believe, they were in the right. None the less, the forcing of the publication of an adjudication like that concentrates all our minds, whether we are national or regional.

**Q244 Chairman:** Given the exemplary records you have set out, do you have any objection, particularly in order to strengthen the credibility of the PCC and confidence people have in it, to that body being given powers to impose financial sanctions?

**Richard Walker:** The courts already have powers to impose sanctions.

**Q245 Chairman:** Not to fine you.

**Richard Walker:** The courts can.

**Q246 Chairman:** But not the PCC.

**Richard Walker:** No.

**Matt McKenzie:** Anything that involved fines would inevitably involve lawyers, and that would involve slowing down the process. The PCC is particularly proud, quite rightly, of

Richard Walker, Editor, Sunday Herald, John McLellan, Editor, The Scotsman, Matt McKenzie, Editor, The Sunday Sun, Alastair Machray, Editor, Liverpool Echo, and Neil Fowler, Nuffield College, Oxford—Oral evidence (QQ 210–272) being efficient, quick and free. All of that would be jeopardised if it had the power to impose fines.

**Neil Fowler:** As soon as money becomes involved, newspapers would take out insurance policies if they had an action against them. Smaller newspapers in particular would have to take out insurance policies. As Matt says, as soon as that happens, lawyers get involved and the whole process slows down, and it becomes like the ombudsman system for many other things. I have already mentioned the insurance ombudsman. Having tried to deal with the banking ombudsman system myself, that takes a long time because of the potential for fines.

**Q247 The Lord Bishop of Chester:** Is the key difference that, in the regional and local newspaper world, while there may be some competition, there is not cut-throat competition with a number of titles fighting for the same readership, whereas nationally there is, and that can perhaps drive down standards at the national level simply because of the pressure to outdo other papers in terms of sensational stories? Is that simply absent from your dynamic, as it were, compared with the national press?

**John McLellan:** Not in Scotland.

**Alastair Machray:** Not in England either. We are competing with the national papers for sales, albeit there are differences in audience. We are also increasingly competing with bloggers and twitterers, all of whom are breaking news left, right and centre; and that is before you consider media like commercial radio stations and the BBC's local networks. There are numerous reasons for us to be competitive, but our core audience expects standards of behaviour about which the nationals' core audience is less concerned.

**Richard Walker:** The competition is certainly keen in Scotland. It is probably the most competitive newspaper market in the world. We work for papers that have a certain reputation and brand, which does not include stories of the nature you are talking about. It would undermine that brand for us to indulge in that. We are under pressure to get good stories before our competitors, but not to diminish, weaken or dilute the values that surround the brand.

**Q248 Lord Black of Brentwood:** I want to go back to a point Mr Fowler raised earlier about a clause in contracts of employment in order to assess how self-regulation works in the newsroom. We have been talking a lot about the PCC. The PCC tends to get involved if something has gone wrong. First, in terms of your own journalists it would be useful to know whether the code is in all their contracts of employment. Second, how do things work in the newsroom? What discussions do you have about the code on particularly controversial stories? Perhaps more importantly, what happens when something has gone wrong and the code has been breached? It may be difficult to say given that none of you has had an adjudication upheld against you, but where, for instance, you have had to produce a correction or apology because some aspect of the code has been breached, what follow-up is there? How is the code enforced?

**Matt McKenzie:** In all of the reporters' contracts they have to abide by it, and it is part of the progression through their careers, as it were. They will be examined on it to advance from trainee reporter. They will take exams. Again, when they become senior reporters there will be regular legal and PCC refreshers. The PCC will do road shows and

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there will be focus groups asking practical, hands-on questions of how these things would be viewed by the PCC and the best way to deal with them. It is very regularly a real issue in everybody's minds, not just the senior team's.

**Alastair Machray:** That is right. As Matt says, trainees are examined upon it and cannot proceed to greater financial reward until they have answered questions on it satisfactorily. Revisions to the code are issued to all staff whenever they come out. We have a weekly meeting when all live legal and PCC issues are discussed. My company Trinity Mirror had a breach of the code at the time I was editor of the *Welsh Daily Post*. It involved an issue in Anglesey. I was required by the editorial director of Trinity Mirror to explain how it had happened and, more importantly, how I would prevent it happening again. It was taken very seriously.

**John McLellan:** One thing that must be understood is that there is a big difference between breaches of the code and adjudications against a newspaper being upheld. We have all breached the code at one point or another, but the desire not to have an adjudication against us is one factor that makes sure that when the code is breached we move swiftly to make amends.

To answer your question, when somebody breaches the code and it is in their contract of employment, ultimately it will lead to disciplinary action if there is no sign of things changing. I have relatively recent experience of putting a member of staff through a disciplinary procedure as a result of a number of inaccuracies that were themselves technical breaches of the code, but I did not have an adjudication against the paper as a result. The code is a very active part of our daily newsroom lives. Just because we do not have a formal adjudication against us does not mean it is not effective or does not operate on a regular basis.

There are day-to-day discussions, in particular about where photographs are taken, or even general scene shots, pictures taken outside schools, and so on, of which we have been aware in the past and are now absolutely off limits. Even if you are taking what we know as a snatch picture, we need to be absolutely certain beforehand that the photographers are fully aware that those pictures must be taken from a public place from where the subject of the photograph would expect to be able to be seen.

One recent case, which went to the PCC but was not upheld, involved a candidate in an election who had made some interesting comments. We went to speak to him afterwards. We took a picture of him at his doorstep. He complained that his privacy had been breached because his picture had been taken, but we were able to demonstrate that his doorstep was fully visible from the street and we had remained at all times on the right side of the public threshold. He would probably still argue that his privacy had been breached, but by the terms of the code it was not. We were very careful at all times to make sure we did not overstep the mark the courts had laid down.

**Q249 Lord Black of Brentwood:** The pattern you have described is that the code is in contracts of employment; there are follow-ups where the code has been breached; and there is ongoing training for journalists throughout their time on your newspaper. Would you say that the code has clearly raised the standards of reporting during the time it has been in operation?

**John McLellan:** I do not think there is any doubt about that. The world is now entirely different from 20 years ago. I can remember publishing a series of pictures in 1997

Richard Walker, Editor, Sunday Herald, John McLellan, Editor, The Scotsman, Matt McKenzie, Editor, The Sunday Sun, Alastair Machray, Editor, Liverpool Echo, and Neil Fowler, Nuffield College, Oxford—Oral evidence (QQ 210–272)

that would now fail the test but did not then. It was a picture of a man killing himself. It was a series of very dramatic pictures where a man killed his dog by throwing it off a bridge in the middle of Edinburgh and then jumped himself. We carried a series of pictures. That very public incident happened in the middle of town. There is no question that we could not do that now.

**Matt McKenzie:** People know to ring up editors now; people will discuss it. I cannot speak with certainty, but that probably happened less frequently 15 years ago. There are regular conversations, and occasionally you will keep something out of the paper if there is a request, say after an inquest. People's feelings would be taken into account.

**Neil Fowler:** If you get a phone call you know straight away whether or not there has been a breach. As an editor of a regional paper, if you want to defend it, the chances are that you will do the work yourself. As Richard said, there is an awful lot of work involved in defending a PCC complaint, so if you know it is wrong it is worth your while to put it right straight away. I think that attitude will be at every level in a newsroom in the regions.

**Q250 Penny Mordaunt:** You touched on how you trained journalists and how you kept them posted with updates on the editors' code. Are there particular issues that local and regional papers face in keeping their teams up to date with that information? I am thinking of things like staff turnover or more inexperienced staff. Do you have particular challenges that perhaps other media groups do not?

**Neil Fowler:** I have been out of it for a few years, but I would not have thought so. There are 60 media schools training journalists in the UK now, and the editors' code training will be an integral part of their training course anyway, so they should be coming to newspapers fully conversant with the code anyway. When they sign their contract they will see that it is also in their contract, so I would not have thought so.

**Matt McKenzie:** I think that is right.

**Q251 Ms Stuart:** Perhaps I may return quickly to the code of conduct and whether it is strong enough. The Chairman earlier raised the issue of whether the PCC should be able to impose fines. How would you feel if the PCC was given the power to award compensation to victims of invasions of privacy?

**Neil Fowler:** I suspect it would have the same effect, because once money is involved you have lawyers involved. I really cannot see any difference.

**John McLellan:** The PCC very occasionally becomes involved in financial transactions between complainants and publications. We are conscious that is always something that is likely to be up for discussion, but I agree with Neil that, as far as operation of the PCC is concerned, it would be tantamount to the same thing as a system of fines, because you would have to enter into protracted negotiations about levels of compensation before an issue was settled. A case that has just gone through involved two very similar complaints about the same thing. One complaint was upheld and the other was dismissed. The one that was dismissed was as a result of a small amount of money being paid to the complainant as compensation. The complainant was then happy for the matter to rest. The other group, which was a small local newspaper that did not have the resources to pay compensation, said it felt it had taken enough action and it was inappropriate for it to pay

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compensation. The complaint against it was upheld because the complainant decided to pursue on the basis that they had got compensation from one but not the other.

**Q252 Mr Bradshaw:** Can you tell us what the case was about?

**John McLellan:** It was to do with the publication of a photograph of a girl. Her father had died and the picture was supplied by an agency. Both newspapers thought that the agency had obtained the requisite permission from the family to publish it. Therefore, one newspaper group paid compensation; the other one did not.

**Q253 Mr Bradshaw:** Because of the upset it caused?

**John McLellan:** Yes, exactly.

**Q254 Ms Stuart:** You would not think that the PCC might be more reasonable in what kinds of fines should be imposed or compensation awarded than the courts might be?

**John McLellan:** Would you please repeat that?

**Q255 Ms Stuart:** You are saying there is no argument for the PCC to impose either fines or compensation once the courts are involved. Do you think the PCC may be more sensitive as to what the appropriate fine or compensation should be within a struggling newspaper environment than the courts?

**John McLellan:** I think it is a question of time and resources. If the PCC were dealing with a compensation set-up, then it would have to expand, because the correspondence and the legal processes would change out of all recognition, and the time taken to resolve complaints would be much longer. It is feasible for the PCC to be set up so that it mediates not only on the content of corrections but also a sum of money in compensation, but that is not the PCC and the system of self-regulation we have now. As an industry we would not welcome that, but clearly something like that is feasible.

**Q256 Lord Mawhinney:** So you are unenthusiastic about money.

**John McLellan:** We are very enthusiastic about money; we just do not have any.

**Q257 Lord Mawhinney:** And you are unenthusiastic about mediation. Therefore, where does Joe or Jane Public go if they cannot obtain mediation and get tripped up in the area of finance? Given the closeness you have to Joe and Jane Public, what do you think they ought to be saying to us in terms of all the negativity about the various issues that have been raised?

**Alastair Machray:** I think it would be well worth asking Joe and Jane Public. You might find their experience of the PCC and its interface between them and the regional media has worked very well. Just because we do not have adjudications against us does not

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mean we do not say sorry and apologise personally to members of the public we have wronged, or who feel they have been wronged. There is a real danger that we chuck the baby out with the bathwater. The PCC works really well for the regional press; but there is natural suspicion that it is not fit for purpose because of things like phone hacking. I believe—I would say this, wouldn't I?—that we have a very responsible regional press. If you ask Joe and Jane Public they would say that by and large they got what they wanted from the PCC.

**Q258 Lord Gold:** That is too late in the process. The issue arises when there is a threat of publication and someone wants to protect against breach of privacy. At the moment, the courts have defined what privacy is, so the first issue is whether Parliament should intervene to clarify the law because there is uncertainty. Second, is the definition too wide? Third, who should intervene to protect the public? At the moment, the only method of protection is to go to court, which is very expensive, so the question is whether there should be some other way of protecting the public who fear publication.

**John McLellan:** When we ask how the PCC has changed over the years, one of the important aspects of its work now is to offer pre-publication advice. More and more of its work is dealing with approaches by members of the public—at the moment probably most of them are well-known people—with an issue, and the PCC then going to the publisher and saying, “There’s a situation here. Are you sure?” I cannot think of any instances off the top of my head because I have not dealt with them, but the PCC is becoming more and more involved pre-publication than it was before. As we move into the Leveson process that will be something the PCC may well expand upon, but I think you are right.

**Q259 Lord Gold:** The risk is that the newspaper publishes immediately for fear that someone will either go to court or the PCC intervenes and says it does not think the newspaper should publish. If the newspaper does publish, right now there is nothing to sanction it.

**John McLellan:** No, but we are talking about mediation. In the vast majority of instances publication is not something that has come out of nowhere; it is the result of investigations, phone calls and conversations between lots of different people. At some point the newspaper in a free society will take a decision to publish knowing that it will upset the subject. I would hope that is something a newspaper will always be able to do.

**Q260 Lord Gold:** My simple question is this: at the moment the only way in which a member of the public can protect his or her position is to go to the court and seek injunctive relief.

**Neil Fowler:** I am afraid that is wrong. You can go to the PCC, as happened when I was editing, and as Alastair did in the case of Rhys Jones where mediation took place.

**Q261 Lord Gold:** But the newspaper could have published in the meantime.

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**Neil Fowler:** It presupposes that the newspaper wants to do something that is wrong. Most newspaper editors I know do their best to produce newspapers that are accurate and are right in all they do.

**Lord Gold:** I am sorry; I must be a bit naïve.

**Q262 Lord Dobbs:** You are suggesting that the culture that is part of the PCC's work is very widespread. You even talked about directors of Trinity Mirror taking a great interest in this. Yet the context of this inquiry is a flagrant and rampant invasion of privacy through phone hacking. Quite irrespective of the legalities of it, the culture of phone hacking and invasion of privacy is widespread at national level. You are saying that this does not impact on the regional level—that you are all whiter than white—and I am very happy to believe that. I ask you to speculate why it is we have this Alice in Wonderland situation where in your world everything is fine, but when you drop down the rabbit hole you come up against the extraordinary story that has been unfolding, and will continue to unfold, about rampant invasion of people's privacy.

**Richard Walker:** Phone hacking in our company and organisation is not rampant.

**Q263 Lord Dobbs:** I am not talking about phone hacking per se but the culture of respect for privacy.

**Richard Walker:** Even so, in our organisation there is that respect. Phone hacking is illegal and there are steps people can take to prosecute those concerned. I think it is unfair to tar everyone with the same brush.

**Q264 Lord Dobbs:** I am asking you to speculate as to why it is clearly different at a national level. I am not trying to impugn your words.

**Richard Walker:** It may be different in some national newspapers as well. You paint a picture in which every national newspaper is indulging in this. I do not think there is evidence to suggest that is accurate.

**John McLellan:** I was not working in London and I have never worked in Fleet Street. It would only be speculation on my part, but I suspect that prior to 2005 and 2006 there had built up over many years an atmosphere, especially at the popular end of the press, in which investigative journalists, private investigators, celebrity agents and policemen interacted, with money flowing through those particular veins. In one or two instances, in particular those involving private investigators, the sense of morality disappeared. Information in people became a commodity and standards of probity disappeared, but that is only speculation on my part; I have no evidence of it, but the atmosphere was very different in that world from the world that the vast majority of regional journalists inhabit.

**Richard Walker:** Inhibiting newspapers from publishing information does not necessarily mean that that information will not get into the public domain, as we have seen with super-injunctions. There are other avenues, obviously the internet, by which information like that can be spread. One thing I would have thought you would look at is why newspapers are subject to certain injunctions and the internet is not.

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**Q265 Mr Bradshaw:** Do you not even have a sense of anger or frustration that a system that you say works perfectly well for you is under threat of statutory regulation or sanctions because of the misbehaviour of some national newspapers and the failure of the PCC to do anything about it?

**Neil Fowler:** As a fellow of Nuffield College, Oxford, for a year I have been looking at the decline and future of regional newspapers. I believe this has been a huge diversion from what really matters in newspapers at present, which is the financial state of the regional and local newspaper industry. I think you should be looking at that rather than at this, because this is a massive diversion. 30 million to 35 million people have contact with a local or regional newspaper every week in the UK. The financial model has changed dramatically. The guys working at the sharp end each day are facing the real issue, which is: can their newspaper survive? Can there be a newspaper scrutinising MPs, local authorities and local courts going forward? This is a big diversion, because regional and local newspapers act in a certain way and nationals in another way. This inquiry is taking us away from what we should really be discussing.

**Richard Walker:** It was not just the failure of the PCC to investigate what happened. The PCC does not have a police force.

**John McLellan:** The frustration for me as a current commissioner and a member of the phone hacking sub-committee, which we set up at the beginning of this year—we did not know at that time just how far it would go—is that the PCC, long before the Milly Dowler allegations came to light, was undergoing a process of change and revisiting all its systems. A very long list of improvements was drawn up by an external sub-committee. The PCC had firmly grasped that it had to change and meet clear failures of perception as far as you and some members of the public were concerned. All of that has been overtaken. What was criminality and also, as Richard has just alluded to, a failure as far as the police investigation was concerned has now basically overridden a lot of the good work that the PCC was already trying to achieve to update itself and make itself fit for purpose for the future.

**Chairman:** I do not want to get too diverted into phone hacking, since that occupies quite enough of my time.

**Q266 Lord Myners:** In response to Mr Fowler, the Joint Committee will decide what issues it wants to look at. The fact that your industry is unable to compete effectively with change is one for you to address rather than us. Mr Machray, you said that the PCC works well for the regional press. My sense is that the regional press probably has a higher percentage of complaints upheld per reader than the national press. Perhaps you have evidence of that, or could help us to understand that, but when I look at PCC adjudications I see a far higher percentage relating to local and regional press than the national press. Please tell me how you can show that the PCC works for the general public. It may work for the regional press because it is pretty clawless, but how does it work for the general public? Where is the evidence rather than the assertion?

**Alastair Machray:** Getting that evidence would be fairly straightforward and it would be valuable to the Joint Committee. The PCC would be more than happy to provide a number of sample respondents who would be delighted to sit here and give you their experiences.

**John McLellan:** We do not work in a perfect world. As Neil has said, the regional press operates under lots of different stresses and pressures, and mistakes are made. I come



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back to my point about the number of complaints upheld versus the number of resolutions in which the PCC is involved. Those are two different things. The public are getting satisfaction in that the mistakes being made are corrected quickly but not necessarily via an adjudication being upheld, which is a much longer process than simply getting things fixed. That is what concentrates the minds of most members of the public: if something is wrong, it is going to be fixed, not how much money they can make out of the situation. It is about fixing things that are mistaken. It is true that 25 or 30 years ago the last thing newspapers would do would be willingly to publish apologies or corrections on a daily basis, but that has now become an industry standard and corrections are published daily. In recent months the circumstances have been pretty febrile, but the *Daily Mail* now carries a corrections panel every day on page two. Whether or not you argue that they have been forced into it, it does not matter; it is there and it was not there before.

**Q267 Chairman:** You referred earlier to the competition you are now experiencing from online distribution of news. What effect is that having on the viability of newspapers, and how serious is the problem that that is completely unregulated, whereas obviously you have to abide by the code?

**Neil Fowler:** The business model for all newspapers, which has relied on advertising subsidising it for the last 200 years, has changed dramatically. Classified advertising, which has supported most quality newspapers, not only on a national basis but for all regional papers, has gone and will not return. New models are being looked at, but they involve lower cost bases, fewer journalists and all kinds of things. It is having a dramatic effect. Over the summer four out of 93 daily newspapers turned into weeklies. The chances are that in the next year or two many more will go weekly. That is just one example.

**Q268 Lord Boateng:** In your view, is that a threat to standards?

**Neil Fowler:** It is not necessarily a threat to standards; it is a threat to having a viable news operation. Those that have turned weekly seem so far to be doing okay, but the problem is that in the present economy, where there is no sign that advertising revenue is improving, they become more aggressive on cover prices, but again that has an effect on sales. Sales continue to fall; advertising revenue is falling. Most companies have lost 40% to 45% of their revenue over the last three or four years, so it is a significant change.

**Richard Walker:** That question has two aspects, one not commercial. There is the situation where newspapers are forbidden from publishing information that is widely available through other sources. There is a commercial impact in that, because why then should people buy newspapers if they can find the news somewhere else? Is it fair for newspapers to be penalised in that way? I would have thought that would be something you should be looking at.

**Q269 Chairman:** Do you find that is having an impact?

**Richard Walker:** There is no doubt that, when it comes to injunctions and super-injunctions, information in the case of Ryan Giggs and other people was very easy to find on the internet, but newspapers were forbidden from publishing it.

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**Q270 Chairman:** I can pay for a newspaper and not find out, or go online and find out for nothing?

**Richard Walker:** Exactly.

**Matt McKenzie:** But those commercial pressures would never lead us to be tempted to breach any standards. That is very clear in our minds. In some ways it becomes an even more keen concern of ours to maintain them. I do not think the internet would affect that in any way.

**Alastair Machray:** It is not just injunctions and super-injunctions that hurt us. The old idea was that newspapers could break news—that does not happen any more. If we were in a court in Liverpool when the verdict in a huge murder trial came in and we were the only media organisation in court, once upon a time we could have held that story for our next edition, broken it and increased our sales. Now it is inconceivable that people will not come out of court—or even in court—and tweet the verdict to everyone they know and put it on Facebook. Essentially, we have to scoop ourselves by putting it on our website.

**Q271 Lord Hollick:** Do you think there is any merit in the argument advanced by some editors that the survival of newspapers is a factor to be taken into account when balancing privacy and freedom of expression? I think what they are really saying is that they should be cut a degree of slack in order to publish stories that are, shall we say, of a more salacious variety in order to sell newspapers.

**Matt McKenzie:** I do not think anybody thinks we should be cut any slack when it comes to privacy; everybody will take that as a given, and the commercial pressures on us are things we have to deal with separately. I do not think it is the case at all.

**Q272 Lord Hollick:** Do you have any sympathy with the national newspapers that take that view?

**Richard Walker:** There is no law against printing salacious stories per se. Some newspapers may choose not to do so. It is not necessarily illegal; there are issues around that, and you may take an opinion on it, but some newspapers are perfectly free to do that, if they wish.

**Chairman:** I think that is all we have for you. We need to begin the second session. Thank you very much.

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[Transcript to be found under Richard Walker, Editor, \*Sunday Herald\*](#)

## **Matt McKenzie, Editor *The Sunday Sun*—Supplementary written evidence**

Privacy issues are a rarity for the *Sunday Sun* and, from first-hand experience, for the other Trinity Mirror titles in the North East: the *Evening Chronicle* (Newcastle), *The Journal* and the *Evening Gazette* (Teesside). I think it's fair to say this applies to the regional/local press as a whole.

The *Sunday Sun* has had two privacy issues in recent years (as outlined in my oral evidence to the Joint Committee) and, on both occasions, the PCC ruled that there had not been a breach of the code.

The type of stories carried by the regional press perhaps explains why there is a scarcity of privacy complaints. We would not accept long-lens photography pictures if offered, and the majority of our coverage of celebrities follows co-operation with them.

The culture throughout Trinity Mirror newsrooms involves strict observation of the PCC code. The default position on contentious stories (or use of pictures) is to consider: "What would the PCC think?", with a decision to take pre-publication guidance if necessary. This is helped by regular road-shows staged by PCC representatives to provide updates and workshops for our editorial teams, including every key decision-maker. They include case studies with practical real-life examples of what has been a breach – or otherwise – of the Code.

Within newsrooms, there are rolling regimes to deliver training on the Code (and wider issues of media law) and to brief staff on any updates to it, with robust policies and procedures in place to deal with any breaches.

The philosophy driving our newsrooms is one that involves responsible journalism that supports, promotes and champions the communities in which we operate. We cannot afford to alienate our readers with cavalier journalism, thus observance of the PCC Code is paramount. Our commitment to transparency and accountability is further evidenced in Trinity Mirror's introduction of Corrections and Clarifications columns on p2 of each of its titles.

To be clear: our concern that we do not alienate or offend communities does not mean that we will desist from investigative, intelligent journalism that holds people to account for hypocrisy or wrongdoing. We will continue to report on these matters in the public interest. This is a big part of our commitment to the communities in which we operate. Any legislation or change in guidance that would prevent the press from this job of holding public servants et al to account would be detrimental to democracy.

Readers - and the subjects of our potential stories - will now be quick to contact our offices with an issue, where a conversation can take place with senior editorial staff pre-publication.

We will, as a matter of course, go to the subjects of our stories in advance of publication to ask for their comments, which will be included in the story.

The regional press is rarely issued with injunctions, although one threat – casually uttered by a businessman who took exception to a Sunday Sun potential story (which was at an early stage of development) – demonstrates the trickle-down effect of the injunction applications by celebrities.

It would be easy for the PCC to be cast as a scapegoat in the wake of the hacking revelations. This was law-breaking, not just a freedom of expression/right to privacy issue. The law should be upheld. It is worth noting should the PCC acquire ‘beefed-up’ powers to deal with serious breaches of its Code, that anything involving fines/compensation would consequently hamper its capacity to be quick and free when it comes to complaint resolution.

Finally, it is important to clarify: we are under no commercial pressure to be cavalier with privacy. The regional press is facing challenges due to the economic climate and the new media ecology in which the internet is a key player. This is a challenge for regional newspapers to meet – that will not be done by breaching privacy guidelines, but by re-thinking what we do and by re-engaging with our communities. Virtually every survey conducted by the industry sees readers rate trust and credibility as the traits they value most in local/regional papers, and their stated trust in the information we provide is something we guard jealously.

25 November 2011

John Witherow, Editor, *The Sunday Times*, Alan Rusbridger, Editor, *The Guardian*, Ian Hislop, Editor, *Private Eye*, and Jonathan Grun, Editor of the Press Association—Oral evidence (QQ 162–209)

**John Witherow, Editor, *The Sunday Times*, Alan Rusbridger, Editor, *The Guardian*, Ian Hislop, Editor, *Private Eye*, and Jonathan Grun, Editor of the Press Association—Oral evidence (QQ 162–209)**

[Transcript to be found under Alan Rusbridger, Editor, \*The Guardian\*](#)

## Hugh Tomlinson QC—Written evidence

### INTRODUCTION

The Joint Committee has been set up to consider privacy and injunctions. This is an extremely important topic and I welcome the committee's establishment and inquiry. Before dealing with the specific questions raised by the Committee I would like to make six introductory points.

First, the protection of privacy against invasions by both private and public bodies is a matter of pressing social concern. Nearly two decades ago, the Data Protection Act 1984 was designed to protect individual privacy in the age of data processing by computers. In 1995 the Data Protection Directive (Directive 95/46/EC) sought to regulate the processing of personal data on an EU wide basis. This Directive was subsequently made part of domestic law by the Data Protection Act 1998. The enormous growth of data processing capacity over the past two decades, coupled with the use of technologies such as CCTV and the spread of social media, with its global reach, has made the problems ever more complicated and pressing.

Second, the right to respect for private life deriving from Article 8 of the European Convention on Human Rights and now firmly embedded in the common law, recognises a fundamental importance of the protection of human autonomy and dignity. Interference with privacy involves encroachment on the autonomy and dignity of individuals – it can be deeply distressing and can seriously impede human development. Serious social harms can result from intrusion into private life. The right is, nevertheless, a “qualified one” – intrusions into privacy can be justified by reference to other rights or social needs. Individuals may consent to disclose parts of their private lives. Society may require intrusion for purposes of the investigation of crime or the protection of public health. In each case, a proper balance must be struck between the rights of the individual and the needs of society as a whole.

Thirdly, by far the most important aspect of privacy intrusion concerns the activities of public bodies which obtain and hold immense amounts of personal data about citizens. Although this is often (perhaps mostly) used for proper and social useful purposes it is also open to abuse. Individuals must be protected against such abuse – in the final resort by the Courts.

Fourth, in cases where proper privacy interests are engaged and where there is no countervailing public interest (which includes most so-called “super injunction” or anonymity order cases) then the law should provide proper and effective protection for those rights. This is, in practice, something which can only be done by injunctions (so called “non-disclosure orders”). If malign individuals seek to evade legal restrictions on publication then the law must devise remedies which work in practice.

Fifth, “privacy injunctions” play a very small and limited part in the protection of privacy. Such injunctions are granted, on average, less than once a week. Although accurate statistics are notoriously hard to come by, my own researches indicate that – putting aside orders made by the criminal and family courts - there are less than 100 such injunctions in force. I am not aware of any such injunction having been granted in the past 4 months. In almost all

cases the information covered by the injunction is not subject to any form of “public interest” – often relating to threatened publication of information about sexual encounters in circumstances where the person threatening publication is seeking payment. When faced with these situations the Courts have (quite rightly) stated that they are ‘blackmail’ cases. The substantial and self-serving media campaign against such injunctions must not serve to disguise the true position.

Six, there has been very considerable judicial attention devoted to the question of privacy injunctions over the past twelve months. A number of judicial decisions, at first instance and the Court of Appeal have clarified the law and practice. Further clarification and new procedural protections for the media have been provided by the Practice Guidance issued by the Master of the Rolls in August 2011 – which itself followed the very substantial “Report of the Committee on Super-Injunctions” in May 2011. The most pressing practical problem in this area is not the over restrictive nature of such injunctions but the problems with enforcing and policing them. I will deal with this point further in response to specific questions.

Bearing these points in mind, I will now seek to address the specific questions raised by the Committee.

## **THE COMMITTEE’S SPECIFIC QUESTIONS**

### **I. How the statutory and common law on privacy and the use of anonymity injunctions and super-injunctions has operated in practice**

- *Have anonymous injunctions and super-injunctions been used too frequently, not enough or in the wrong circumstances?*

The numbers of anonymity orders and “super-injunctions” (that is, injunctions which prevent the reporting of their own existence) is small. As with any kind of order, there will be circumstances in which it can be said, in retrospect, the order should not have been granted. However, in general, I do not think that such orders have been used too frequently or in the wrong circumstances. The fact that very few have been subject to appeals is an indication of this, particularly when one considers the strong media comments on this subject. The fact that improperly intrusive stories continue to be published could lead to an argument that injunctions have not been used frequently enough but claimants often choose not to apply for injunctions for other, non-legal reasons.

- *Are the courts making appropriate use of time limitations to injunctions and of injunctions contra mundum (i.e. injunctions which are binding on the whole world) and how are such injunctions working in practice?*

I assume that the question is directed to the point as to whether interim injunctions should have a time limit – for example, 3 or 6 months. Under the modern practice injunctions are invariably limited in time when first issued – usually for 2 or 3 days – but then on the “return date” are granted for an indefinite period. This is the result of uncertainty over the impact of final injunctions on non-parties means that interim injunctions are often left in place indefinitely. This is a practice which the media have agreed to over the years as, in most cases, they accept an injunction is appropriate but want to avoid the costs of further hearings. The problem of what to do about indefinitely continuing injunctions is something which needs to be resolved by judicial decision or legislation.



Contra Mundum injunctions have, generally, been granted in highly exception cases – where there have been threats to life and safety (for example in the *Venables and Thompson* case). In one recent case (*OPQ v BJM* [2011] EWHC 1059) Eady J granted contra mundum injunctions on the basis of Article 8 where there was no risk of physical harm. However in that case there was ‘solid medical evidence’ that publication of the information would have on the health, including the mental health of the claimant and various family members. That case concerned a “straightforward and blatant blackmail case” where the defendant had been seeking to sell previously unpublished intimate photographs of the claimant, to whom she owed a duty of confidence, and there was no legitimate public interest in its disclosure. In my view this was an appropriate and proper remedy in that case.

- *What can be done about the cost of obtaining a privacy injunction? Whilst individuals the subject of widespread and persistent media coverage often have the financial means to pursue injunctions, could a cheaper mechanism be created allowing those without similar financial resources access to the same legal protection?*

The costs of litigation are very high in all classes of case in England for complex reasons concerning the nature of the legal professions and English civil procedure. The effect of recent reforms (such as the Master of the Rolls’ Practice Direction of August 2011) is to further increase costs. If Conditional Fee Agreements are effectively abolished in privacy cases then privacy injunctions will be definitively out of reach of everyone but the very wealthy.

- *Are injunctions and appeals regarding injunctions being dealt with by the courts sufficiently quickly to minimise either (where the injunction is granted or upheld) prolonged unjustifiable distress for the individual or (where an injunction is overturned or not granted) the risk of news losing its current topical value?*

In my experience, the Courts usually deal with injunction applications and appeals regarding injunctions expeditiously. I do not think that procedural reform is needed in this area.

- *Should steps be taken to penalise newspapers which refuse to give an undertaking not to publish private information but also make no attempt to defend an application for an injunction in respect of that information, thereby wasting the court’s time?*

This is, in my experience, a common problem. The newspaper does not oppose the application but does not agree it – in order that it can run a “we have been gagged” story. A party is entitled to take such a stance in ordinary litigation but such a stance is a clear breach of a newspaper’s obligations under the PCC Editors’ Code – as it is threatening an unjustified intrusion into private life. The Courts should, perhaps, consider imposing costs penalties in cases of this kind

## **2. How best to strike the balance between privacy and freedom of expression, in particular how best to determine whether there is a public interest in material concerning people’s private and family life**

- *Have there been and are there currently any problems with the balance struck in law between freedom of expression and the right to privacy?*

In my view, there have been no substantial problems in this area. The balance is struck on a case by case basis – with the court looking at the respective strengths of the “privacy” and “expression” rights in issue. It is, of course, possible to have

different views about the way in which the balance was struck in particular cases but the overall approach is one which strikes a proper balance between the different rights in play.

- *Who should decide where the balance between freedom of expression and the right to privacy lies?*

This must, in an individual case, be decided by the Judge. Parliament could, in the context of a privacy law, give general guidance.

- *Should Parliament enact a statutory privacy law?*

In my view Parliament should enact a statutory privacy law. This would mean that

- (a) there was a full public and parliamentary debate about the issues involved and
- (b) the law, as enacted, would have the democratic legitimacy which the “judge made” law of privacy is said to lack.

- *Should Parliament prescribe the definition of ‘public interest’ in statute, or should it be left to the courts?*

If Parliament does enact a privacy law then this should contain guidance as to public interest (although not an attempt at exhaustive definition).

- *Is the current definition of ‘public interest’ inadequate or unclear?*

There is no single “definition” but the current approach to public interest – which has a considerable overlap with paragraph 1 of the PCC Editor’s Code section on “Public Interest” – is a workable and useful one.

- *Should the commercial viability of the press be a public interest consideration to be balanced against an individual’s right to privacy?*

It should not. Such a consideration would, if taken into account, provide “justification” for the most egregious invasions of privacy where no public interest of any kind was served. It might assist the commercial position of newspapers to invade privacy, as it might assist them to breach copyright or the law relating to wrongful accessing of personal data but this cannot justify the invasion of others’ rights.

- *Should it be the case that individuals waive some or all of their right to privacy when they become a celebrity? A politician? A sportsperson? Should it depend on the degree to which that individual uses their image or private life for popularity? For money? To get elected? Does the image the individual relies on have to relate to the information published in order for there to be a public interest in publishing it (a ‘hypocrisy’ argument)? If so, how directly?*

In order to “waive” a right – that is to lose the ability to enforce it – a person must make a conscious decision to do so and others must then rely on that decision. A person does not “waive” or surrender any part of their privacy by occupying a public role. They may, however, have a reduced “expectation of privacy” if, for example, they parade their family before the cameras or invite magazine photographers into their homes. The notion of “use of an image” is a difficult one as “image” is often a creation not of the individual but rather of the media. The law recognises that if a person makes false public statements for gain or for other advantage (for example, in order to persuade voters to support them at the polls) then there is a public interest in “exposing hypocrisy”. “Public figures” remain entitled to their privacy – save perhaps in the most extreme cases. If participation in public life means that, in effect,

all privacy is surrendered this would deter many people from such participation and would not be in the public interest more generally.

- *Should any or all individuals in the public eye be considered to be ‘role models’ such that their private lives may be subject to enhanced public scrutiny regardless of whether or not they make public their views on morality or personal conduct (i.e. in the absence of a ‘hypocrisy’ argument)?*

The concept of the “role model” is a difficult one which, on analysis, should have no place in the law. If a person publicly espouses particular standards which they fail to keep in their own lives then this is an example of “hypocrisy”. But there should be no place in the law of privacy for individuals being treated as “involuntary role models” – ie as requiring higher standards of private conduct simply because of the public role they occupy, rather than as a result of their own conduct.

- *Are the courts giving appropriate weight to the value of freedom of expression in ‘celebrity gossip’ and ‘tittle-tattle’?*

In my view the courts are giving appropriate weight to freedom of expression in this context. The Court of Human rights approaches freedom of expression on the basis of what is, in effect, a “scale” from “political expression” at the top end to pornography or the speech of blackmailers at the bottom end. “Gossip” is not the “lowest value” speech but it is less valuable than say, political or artistic expression. This kind of approach is adopted by the English courts and is, in my view, appropriate.

- *In the context of sexual conduct, should it be the case that a person’s conduct in private must constitute a significant breach of the criminal law before it may be disclosed and criticised in the press?*

In my view, this is the appropriate approach. A person’s sexual conduct is generally regarded as being at the “core” of private life and its public exposure requires cogent public interest justification.

- *Could different remedies (other than damages) play a role in encouraging an appropriate balance?*

Although there may be some role for “court ordered apologies” in this area the primary remedy is and will remain the injunction. Once private information is published its private nature has been destroyed. In other countries privacy protection is provided by the criminal law but in the English tradition this is not regarded as appropriate – save in extreme cases such as unauthorised access to emails or voicemails.

- *Are damages a sufficient remedy for a breach of privacy? Would punitive financial penalties be an effective remedy? Would they adequately deter disproportionate breaches of privacy?*

Damages are not usually an adequate or sufficient remedy in privacy cases. Privacy damages are low and awards do not serve as any kind of deterrent to wrongdoers. If punitive financial penalties were imposed then this would deter invasions of privacy but, in my view, injunctions are a more appropriate remedy, particularly bearing in mind the current poor financial health of the print media.

- *Should we introduce a prior notification requirement, requiring newspapers and other print media to notify an individual before information is published, thereby giving the individual time to seek an injunction if a court agrees the publication is more likely than not to be*

*found a breach of privacy? If so, how would such a requirement function in terms of written content online eg blogs and other media?*

In my view, a prior notification requirement is appropriate – subject of course to a public interest exception if notification would “tip off” a wrongdoer. This could be a regulatory requirement for the press (as it is, in effect, for broadcasters) and any online publishers who were also subject to regulation.

- *Should aggravated damages be payable if a media publisher does not give prior notification to the subject of a publication which a court finds is in breach of that individual’s privacy?*

This is already the legal position but provides very little protection for victims of privacy invasion.

- *Is section 12 of the Human Rights Act 1998 appropriately balanced? Should the media’s freedom of expression be protected in stronger terms? Or is there a disproportionate emphasis on the media’s freedom of expression over the right to privacy? Has Section 12 of the Human Rights Act 1998 ensured a more favourable press environment than would be the case if Strasbourg jurisprudence and UK injunctions jurisprudence were applied in the absence of Section 12?*

I think that section 12 is appropriately balanced. Any attempt to protect freedom of expression in strong terms would be in breach of the European Convention. Although, by its terms section 12 does give priority to freedom of expression over privacy it does serve as a useful reminder to the courts of the importance of expression interests and, as presently interpreted, it does not give freedom of expression actual “priority”.

- *Is the test in section 12 for an injunction to be granted too high a threshold? Should that test depend on the type of information about to be published? Has the court struck the right balance in applying section 12?*

I do not think that the threshold is too high. I believe that the Court has struck has the right balance.

- *Is there an anomaly requiring legislative attention between the tests for an injunction for breach of privacy and in defamation?*

There is such an anomaly which, if not resolved by the Courts, should receive legislative attention. The position in defamation actions should be brought into line with that in privacy cases.

### **3. Issues relating to the enforcement of anonymity injunctions and super-injunctions, including the internet, cross-border jurisdiction within the United Kingdom, parliamentary privilege and the rule of law**

- *How can privacy injunctions be enforced in this age of ‘new media’? Is it practical and/or desirable to prosecute ‘tweeters’ or bloggers? If so, for what kind of behaviour and how many people – where should or could those lines be drawn?*

Although complete protection can never be provided additional steps could be taken to enforce injunctions against those who deliberately breach court orders. In my view, the Attorney-General (as guardian of the rule of law) should take active steps to deal with the most blatant and inexcusable cases of breach, particularly those

where it appears that anonymous “tweeters” or “bloggers” are being used by newspapers to “get round” injunctions.

- *Is it possible, practical and/or desirable for print media to be restrained by the law when other forms of ‘new media’ will cover material subject to an injunction anyway? Does the status quo of seeking to restrict press intrusion into individual’s private lives whilst the ‘new media’ users remain unchallenged represent a good compromise?*

There remains a qualitative difference between the spread and reach of the “mainstream media” (read by millions) and that of blogs or twitter (read by hundreds or thousands). Privacy invasions resulting from front page newspaper publication (which are also published online) remain much more serious and intrusive than those resulting from publication on a blog or in a tweet.

- *Is enough being done to tackle ‘jigsaw’ identification by the press and ‘new media’ users? For example see Mr Justice King’s provisional view in *NEJ v. Wood* [2011] EWHC 1972 (QB) at [20] that information published in the Daily Mail breached the order of Mr Justice Blake, and the consideration by Mr Justice Tugendhat in *TSE and ELP v. News Group Newspapers* [2011] EWHC 1308 (QB) at [33]-[34] as to whether details about TSE published by The Sun breached the order of Mrs Justice Sharp.*

There is a problem of enforcement in such cases. Individuals are deterred from taking action against breaches by the high costs and by the risk of being subject to online hate campaigns. In my view, the Attorney-General should take steps against newspapers who flout injunctions in order to emphasise the importance of the rule of law. If newspapers do not like an injunction they should apply to vary or discharge it, they should not seek to undermine it by releasing bits of the jigsaw.

- *Are there any concerns regarding enforcement of privacy injunctions across jurisdictional borders within the UK? If so, how should those concerns be dealt with?*

There are such concerns. Once again, if the press in Scotland or Northern Ireland deliberately breaches injunctions granted by the English courts then the appropriate law officers should take action against them.

#### *Parliamentary Privilege*

- *With regard to the enforcement of privacy injunctions and the breaching of them during Parliamentary proceedings, is there a case for reforming the Parliamentary Papers Act 1840 and other aspects of Parliamentary privilege? Should this be addressed by a specific Parliamentary Privilege Bill or is it desirable for this Committee to consider privilege to the extent it is relevant to injunctions?*

I believe that there is a case for reform and statutory clarification of the position through legislation.

- *Should Parliament consider enforcing ‘proper’ use of Parliamentary Privilege through penalties for ‘abuse’?*

I believe that it should. If an MP – who often do not know the details of case – deliberately breaches an injunction by naming an individual in Parliament then there should be sanctions. The Speaker could, perhaps, forbid publication of that part of the proceedings in the press.

- *What is ‘proper’ use and what is ‘abuse’ of Parliamentary Privilege?*  
Proper use of privilege is when a member is dealing with an issue in the public interest. Criticism of judicial decisions may be appropriate but, save in the most exceptional cases, breaches of orders will not be appropriate.
- *Is it desirable to address the situation whereby a Member of either house breaches an injunction using Parliamentary Privilege using privacy law, or is that a situation best left entirely to Parliament to deal with? Indeed, is it possible to address the situation through privacy law or is that constitutionally impermissible? Could the current position in this respect be changed in any significant way? If so, how?*  
In my view, this is a matter which should be left to Parliament to deal with.

#### **4. Issues relating to media regulation in this context, including the role of the Press Complaints Commission and the Office of Communications (OFCOM)**

##### *PCC*

*Do the guidelines in section 3 of the Editors’ Code of Practice correctly address the balance between the individual’s right to privacy and press freedom of expression?*

As already mentioned, para 1 of the provision in the Editors’ Code is very similar to the law applied by the Courts.

*How effective has the PCC been in dealing with bad behaviour from the press in relation to injunctions and breaches of privacy?*

The PCC has not been effective. I do not believe that it has taken action in any case in which a newspaper has acted inappropriately in relation to an injunction. PCC action in privacy cases is rare.

*Does the PCC have sufficient powers to provide remedies for breaches of the Editors’ Code of Practice in relation to privacy complaints?*

It does not.

*Should the PCC be able to initiate its own investigations on behalf of someone whose privacy may have been infringed by something published in a newspaper or magazine in the UK?*

I do not believe that the PCC should continue in its press form. A regulator of the press or media should have that power.

*Should the PCC have the power to consider the balance between an individual’s privacy and freedom of expression prior to the publication of material – or should this power remain with the Courts?*

This is a matter which a regulator can and should consider and on which it can and should give guidance. However, in the final analysis the decision on these matters must be made by an independent and impartial judicial body.

*Is there sufficient awareness in the general public of the powers and responsibilities of the PCC in the context of privacy and injunctions?*

The PCC has no powers in relation to injunctions. Its powers in relation to privacy are very limited.

##### *OFCOM*

*Do the guidelines in Section 8 of the Ofcom Broadcasting Code correctly address the balance between the individual's right to privacy and freedom of expression?*

In my view, these guidelines are extremely helpful.

*How effective has Ofcom been in dealing with breaches of the Ofcom Broadcasting Code in relation to breaches of privacy?*

I do not have enough experience of dealing with Ofcom to express a view on this point.

*Is there a case that the rules on infringement of privacy should be applied equally across all media content?*

In my view, rules similar to those applied by Ofcom should be applied across all media content. There are, however, very considerable practical difficulties with this course. I favour a voluntary "Media Regulation Tribunal" - a court which applies a specific media code and regulates the media.

6 October 2011

**Hugh Tomlinson QC, Schillings, and Carter Ruck Solicitors—Oral evidence (QQ 65–118)**

Evidence heard in Public

Questions 65–118

MONDAY, 24 OCTOBER 2011

Members present:

Mr John Whittingdale (Chairman)  
Lord Black of Brentwood  
Lord Boateng  
Mr Ben Bradshaw  
The Lord Bishop of Chester  
Lord Dobbs  
Paul Farrelly  
Lord Gold  
Lord Harries of Pentregarth  
Lord Hollick  
Lord Janvrin  
Eric Joyce  
Yasmin Qureshi  
Ms Gisela Stuart  
Lord Thomas of Gresford

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**Examination of Witnesses**

*Witnesses:* **Hugh Tomlinson QC**, Matrix Chambers, **Gideon Benaim**, Schillings, and **Alasdair Pepper**, Carter-Ruck.

**Q65 Chairman:** We now move to our second session, which is essentially to take the views of those acting for applicants. I welcome Hugh Tomlinson QC from Matrix Chambers, and Gideon Benaim and Alasdair Pepper respectively from Schillings and Carter-Ruck. Perhaps I may start with the same question I put to the previous panel. Is there a problem here, or is the law working reasonably well?

**Hugh Tomlinson:** The law is working reasonably well; there is no practical problem.

**Q66 Chairman:** So, we can all pack up and go home?



**Hugh Tomlinson:** Most of the issues talked about by the previous panel are abstract issues that in practice do not arise. In practice, the public interest arises in one case in 10. A very high proportion involve blackmail and very rarely anybody who plays any role in public life. If I may say this of the previous panel, distinguished though they are, their practical experience of recent privacy injunctions is quite limited. I have been involved in about 20 over the past 12 months, and I think I can say with some confidence that the judges give them very careful consideration. In most cases the newspapers concede them. In my experience Gillian Phillips' newspaper has never been subject to a privacy injunction, but those which are subject to it almost always concede it because they know there is no public interest involved and the information is private.

**Q67 Chairman:** The evidence we have just heard is that the number is drying up. 20 cases in the last 12 months does not suggest drying up.

**Hugh Tomlinson:** The last one listed before the courts was in June of this year. To my knowledge, there has not been one since June. Why that is I do not know, but I think it is in part due to the fact that, post certain significant events affecting newspapers in July of this year, they have been very careful. There is also an ongoing problem that newspapers in the first half of this year hit on a way of frustrating the will of the courts by using social media, and as a result claimants have become even more concerned than they were before to use the court processes. But that is an enforcement rather than practical issue about how injunctions work.

**Q68 Chairman:** Do you agree there is not a problem?

**Alasdair Pepper:** I largely agree that there is not a real problem at present. The problem of injunctions, or confidential or private information leaking out, is a significant issue from the point of view of claimants because when they are deciding whether or not to seek an injunction there are two things that are certain: if you apply and fail, you make matters hugely worse for yourself than if you do not apply at all and let the story go out. If you apply, succeed and then the information comes out, there is also a very significant risk that you will make matters hugely worse for yourself than if you do not apply at all and let the story come out. That may be a factor in why there have been fewer injunctions in the last six months.

**Gideon Benaim:** I agree with what both Hugh and Alasdair have said. I would only add that the most important remedy for claimants is injunctive relief because no amount of damages after the event can ever make the information private again. That is why it is fundamentally important that we have practical interim protection.

**Q69 Chairman:** But your experience is that there is enough business for you respectively to pay the mortgage?

**Gideon Benaim:** As far as we are aware, there have been no injunctions since about June.

**Q70 Paul Farrelly:** We have just talked about injunctions. I want to touch on super-injunctions. Hugh Tomlinson may want to answer this first. Is it the case that, following *Trafigura* and some of the fierce questioning of privacy injunctions and then the report of the Master of the Rolls, there has been a sea change, to the extent that some of the lawyers represented here might have been limiting themselves in terms of what they were asking judges for, perhaps recognising that they were probably not giving advice in their clients' best interests, particularly when the intention was to suppress rather than generate publicity?

**Hugh Tomlinson:** I am not quite sure what the question is.

**Q71 Paul Farrelly:** It was a long one.

**Hugh Tomlinson:** The position is that no so-called super-injunctions have been granted since August of last year. I got the last one in August of last year. Why people got those injunctions is because the press play games by leaking things in part and engaging in jigsaw identification. There were a number of examples where the press got round the injunctions by letting out little pieces of information. That was the most practical and effective way of protecting privacy. However, there are countervailing considerations of open justice, and it is important for the public to know what is going on; and it is partly important for the public to realise that what is going on is that wicked politicians and public figures are not hiding terrible things behind injunctions. They are really rather low-level personal privacy issues in the greater scheme of things.

There have been procedural changes in the way the courts have approached things over the past year or so. In general, those have been driven by media pressure, and I am afraid that by and large they have been driven by an attempt to cause trouble. The media knew about every super-injunction because they were always served on them, and the media never challenged one. The only case in which a media injunction was challenged in the Court of Appeal—this is not an advertisement break—just happened to be one of mine. We challenged a super-injunction in the Court of Appeal in a case called *Ntuli v Donald*. The media had those injunctions served on them for a number of years and had done nothing about it, for the reason that none of them related to anything of the remotest public interest. But for the media it made a good story to complain. A very interesting example of media hypocrisy in this area is that these hearings were traditionally conducted in private. For the first time in a case last May the judge said to me, “With a bit of discretion, we could conduct the whole case in public with the press present, being careful to protect the private information.” Obviously, that serves the interests of open justice. You may or may not be surprised to know that the media did not report that hearing at all, because their interest in open justice was simply an interest in undermining the whole injunction process.

**Q72 Paul Farrelly:** Mr Pepper, did you understand the question?

**Alasdair Pepper:** I am not sure.

**Q73 Paul Farrelly:** Shall I repeat it?

**Alasdair Pepper:** If you wish to repeat it, yes.

**Q74 Paul Farrelly:** Since Trafigura—you are my favourite firm from my time in journalism and my decade here—has the furore over super-injunctions and the Master of Rolls’ report had an effect on solicitors’ behaviour and firms such as yours, in that you do not seek to get even more bells and whistles?

**Alasdair Pepper:** With the Master of the Rolls’ report there is now a prescribed procedure that is required to be followed and provides significantly greater protection now for a claimant seeking an injunction prior to having obtained it. This is via a mechanism whereby you send out a standard form letter that is required to be signed—if it is a media outlet, they will have a lawyer—and that turns into an undertaking to the court not to use any information provided under the letter for any purpose other than the court procedure. The whole landscape has changed, with the proviso that we still have the problem that, if an injunction is granted, there is material danger of means being found to get round it.

**Q75 Paul Farrelly:** Mr Pepper and Mr Benaim, do you feel that those changes are to the good and that the intense discussion we have had, be it a furore or for whatever motive, has had a positive outcome?

**Gideon Benaim:** I think that largely the changes are welcome, and it will take time for us to work out exactly what issues arise. I think we should be given that time to identify potential problem areas. But the fundamental thing is that once an injunction has been granted, steps should be taken to protect the individuals who have the injunction and steps taken against those who attempt to flout it. I think that is an area where the Committee can help.

**Hugh Tomlinson:** Perhaps I may deal with Mr Farrelly’s “bells and whistles” point, which he also put to the last set of witnesses. We do not go around adding things to injunctions just to entertain ourselves or because we have word processors. The reason injunctions have become more complicated is because of attempts made by the media to get round them. Some years ago you had a quite straightforward order, and then someone would say, “Ah, it doesn’t cover this, so we can do this.” So, next time you try to cover that. Again, the media would try to get round it in some other way. That is why the most recent injunctions have become very complicated indeed. Nobody thinks that is a sensible idea, but it has been produced by practical circumstances, not through any attempt to increase costs or complexity.

**Q76 Lord Hollick:** I think it is generally agreed—indeed, Carter-Ruck have said in their evidence—that the cost is very high and that means justice is available really only to the very wealthy. Mr Tomlinson, you commented earlier that everything was working well, but, surely, that is a real problem because 99% of the population do not have access to justice in this matter.

**Hugh Tomlinson:** I think my colleagues earlier addressed this to some extent. The position is that injunction applications in privacy cases are no more expensive than injunction applications in any case. It is a feature of English civil procedure that these kinds of injunctions are expensive. All injunction applications are relatively expensive. Therefore, they are available only to those who are wealthy, have public funding or have the benefit of conditional fee agreements.

It is quite unusual for people with either public funding or conditional fee agreements to bring injunctive applications only because it is quite unusual for the press to want to write about it. As Gavin Millar mentioned—I have done similar cases myself—the kind of people you tend to get who want to bring privacy injunctions and who are not celebrities are prisoners and people who have been involved in crime. Those cases do happen, and I have done them myself. Reference was made earlier by Lord Boateng, I think, to the vast middle for whom the legal system is very difficult; unless you are very wealthy or poor, access to justice is difficult everywhere. Those people in general are not people whose privacy is invaded by the press.

**Q77 Chairman:** Can you give an idea of what obtaining an injunction costs? You probably heard the response by the previous panel about the sort of sum you would need to obtain an injunction.

**Alasdair Pepper:** It is a difficult question because so much depends on what happens. The most simple is, say, a blackmail case. A lot of sex cases have been talked about. Maybe it involves a partner and somebody being blackmailed in relation to information about that relationship. If the injunction is just against that individual, there is probably a 50:50 chance whether they even respond to it at all or turn up for any hearing. The actual cost may be £5,000 to £10,000, depending on how simple the thing is and the profile of the claimant. As soon as you get into an environment where you have contested applications and the case goes forward, you are talking of hundreds of thousands of pounds.

To answer your question about whether there is access to justice to obtain a privacy injunction, the answer is no, except for the very wealthy and possibly those on legal aid. For everybody in the middle, they will not get a conditional fee agreement because of the problems alluded to before. In addition, a cat-and-mouse game can go on right up to the door of the court with the newspaper refusing to accept the injunction and, at the final minute, giving an undertaking not to publish, but you do not get any costs because you are not going to take the thing into the hearing and obtain costs.

The other problem is that usually when these injunctions are granted the costs are not awarded to either party; they are reserved for the trial, so again there is a problem there with recoverability and the business model for CFAs. CFAs are hopeless in practical terms for injunctions. They are available for a privacy action as they are for most other areas of law. My firm run privacy cases under CFAs through to trial and all the normal principles apply.

**Q78 Chairman:** Are you suggesting that in the case of those seeking injunctions CFAs really are not an option?

**Alasdair Pepper:** They do not work. The answer, insofar as there is one, is in judicial case management—doing everything you can to simplify the procedure, to reduce the number of hearings by dealing with matters when you can on paper, by telephone and so forth, but obtaining an injunction will always be expensive.

**Q79 Chairman:** I remember Max Mosley saying to us that even when he was successful in his privacy action and costs and damages were awarded, he was still out of pocket at the end of it. Would you say that is true in some cases?

**Alasdair Pepper:** That is true unless you are being represented under a CFA. The normal CFA model is that the solicitors and counsel will accept the success fee, in terms of the shortfall in cost that you normally charge to your client and the costs recovered, and so will leave the client with 100% of the damages.

**Q80 Mr Bradshaw:** Could you explain that more clearly for those of us who are not experts in this?

**Alasdair Pepper:** If you have a private fee-paying client, the normal principles are that you recover about 70% to 80% of your full costs. The solicitor will charge his client, say, £100 but only £70 to £80 will be recovered, hence Max Mosley was out of pocket for a large sum of money because, although the damages were high for a privacy case, they were still pretty low in terms of cost. If a solicitor is on a CFA with a success fee and it is taken to trial, the success fee is likely to be 100%. That does not mean 100% of the full cost to the client, but it will be 100% of the reduced fee, that is the 70% to 80%, so he may recover of the order of 150% of his normal client fee. In those circumstances most solicitors will not look to the client to pay anything more or take anything out of the damages.

**Q81 Yasmin Qureshi:** You probably heard my earlier question about whether the judicial process is causing judicial censorship. Earlier I touched on the fact that we had received written and oral evidence about whether judges were applying the balance between Articles 8 and 10 properly. Do you think there is or is not censorship by judicial process?

**Hugh Tomlinson:** There is censorship in the sense that judges prevent things from being published that would otherwise be published, but it is censorship in the public interest, in exactly the same way that every day the criminal and family courts make orders preventing the publication of sensitive information of various categories. In one sense that is censorship but it is done for a proper purpose.

**Q82 Yasmin Qureshi:** I think that in ordinary layman's terminology when you talk about censorship you are not talking of the strict legal definition but the general feeling that the state is trying to impose censorship. Would you say that is not a problem as such?

**Hugh Tomlinson:** "Censorship" is an emotive word.

**Q83 Lord Thomas of Gresford:** It is inappropriate.

**Hugh Tomlinson:** Yes. The position is that there is prior restraint. I heard the earlier evidence. There is what has been called a US fetish against prior restraint in most cases, but that is not the Strasbourg approach or the English approach. In certain cases we take the view that it is appropriate to stop things being published if the public interest balance is right. In granting privacy injunctions, judges stop things being published. There

are arguments about individual cases, but the judges take care to balance Articles 8 and 10 in each case.

**Gideon Benaim:** It would be wrong to think that the public are being prevented from hearing matters of serious public concern. It is simply not so; it is at the lower end; it is tittle-tattle about sexual relationships, medical details of celebrities and so on.

**Hugh Tomlinson:** It is very indicative that when specific examples were asked for, none could be produced, for the reason that there are not any. There are not injunctions involving politicians and the suppression of information about corruption. For anything of that sort no injunction would be granted.

**Q84 Lord Dobbs:** We heard earlier about Fred Goodwin. Has the law moved on since then? Would Fred Goodwin today still get his injunction?

**Hugh Tomlinson:** That is one of my cases and I cannot talk about the details.

**Q85 Lord Dobbs:** I do not want the details.

**Hugh Tomlinson:** The law has not moved on at all. It is quite a recent case. If you read the public judgment, the judge dissects each of the public interest arguments, most of which failed very badly the “laugh out loud” test. As soon as they were formulated in court people laughed because they were so ridiculous. Three of them are set out in the judgment, and if you study that case you see what they are.

**Q86 Lord Thomas of Gresford:** It is quite inappropriate to talk about censorship, is it not, because one side is asserting a right to privacy; the other side is asserting a right to freedom of expression; and the judge carries out a balancing exercise between those rights.

**Hugh Tomlinson:** Yes.

**Q87 Lord Thomas of Gresford:** He is not acting as a censor you have to go to in order to have something passed; he is carrying out his function. I think it is a very misleading and emotive word to use in this context.

**Hugh Tomlinson:** Yes.

**Q88 Lord Black of Brentwood:** Perhaps I may go back to the chilling effect of all this. Mr Tomlinson, earlier you made the point that newspapers seldom now bother to contest these things and they concede a lot of the injunctions. Could that possibly be not because they think the judgment is right but that they simply cannot afford to take the case any further? The commercial viability point was touched on by the speech of the Lord Chief Justice last week. The commercial viability of a lot of newspapers is under very serious threat at the moment. If they had two or three cases brought against them that went wrong, that could be enough to put some publications under. Therefore, what we may be seeing here are newspapers simply being unable to challenge these injunctive proceedings.

**Hugh Tomlinson:** That would be a plausible abstract theory were it not for the case that the newspapers turn up represented by solicitor and leading counsel to indicate that they do not oppose.

**Q89 Lord Black of Brentwood:** Because they know what is going to follow.

**Hugh Tomlinson:** No. They have been criticised by judges on a number of occasions for wasting court time and costs. They turn up to say they do not oppose the injunction. They have already spent the money on instructing their lawyers to turn up to say they do not oppose.

**Q90 Lord Black of Brentwood:** But the case might continue and at some point go to a full trial.

**Hugh Tomlinson:** But the reason they do not oppose is that there are no good grounds for opposing. There are now public judgments, as people have pointed out. The judges explain what has happened and the detail and there is the absence of any public interest.

**Gideon Benaim:** It is an interesting question, but the reality is that in 99% of cases the newspapers are wealthier than the individuals who are trying to protect their privacy, so that also needs to be taken into account.

**Q91 Lord Black of Brentwood:** Let me press the point about commercial viability because it was raised in some of the written material you kindly gave us. The question is whether the commercial viability of the press should be a public interest consideration. We heard reference to some of the very early judgments after the Human Rights Act was passed. Lord Woolf in the *Flitcroft* case made the point that, unless newspapers published material people wanted to read, those newspapers might cease to exist and press freedom is diminished as a result. In his speech last week the Lord Chief Justice returned to that point: that if we want a free press, we must have a commercially viable press, which means people have to read things in which they are interested. Do I take it you do not agree with that?

**Alasdair Pepper:** If I may go back to your previous question, I want to deal with insurance. Claimants frequently obtain insurance for costs in all sorts of actions, including privacy actions, and newspapers are no exception. Many of them have existing insurance coverage anyway; if they do not, they can go out to the market like anybody else and obtain insurance, if they have a good case.

**Q92 Lord Black of Brentwood:** Which is not cheap either.

**Alasdair Pepper:** The premiums are payable at the end of the action. If you win the action, they are usually payable by the other side. If you are being sued in a confidence case by a claimant who has money, say a wealthy celebrity, and you take out an insurance premium, you expect the celebrity to be able to pay that premium if you win at the end of the action.

**Q93 Lord Black of Brentwood:** Can you answer the broader point?

**Gideon Benaim:** To answer your question, we certainly believe that a free and independent press is really important in our society, but we do not think that the financial viability of the press ought to be a consideration when deciding whether or not to allow the misuse of someone else’s private information. Newspapers would be more commercially viable if they did not have to pay corporation tax, but no one is suggesting that. Therefore, a carve-out for privacy is not suitable in our view.

**Lord Black of Brentwood:** Some newspapers in this country do not pay corporation tax, but that is another point.

**Q94 Mr Bradshaw:** Do you have any sympathy for the point Gavin Millar made earlier about celebrities who make money out of their public image and so have a lesser right to keep their sexual infidelities secret?

**Hugh Tomlinson:** It is a point I have heard many times in court. There are very few cases in which celebrities make money out of promoting their images. Tiger Woods may be an example of someone who had a clean-cut false image and made money out of it, but for 99% of celebrities that does not happen. If you think of the typical premiership footballer, he does not make money out of promoting clean-cut images. Indeed, there is a famous exchange with a representative of Nike, or one of the big sponsorship bodies. Effectively, it was said that if you thought a footballer was behaving badly and getting into all kinds of situations with attractive young women, it would increase and not reduce his commercial value.

One of the incorrect analyses the media often try to foist on the public in relation to this is that there is a unified category of “the celebrity”. There is a whole host of people in very different positions. Some people make money out of their image; others make money out of appearing on a football pitch or in films and have no desire to foist any image of any kind. Some people sell their wedding photographs to *Hello!* magazine; some people take great steps to stop that magazine coming anywhere near them. You have to look at it on a case-by-case basis.

**Q95 Mr Bradshaw:** What about the politician who is married, uses a photograph of his wife and children on his election literature, has a terrible voting record on gay equality and uses rent boys?

**Hugh Tomlinson:** There is absolutely no question that if such a politician applied for a privacy injunction that application would fail. There is absolutely no question of an injunction being obtained in that situation for public interest reasons.

**Gideon Benaim:** The courts conduct the balancing act in every exercise, and the extent to which a person has held himself up as a role model and put his own private life into the public domain, and the extent to which others have put that person’s private life into the public domain, is all in the balancing act conducted by the judge each time there is a injunction application, so it is taken into account.



**Alasdair Pepper:** If you look at the recent Ferdinand decision you will see exactly how the issues were considered and balanced, and in that case he lost.

**Q96 Lord Dobbs:** Given that I am one who does not believe we are very good at making legal definitions of things like privacy and would much prefer to find a non-legislative way ahead, I think all three of you in your submissions talked about the PCC being ineffective or toothless and not having enough powers. If we were to ask you to dream up a PCC that had effective powers to get the right balance, what teeth would they need?

**Hugh Tomlinson:** One of the written questions sent to me was why I thought the Ofcom privacy code had practical problems applying to the media. It is a very fundamental problem. At the moment, if a body broadcasts television programmes and breaches the terms of the code, ultimately it can have its licence taken away. That is how it works in the broadcasting sphere. Can we do that in respect of the press? Can we say ultimately to a newspaper that does not obey the rules of a regulatory body, “We are going to take away your licence and you can no longer print your newspaper”? That seems to me to be an extraordinarily draconian step.

But what is the alternative? If newspapers have to join the body then, like *Private Eye* or the *Express*, they can simply refuse to join. How do you regulate them? That is the basic regulatory problem. For any body to have teeth it would seem to me to involve requiring newspapers in advance not to publish things that were in breach of privacy and compensation and fines. If it is a voluntary body, the newspapers that did not like it would leave.

**Q97 Lord Dobbs:** Therefore, you do not see any role for a PCC in regulatory terms?

**Hugh Tomlinson:** I do not see any role. You could give the PCC teeth tomorrow, but what would that mean for newspapers that did not like its adjudications?

**Q98 Lord Dobbs:** Would not a judge take into account, if a case ended up in court, that the newspaper had deliberately avoided the PCC? Would that not tend to make life more difficult for it in that case?

**Hugh Tomlinson:** I favour a complex system, perhaps a too complex one, involving a voluntary tribunal but with rather strong powers and incentives. It would be a rather complicated system that I think might work. Judges could take into account a failure to play the game in regulation. Like my earlier colleagues and, I suspect, all of us here, I believe that litigation is a very crude instrument and is an absolutely last resort. No sensible person would want a system whereby ultimately you had to sort out how the press behaved by going to court. It is costly, slow and bad for everybody. An effective regulator would be a much better system. How you produce that effective regulator is, I think, a very difficult and complex exercise.

**Gideon Benaim:** I am also not sure how it would help with interim injunctive relief. In terms of privacy, I am not sure how a PCC or regulator could help.

**Hugh Tomlinson:** You would have to have a regulator that could say to a newspaper, “Don’t publish.”

**Q99 Lord Dobbs:** When he was here last week, Lord Wakeham gave evidence that when he was chairman of the PCC he frequently called up newspapers and said, “Don’t do this. I think it’s wrong”, and they complied. It is a slightly grey area.

**Hugh Tomlinson:** I read that evidence with interest. The position in my day, certainly when Lord Wakeham was chairman, was that if you asked the PCC to do anything in advance, unless your client was a member of the royal family they would say, “Sorry; we can’t take any action.”

**Q100 Lord Gold:** To some extent you have taken me into this area. I accept entirely that one requires some agreement with the press, from what I put to the previous witnesses, but I query whether, if you had some sort of mediation pre-action, you might be able to reduce the costs somewhat. The reason for having a lawyer is to balance what will be the power of the newspaper, which will have access to great legal expertise, but the saving of cost would arise from avoiding all the preparatory work in terms of statements and things. What I envisage is an informal arrangement where effectively the press agree—I recognise that is a big question—that it will not publish for, say, a week and in that week, with the help of lawyers on both sides, there is a discussion; the evaluative mediator will know the law and have it at his or her fingertips; and at the end it may be that an agreed position is reached where some publication takes place but the prospective claimant is satisfied that he has protected himself to some extent. If it all falls down there is then nothing to stop an application being made to the court, and the judge can take a view as to whether the press has acted reasonably and may have power to award very substantial damages if the judge considers that the press has acted unreasonably. This is all very crude. I am not putting forward something in final form, but we have the problem that people do not have access to justice and I wonder whether this is a way of helping that class of person.

**Alasdair Pepper:** The first problem with it is advance notification of the publication of the private information.

**Q101 Lord Gold:** Although the Master of the Rolls requires advance notice now.

**Alasdair Pepper:** No; that is when seeking an injunction. If we take Max Mosley as an example, he had no advance notification of that and therefore no opportunity to do anything about it. Unless there is some obligation on the press to notify people prior to the publication—

**Q102 Lord Gold:** I am not saying that. I am addressing the case where the claimant wants to stop something being published and then follows the procedure I am talking about. In the example of the Mosley case, if the press chooses to publish, it runs the risk of a libel action. I think that is a different circumstance.

**Alasdair Pepper:** As to the Mosley case, you now see this in the libel arena with the Reynolds test of responsible journalism. Because of the way that is framed, there is an onus

and now a standard practice on the part of newspapers to inform subjects of criticism what they propose to say and give them an opportunity to comment and then publish that comment. If they do that, the likelihood is they will have a good defence under the Reynolds principles.

If something similar was imported into the privacy arena then, if the newspapers failed to give advance notification without good reason, I for one believe they ought to suffer increased damages, either exemplary damages or aggravated damages, so it was not worth their while and they would have good reason to give advance notification of anything they proposed to publish. Then the sort of procedure you are talking about may well be one that could have huge benefits.

**Gideon Benaim:** The irony of the current situation is that a newspaper does not have to give advance notification of an article it intends to publish about someone's private life, but an individual needs to give advance notification to a newspaper that he or she intends to apply for an injunction.

**Hugh Tomlinson:** I think your idea is an attractive one, in the sense of anything that can be done to resolve these matters cheaply and sensibly without incurring huge legal costs. If the newspapers would co-operate with a mediation system for privacy, it would be worth exploring. One practical difficulty I envisage is that newspapers are afraid of two things: the claimant injunctioning them and their rivals finding out. If it is a particularly sexy or big story usually they do not want to wait a week, because they think someone else will get it or it will leak out of mediation and then they will be stymied.

**Gideon Benaim:** We have had a situation where one newspaper group has asked a judge to throw the other newspaper group out of the court so they cannot hear the private information about our clients.

**Q103 Paul Farrelly:** Hugh, this is another one for you as the shop steward on the panel.

**Hugh Tomlinson:** An honourable position.

**Q104 Paul Farrelly:** You are doing it very well. I have nodded so far rather than try to trample your rather rosy garden where newspapers rarely contest injunctions and they are not worried about costs because they turn up with their legal teams to agree with you and cave in. Are you saying that in privacy the situation is rather different from confidentiality, particularly commercial confidentiality, in which I am well aware of cases, such as *Trafigura* and *Barclays* with its tax affairs, where newspapers have vigorously contested interim injunctions and costs are a very big issue.

**Hugh Tomlinson:** As you probably know, I acted for *The Guardian* in the *Barclays* case, so I am very well aware of what happened. In relation to *Trafigura*, *The Guardian* did not contest the case but agreed to the injunction on the first occasion. It contested the anonymity but not the super-injunction part of it, as far as I understand it, and on the second occasion it consented to the injunction going over.

**Q105 Paul Farrelly:** It went back to court on the very day when, coincidentally, my question was published, which meant that the issue resumed.

**Hugh Tomlinson:** There are of course occasions on which newspapers do contest it. Those with longer memories will remember the great contest over *Spycatcher*. A huge constitutional issue was fought out by many newspapers entirely in the public interest. That took many years and involved the courts of many countries. That does happen. But confidentiality is a bit different, because usually in such cases the information is of some importance, which is why someone wants to publish it. Usually, in private cases it is what Baroness Hale of Richmond famously referred to as vapid tittle-tattle. It is usually about sex, and very often there is an element of blackmail. That is why in the end newspapers tend not to contest the cases.

**Q106 Lord Janvrin:** Mention was made of *Spycatcher*. I think someone said that the impact of social media is an enforcement rather than legal issue, which is probably the case. What about in five years' time? What do you see as the longer term impact of social media on the injunction process?

**Gideon Benaim:** I think it is important to discourage disobedience, so I think action should be taken against individual journalists who leak stories and against the individuals who originally leaked the information online. I think that holding people to account is the best way to ensure that disobedience is held to a minimum. One must look at the injunction system. The courts are required to give practical protection. If the current system is not sufficient to give practical protection, we cannot bury our heads in the sand; we need to adapt it.

**Hugh Tomlinson:** This is a worldwide problem. It is very interesting that in the United States, where there is no prior restraint and effectively very little restraint on what the press publishes about criminal trials, there is now huge concern about jurors using social media to find out about defendants in criminal cases. There are very complex jury directions that now have to be given. As to exactly how you do it going forward, I suspect that in 30 or 40 years' time there will be a system whereby the internet can be regulated in a way that satisfies everybody. As is now becoming the position in relation to copyright, for example, what happens in the interim is that for a time there will be unregulated chaos.

**Gideon Benaim:** I think a couple of practical things can be done straight away. When we serve an injunction on the media they internally distribute it. They say they need to distribute it so people do not breach the injunction, but I think that restricting it internally only to those who are absolutely necessary—maybe the senior editors and legal department—and keeping a list of the individuals who have been told will limit the pool of information, because you should have no doubt that the leaks originate from people who have received notice of the injunctions. The original information is given by journalists or other employees of those organisations; it may be to friends and it leaks out online. If you limit who knows about it, it is more likely that you can hold them accountable.

**Q107 Chairman:** Have you advised your clients to take action against Twitter posters or bloggers?

**Gideon Benaim:** It is perfectly possible to take action against Twitter. It is not suing Twitter but asking it to disclose the identity of a number of individuals who may or may not have been the first to leak the particular information, but I cannot talk of specific cases.

**Q108 Chairman:** But there is at least one Twitter stream, which I think is called Super-injunction, to which I subscribe, with a whole host of revelations, some of which may be true and some of which may not. If one of your clients popped up there, would you say that they should desist?

**Gideon Benaim:** It depends on the facts of that particular case and whether or not the client wished to pursue it and the risks involved, but you can take action to find out the identity of the individuals who are behind the Twitter account or other postings online. There may be jurisdictional issues, but they can be overcome in general.

**Q109 Lord Hollick:** I had thought at this point Twitter would not comply.

**Gideon Benaim:** That is not the case. They have terms and conditions, and they will comply with valid court orders.

**Q110 Chairman:** But it may not always be the case that they know who has posted it.

**Gideon Benaim:** It may well be that it will not disclose the end user, the specific person, but it will give you some information that may enable you to investigate further.

**Q111 The Lord Bishop of Chester:** Given that the purpose of the European Convention on Human Rights, as I understand it, is to protect and enhance the lives of ordinary citizens—not just the stars we usually talk about—who could not afford to employ you for injunction purposes, should I or my family feel more protected by the case law that has emerged in the last 10 years; or by some statutory statement of the public interest and so on which would bring out what the law of privacy means, not just on the back of the crude instrument of litigation to which reference is made? Would a law of privacy in some form safeguard the ordinary citizen because they would know where they were in areas where they did not have access to experts like you?

**Alasdair Pepper:** The law as it has developed gives far greater protection to the average person today. Going back, there was no law of privacy, so at least now there is a law. If that privacy is infringed through the publication of information in a newspaper or on a television station, action at law and elsewhere can be taken and, subject to the CFA system surviving in some form or other, there are means to afford or have access to lawyers to bring those cases. Historically there was no law to protect privacy. Newspapers know that the law is there and they are used to working within the constraints imposed on them by and large, unless they believe there is a particular reason to stray into private information. On the whole, as Gill from *The Guardian* said, it is not really a huge issue from their point of view. That is the case for most of the media.

**Hugh Tomlinson:** You have to distinguish two things. One is the law of privacy and the other is privacy injunctions. Privacy injunctions are an expensive, unwieldy and difficult set of procedures that should be used only in extreme cases where the newspaper decides to publish something that is arguably private. The law of private information protects everybody, in the sense that newspaper lawyers like Gill and those employed by the tabloids will advise their editors that something is private, there is no public interest justification and it should not be published. To some extent that will protect the ordinary citizen.

As to whether there would be enhanced protection by having a privacy statute, I am personally in favour of that, as you will have seen from my written evidence to the Committee. Lord Thomas of Gresford made the point in the previous session. It seems to me that it is proper and democratic that the Houses of Parliament should debate what the law should be. It may look fairly similar to the way the law looks now, although I think Gavin was right to say that there is a margin for difference with the Strasbourg position, if Parliament thought that was appropriate. But it seems to me that would mean everybody knew that privacy was protected by statute and it had democratic legitimacy, and that would be a positive move forward. I noted that in his evidence last week, Sir Stephen Sedley disagreed with that, but I think he is wrong and you can formulate a law of privacy with sufficient certainty.

**Q112 Lord Thomas of Gresford:** As you say, the law of privacy has developed over the last 10 years by judge-made law. There is a strong body of opinion that they have the balance wrong—that there is a presumption of privacy and that freedom of expression is used as a defence to breaching privacy. From what you say, you would agree that Parliament now should step back, have an informed debate about it and come to a democratic conclusion as to whether the law is in the right place at the moment.

**Hugh Tomlinson:** I entirely agree with that. It is right to say, however, that the United Kingdom is constrained by its international treaty obligations. It is not just the convention but also the so-called UN covenant in rather similar terms, which effectively puts privacy and freedom of expression as rights of equal value. The US is the only country in the world that regards them as not being of equal value. The common law countries Canada, Australia and New Zealand take a rather similar approach, but in different ways, to that of England under the convention. There has to be a balance. Exactly how that is struck is a matter on which I think Parliament could express guidance.

**Q113 Lord Thomas of Gresford:** International obligations would obviously inform the debate.

**Hugh Tomlinson:** Yes.

**Lord Thomas of Gresford:** Any legislation that followed would take those international obligations into account; in other words, we would be discussing the flexibility that may exist between the bald terms of the European Convention and what we could do to improve the law of privacy as it stands.

**Q114 Lord Hollick:** Given those international conventions, is there really much scope for defining privacy substantially differently from the way it has been defined effectively by the courts?

**Hugh Tomlinson:** I agree with Gavin Millar. You could not have an exhaustive definition, but, for example, as is being suggested in relation to the defence of responsible journalism in clause 2 of the draft Defamation Bill, you could have a non-exhaustive list of factors. You could say the court should pay particular regard to certain things and put them in a way that did not slavishly follow Strasbourg and emphasised different areas that Parliament regarded as important. I do not think Strasbourg would have difficulty with that. As long as the national law sensibly addresses the issue, Strasbourg is not, contrary to what some people say, in the business of micro-managing.

**Q115 Eric Joyce:** There may be a simple technical answer to this. During these proceedings both Alasdair and Hugh have used the term “blackmail”. One thing that has been mentioned to me a few times is that sometimes in the courts lawyers use that term; indeed, a High Court judge mentioned it in the Ryan Giggs case. To a lay person like me, if there is an accusation of blackmail that is a criminal matter for the police, yet these things do not seem to progress that far. How is it that the term “blackmail” is used in obvious cases where an injunction is granted but the police do not become involved?

**Hugh Tomlinson:** I have had one case in the past 12 months where the term “blackmail” was used and the police were informed. There was an injunction and the perpetrator was arrested and subsequently sent to prison. In many cases where that word is used, not every case, what has happened is blackmail in the criminal sense. I say to my clients, “Do you want to report this to the police?” and they say of the blackmailer, “What they have done is wrong, but I did have a relationship with them for 10 years and I don’t want them to go to prison.” In the end, they get an injunction, the matter has been dealt with and they decide not to take it any further. That is the practicality of the position.

Last year I had two cases where the blackmailer had made tapes for the purpose of blackmail and then demanded sums of between £1 million and £2 million for the purchase of those tapes. In both cases we got injunctions. Those are the clearest cases of blackmail you can imagine. In both cases my client decided not to go to the police because of personal sensitivities.

**Q116 Chairman:** You referred earlier to jigsaw identification. It appears that in some instance the press have almost been trying to put up two fingers at the courts. Is that a serious problem and, if so, what should be done about it?

**Hugh Tomlinson:** It has been a problem. In a case in which Gideon and I were involved last year called DFT the judge made an order, the idea of which was to get round the problem by limiting what the press could report. You could report only this so no more pieces of information were permitted; in other words, to try to cut the blackmailing. I think it worked in that case but in subsequent cases the press tried to get round those orders. We reached an absurd position. I had one case, the details of which I cannot go into, where the order had a schedule that said, “These are the things the press can say. They can say the claimant is a Premiership footballer and that he is married, and this, this and this. The press cannot say for which team the claimant plays, how many children he has, how many goals he has scored,” and so on. That was to try to cut down jigsaw identification. It is a situation

into which people are driven by the fact that, whenever you have an injunction, the press try to get round it, so I think it is a practical problem.

**Q117 Chairman:** In the case of the well-known super-injunctions, there have been cases where the press suddenly produce a picture of a very famous footballer, who is a happily married man, getting out of his car. There is no obvious reason for the picture to appear in the paper other than to identify him.

**Hugh Tomlinson:** Yes. I had a case involving a footballer and a mobile telephone. They started publishing random pictures of the footballer with his mobile telephone and little humorous captions underneath designed to tip people off.

**Gideon Benaim:** There should be no doubt that they are creating an environment in which disobedience can occur. That should be discouraged. Whatever protection we have in future, it needs to be practical and to be enforced.

**Hugh Tomlinson:** I think the single practical effective measure in a particularly bad case would be if the Attorney General, whose job it is to enforce the rule of law, made an application to commit for contempt. There have been two or three very bad cases where the newspapers have gone over the line in identification and the Attorney General, for whatever reason, has not intervened. It is difficult for a private individual, in terms of both cost and public exposure, and I think that if the Attorney General did intervene in just one or two cases it would remind people that they must obey the rules.

**Q118 Lord Dobbs:** Would you write to us about the two or three cases that you have in mind?

**Hugh Tomlinson:** I can tell you of one case because it is in the public domain. There is a judgment of Mr Justice Tugendhat in the Goodwin case where the *Daily Mail*, having appeared the day before and sought and failed to have the injunction varied, then ran what looked like to us the very same information in an article it had failed to have put into the public domain. We sought a reference to the Attorney General by the judge. The judge said that he would not refer it but the Attorney General could take whatever steps he regarded as appropriate. There is a public judgment about that issue.

**Chairman:** I think that is all the questions we have. Thank you very much indeed.



The Rt Hon. Lord Wakeham, The Rt Hon. Jack Straw MP, The Rt Hon. Sir Stephen Sedley, and Professor Gavin Phillipson—Oral evidence (QQ 1–32)

**The Rt Hon. Lord Wakeham, The Rt Hon. Jack Straw MP, The Rt Hon. Sir Stephen Sedley, and Professor Gavin Phillipson—Oral evidence (QQ 1–32)**

[Transcript to be found under The Rt Hon. Jack Straw MP](#)

## **The Rt Hon. the Lord Wakeham DL—Written evidence**

When I appeared before the Joint Committee with Jack Straw, I promised you some thoughts on how self regulation might be developed to take account of Parliamentary and public concern about phone hacking, and also to deal – if possible – with the issue of injunctions and super-injunctions which caused such difficulties in the summer. While that issue may have receded for the moment, I am sure it will return because Section 12 of the Human Rights Act is not operating properly, and we ought to take advantage of this opportunity to make sure it will be easier to deal with when it does.

I start from the approach I set out in the Committee, namely that we should avoid legislation. It would be fiendishly difficult – both in terms of drafting a Bill and of the politics – to put statutory controls in place; and, in any case, I really do not believe they are necessary if the press moves to strengthen self regulation.

Looking to the future, I have been very struck by the approach David Hunt has taken in differentiating the issues of “complaints” and “compliance”. I touched on this – as did Jack – when we gave evidence.

Personally, I have never believed there to be a significant problem with the PCC’s complaints handling mechanisms. They are very good at resolving most complaints without cost, speedily and apparently to the satisfaction of the significant majority of complainants.

This of course is what the Press Complaints Commission – and the clue is in the name! – was set up to do on the advice of Calcutt. But over the years, it has added on functions that are of a more regulatory nature without its structures or remit being amended accordingly. Most of this has happened in the last few years, culminating in the disastrous report on phone hacking. I also suspect that the PCC’s Governance Review – with which I was not impressed – tried to remodel it as a regulatory quango, far removed from its original mission or its powers or expertise.

I think the first thing that has to happen is to separate out and renew the basic complaints handling function. This is after all what matters most to ordinary members of the public and is also probably of most importance to the industry, particularly in the regional press. The bulk of the complaints of course relate largely to accuracy.

Personally, I think all this could be vested in an “Ombudsman” figure who would obviously need a trained complaints handling staff, but would not need a Commission the size it is now, or the complex bureaucracy that has grown up around the PCC. The Ombudsman and his staff could deal with most straightforward complaints and resolve them: but where an adjudication was needed on a point of principle this could be taken by a team with up to four additional assessors, mostly lay people but with some expert industry input.

That would preserve and enhance the best of the PCC – speedy and cost-free conciliation from a body that is independent but draws on the expertise of the press as it needs to.

Because such a body would not be burdened by excessive bureaucracy and would be small enough to be able to take very speedy decisions, I think it would be a perfect first port of

call for those seeking to take out an injunction on a privacy matter. The Courts could I hope be persuaded to ask applicants for an injunction whether they had (a) taken advice from the Ombudsman on whether a story was likely to breach the privacy sections of the Code and (b) if so, whether the Ombudsman believed it was an issue which could be dealt with through his pre-publication service.

Changes would have to be made to the Code to require editors to provide the Ombudsman with information in advance of publication where the issues were of such a serious nature that the Court was involved in considering injunctive relief, but that shouldn't be difficult.

I think that this would give effect to the original intention of Section 12 of the Human Rights Act, as amplified by Jack Straw in the House, that self regulation and the application of the privacy Code should be the norm, and interlocutory injunctions kept extremely rare. Of course there would still be some cases where the Ombudsman did not feel it appropriate to act; in which case an applicant can return to the Judge to explain that his or her remedies have been exhausted elsewhere. The Judge would then have the benefit of the Ombudsman's advice on the matter.

Some will consider that this still leaves two substantive problems: how to establish a "standards" regime which can deal with issues or complaints of such a serious nature that it is not appropriate for the Ombudsman's service to deal with them; and how to ensure full industry compliance with the system from the point of view of funding and indeed support for the Code.

On the former, there are in fact very few occasions when I think such an investigation would be required. If you consider recent years, and leaving the obvious issue of hacking to one side, we are looking at the McCanns, the so-called "City Slickers" affair back in 2001, the issues that arose after the death of Diana in 1997, problems with witness payments in the West trial in 1995 and perhaps a few other events. I do not believe there is need for a permanent body or whether the Ombudsman could be responsible for establishing one where a major issue arises, or where he judges a complaint to be so serious that it requires a substantial standards investigation, or where patterns of complaints give rise to concerns about internal management or indeed even an individual reporter. The publisher could pay on a "polluter pays" principle.

On the issue of industry compliance, I think this is the trickiest area. To some extent, it has always been a problem but in a much less acute manner: there are a handful of very small local or magazine publishers outside the system, and the PCC has been able to deal with those. It's Northern and Shell's size which has produced the real danger. For myself, I can't understand why such a large group should wish to remain outside the system, when the benefits are so clear and the dangers of statutory control so obvious. I think the industry needs to look quickly at various incentives, and when Northern and Shell is back in – which I'm optimistic about – produce binding agreements to keep it there.

I hope these thoughts are of some use. Please let me know if you would like me to expand on them in any way.

I am sending a copy of this letter to Jack Straw.

21 November 2011

Richard Wilson, Paul Staines, Jamie East, and David Allen Green—Oral evidence (QQ 326–403)

**Richard Wilson, Paul Staines, Jamie East, and David Allen Green—  
Oral evidence (QQ 326–403)**

[Transcript to be found under Paul Staines](#)

## **Richard Wilson—Supplementary written evidence**

Thankyou for your invitation to submit written evidence elaborating on my recent comments to the Committee about the Trafigura “super-injunction” case. I am very grateful to Calum Carr (<http://calumcarr.blogspot.com/>) for his assistance in preparing this information.

On October 12<sup>th</sup> 2009 I responded to a news report that the Guardian newspaper had been gagged from reporting a Parliamentary Question, by locating the relevant information and posting it to the social media website Twitter.  
(<http://www.guardian.co.uk/media/2009/oct/13/trafigura-tweets-freedom-of-speech>)

The Parliamentary Question referred to a secret injunction secured by Trafigura, an Anglo-Dutch oil trader, preventing any mention of the “Minton Report” - an internal company document relating to the illegal dumping of a large amount of toxic waste in the Ivory Coast in 2006.

I was quickly struck by the contrast between the way that the story was reported in the UK and the coverage it was getting elsewhere in the world – notably the United States, the Netherlands, and Norway.

### **“Prior restraint” and the Norwegian media**

Even while the Trafigura injunction was still in force, the Norwegian national broadcaster NRK defied the UK court order and published the Minton Report online, together with the full text of the injunction, copies of the correspondence it had received from Trafigura's lawyers, and a detailed English commentary.  
(<http://www.nrk.no/programmer/tv/brennpunkt/1.6816347>).

They were able to do this because a test case in Norway's Supreme Court had found in 2007 that a prior restraint injunction violated Article 10 of the European Convention on Human Rights. “Legal rules in Norway do not stop us from publishing information in the same way you do in Britain”, NRK's Synnøve Bakke later explained.  
(<http://www.journalism.co.uk/news-features/trafigura-and-the-minton-report--super-injunction-was-lifted-after-the-horse-had-bolted/s5/a536178/>)

NRK's report was widely circulated among UK social media users, who found themselves turning to the foreign media in order to understand what was happening in their own country. Others were able to read the Minton Report on the whistleblowing website Wikileaks, which had published the document several weeks before.

### **“Reputation management”**

It seems clear that the injunction obtained by Trafigura was part of a much larger “reputation management” strategy. It also seems clear that this strategy has been significantly more successful in Britain than elsewhere in the world.

Since 2009, I have continued to monitor the reporting of the Trafigura case, looking in particular at the elements of the story that would, on the face of it, appear to be of

considerable interest to the UK media, but which have gone largely or wholly unreported here.

Three issues in particular stand out:

1. The Dutch media have aired detailed allegations that a major London law firm, acting on behalf of Trafigura, offered bribes to witnesses in a civil case being brought in the UK courts against the company over the toxic dumping incident. Despite the gravity of these allegations, they have not been reported in the mainstream UK media. Only one outlet – the magazine *Private Eye* – has made any mention of them. One journalist has told me explicitly that they want to run this story but dare not for fear of the legal repercussions.

2. Media outlets outside the UK have consistently reported that the 2006 toxic waste incident caused at least 15 deaths. In contrast, many UK media articles about the case have made no mention of this central allegation. In one instance, Trafigura successfully sued the BBC for libel over the allegation, and in others it was able to secure a retraction. No legal action has been taken against media outside the UK who have reported on the alleged deaths.

3. Trafigura is currently under investigation by the Dutch authorities over an alleged bribe of 466,000 Euros made by Trafigura from its UK bank account to Jamaica's ruling People's National Party (PNP). The Dutch investigation has been widely reported in Jamaica. Yet despite the fact that the allegedly corrupt payments originated in the UK, our media have not covered it.

### **Alleged bribery of eyewitnesses by Trafigura and MacFarlanes**

In May 2010, the Dutch media published detailed allegations of corruption relating to Trafigura and a major London law firm, MacFarlanes. In a series of interviews aired by NOVA TV, a number of the drivers involved in dumping the waste alleged that they had been offered bribes by MacFarlanes to give false testimony to the UK courts in a civil case against Trafigura over the dumping incident (<http://vimeo.com/16874069>).

According to Radio Netherlands Worldwide:

*The drivers who dumped the waste now say they were approached by Trafigura's lawyers and asked to sign false statements. They were persuaded to lie about the nature of the waste and to deny they had suffered health problems.*

*“There are some sentences in the declaration that are not true, they are lies,” says one of the drivers who was approached by Trafigura.*

*The drivers say they each received 650 euros in exchange for signing the false statements. They were told that the statements would be used in the London court case Trafigura was fighting against the Ivorian victims...*

*The drivers say they were approached a second time by Trafigura, this time to sign a statement that they had never received money from the company. They claim to have received 2,300 euros each for the second statement.*

<http://www.rnw.nl/english/article/trafigura-accused-bribing-witnesses>

Trafigura and MacFarlanes deny these allegations, saying that such behaviour would have been “grossly unethical” and “would have constituted serious professional misconduct by MacFarlanes”. (<http://www.scribd.com/doc/31503180/Verweer-Trafigura>)

Nonetheless, given the nature of the allegations, and the fact those making them were prepared to do so on camera, it is striking that – other than one piece in Private Eye - the mainstream UK media has made no mention of them.

To the best of my knowledge, Trafigura and MacFarlanes have taken no action against any of the Dutch media that have reported the story.

### **Death toll from the 2006 toxic waste incident**

“I was supposed to do an interview on British radio the day that the court in Abidjan had come to a decision and had sent two people to jail. I was told that I should in no way mention Trafigura because of possible libel claims.” - Marietta Harjono, Greenpeace, May 2009

(<http://www.guardian.co.uk/environment/2009/may/13/trafigura-pr-campaign-pollution-ivory-coast>)

In May 2009, Trafigura issued libel proceedings against the BBC over a Newsnight feature which alleged that the 2006 incident had led to a number of deaths and serious injuries. In early December 2009, the programme, and its accompanying article, disappeared from the BBC’s website without explanation (although it reappeared on the website Youtube soon afterwards).

On December 17<sup>th</sup>, the BBC announced that it had agreed to withdraw its allegations about the Probo Koala incident, pay damages, and broadcast a public apology. Some reports suggested that fighting the case could have cost the BBC up to £3 million had it come to court. (<http://www.englishpen.org/aboutenglishpen/campaigns/reformingthelibellaws/bbc-and-trafigura/>)

Commenting on the settlement, Trafigura noted that the BBC had ‘stated that Trafigura’s actions had caused a number of deaths, miscarriages and serious and long-term injuries in Abidjan in what Newsnight claimed “may be the biggest incident of its kind since....Bhopal.”’. Trafigura described these as “grave, yet wholly false allegations”, over which it had “no alternative but to commence libel proceedings”

([http://www.trafigura.com/pdf/2009.12.17\\_TrafiguraStatement.pdf](http://www.trafigura.com/pdf/2009.12.17_TrafiguraStatement.pdf))

Yet Trafigura appears to have taken no legal action over a November 2009 New York Times article which described the Probo Koala incident as “one of the worst toxic dumping scandals in years”, which had “become notorious as a kind of African Bhopal”, and claimed that “About 108,000 people sought treatment for nausea, headaches, vomiting and abdominal pains, and at least 15 died”.

(<http://www.nytimes.com/2009/11/05/world/africa/05trafigura.html>).

On February 22<sup>nd</sup> 2010, the Independent newspaper published an apology and ‘correction’ for its September 2009 article, “Toxic shame: Thousands injured in African city”

<http://www.independent.co.uk/news/world/africa/trafigura-no-link-identified-between-toxic-dumping-incident-and-serious-injuries-1904830.html>

On April 30<sup>th</sup> 2010, the Times issued a 'correction' over a March 26<sup>th</sup> article which had referred to allegations that the Probo Koala incident had led to 17 deaths. The correction stated that "the dumping was not carried out by Trafigura... but by an independent local contractor without Trafigura's authority or knowledge. Furthermore, in September 2009 lawyers for Ivorians who were suing Trafigura over injuries allegedly caused by the dumping acknowledged that at worst the waste could only have caused flu-like symptoms".

<http://www.timesonline.co.uk/tol/news/world/africa/article7111946.ece>

To the best of my knowledge, Trafigura has taken no action against any media outlet outside of the UK that have made similar allegations. Trafigura continues to deny that its waste caused any deaths.

### **Alleged bribery of Jamaica's ruling party**

According to the Jamaica Gleaner newspaper, Trafigura is currently under investigation by the Dutch authorities over an alleged bribe of 466,000 Euros made in 2006 by Trafigura from its UK bank account to Jamaica's ruling People's National Party (PNP). While some of these allegations have previously been reported in the Guardian, to my knowledge the current investigation has not been mentioned anywhere in the UK media.

The Gleaner reports that a senior politician, Bruce Golding, who was until recently Jamaica's Prime Minister, has made a formal complaint to the Dutch authorities asking them to investigate whether this payment amounted to a criminal offence in the Netherlands.

According to the Gleaner:

*Golding also told Dutch authorities that on August 23 [2006], Charles Dauphin, president of Trafigura, arrived in Jamaica and met with government ministers... He said no public announcement of these meetings was made to the people of Jamaica... He stated that in early September 2006, between September 6 and 12, prior to the PNP's annual conference, Trafigura transferred €466,000 or more than J\$31 million from its account in the United Kingdom to an account in Jamaica known as CCOC Association...*

*The address provided by CCOC Association is c/o Portmore Gas, Bridgeport, St Catherine ... . One of the signatories on this account is Senator Colin Campbell, general secretary of the PNP and a minister of government having portfolio responsibility for information and development."*

*The document stated that shortly after the funds were received into the account, two cheques totalling \$30 million were issued payable to SW Services (Team Jamaica), both bearing Campbell's signatures.*

*Golding noted that on Thursday, October, 2006, the chairman of the PNP, Robert Pickersgill, confirmed payment of the funds by Trafigura and described it as an unsolicited donation to the PNP for its upcoming political campaign.*

<http://jamaica-gleaner.com/gleaner/20111113/lead/lead4.html> )



Greenpeace International reports that: “Trafigura is thought to have bribed a Jamaican politician with the apparent aim of extending an oil contract of Nigerian oil.”  
(<http://www.greenpeace.org/africa/en/News/news/Trafigura-new-corruption-charges/>)

Trafigura insist that the money was a political donation and that they have done nothing untoward.

### **Conclusion**

Trafigura's “reputation management” strategy has not prevented the above information from being read, and shared, in the UK. But it has inhibited the ability of our domestic media to debate these very serious issues openly and robustly, and left the British public reliant on the foreign press to inform them of the full facts behind a major public interest story. The Trafigura case highlights a worrying gulf between our own media laws and those of the United States and our European neighbours, and raises serious questions about the state of freedom of expression in the UK.

7 December 2011

## Withers LLP—Written evidence

### INTRODUCTION

#### Withers' expertise

We in the Withers Reputation Management team specialise in privacy, defamation and media law. Given our experience in these areas, we believe that we are well-placed to respond to the Call for Evidence from the Joint Committee on Privacy and Injunctions.

Withers' Reputation Management team acts predominantly for claimants including high net worth individuals, philanthropists, entrepreneurs, members of parliament, sports people, celebrities, companies, charities and not-for-profit organisations. We are recognised for our privacy, defamation and media work in the principal legal directories where the team's partners, Jennifer McDermott and Amber Melville-Brown, are commended as leading media law practitioners. During their careers, they have advised and represented clients across the claimant/defendant divide on the gamut of privacy, media, reputation and related matters.

Jennifer, for example, is the Chair of the Executive Board of the all party human rights organisation, JUSTICE. She currently gives privacy and reputation management advice to their Excellencies Sir David Barclay and Sir Frederick Barclay, their family and companies as well as to many other high net worth private clients of Withers. She has previously advised newspapers on high profile media matters, for example *The Guardian* and *The Observer* in the *Spycatcher* confidentiality saga.

Amber is a well-respected lawyer, author and teacher in all fields of media law. She advises and represents clients from many disciplines in media and reputation management matters. It would not be appropriate to name those of Amber's clients who seek privacy advice, but they cover the breadth of the firm's clients including private individuals involved in family matters, public figures in all walks of life from politicians to pop stars, charities and companies.

Both Jennifer and Amber regularly speak at conferences on media related matters and are commentators on topical issues for the media. Amber is one of the longest standing special columnists for *The Law Society Gazette* as its media columnist and is a visiting lecturer on media law at the LSE.

Our response is not intended as a detailed reply to each question posed by the Joint Committee, but an outline statement of the firm's position on the four main questions posed.

#### **B RESPONSE**

##### **Q1. How the statutory and common law on privacy and the use of anonymity injunctions and super-injunctions has operated in practice.**

The impression one gains from reading media commentary on the subject of privacy injunctions – particularly in the run up to and during the hiatus concerning the 'footballer injunction' leading to 'Twittergate' – is that they are handed out by judges as if they were sweets from a sweet shop. This is not true in our experience.

This perception, or assertion, is for the main part probably due to a misdescription by the media – whether intentionally to serve its own ends, or otherwise – that all privacy injunctions, or at least all anonymised injunctions, are ‘super-injunctions’ i.e. obtained in a secret court process and whose very existence must be kept permanently secret under pain of contempt. In fact, the true position as set out in the Report of Lord Neuberger’s Committee on Super-Injunctions is “*Since the Terry case, as far as the Committee is aware, only two known super-injunctions have been granted to protect information said to be private or confidential... applicants now rarely apply for such orders and it is even rarer for them to be granted on anything other than an anti-tipping-off, short-term basis*”.<sup>418</sup>

The other misconception given by the media is that the privacy law which has developed in this country has arrived ‘through the back door’ and accordingly that the UK is constrained by some sort of secret justice by virtue of super-injunctions which was never intended by Parliament. In fact, privacy law has come into our law very obviously through the front door, as explained by Eady J in his judgment in *CTB v News Group Newspapers*.<sup>419</sup> When the Human Rights Act 1998 was placed before Parliament in 1997 the then Lord Chancellor, Lord Irvine, expressly stated that any privacy law subsequently developed by the judges would require them to balance Articles 8 (privacy) and 10 (freedom of expression) and that the law would be better as a result. The principles of the law of privacy, including applications for injunctive relief, were clearly expounded in section 12 of the Human Rights Act 1998 and in the European Convention on Human Rights itself. Its subsequent development, for example in the House of Lords decisions in *Campbell v MGN Ltd*<sup>420</sup> and *Re S (A Child)*<sup>421</sup>, was exactly as intended by Parliament and not by the back door.

In the courts of England and Wales we start with the principle of open justice. But there are nonetheless exceptional circumstances when it is in the interests of justice for that principle to accede to a private hearing and even in some cases a private judgment. An application for injunctive relief to protect one’s right to respect for privacy would usually be self-defeating unless anonymised.

In order to make an application for a privacy injunction, the applicant must first show that there is an imminent risk of publication of the private material in question. This does not equate to a vague fear that an element of the media might at some point in the future publish something private. Evidence of an imminent threat of a specific privacy-invading publication will be required by the court.

It should be noted here that this is a high hurdle which many applicants fail to overcome, often because they are not notified in advance of the proposed publication. A mere whiff of it may not be enough to convince the court and the media are not obliged to notify the subject of an article prior to publication of private and/or confidential information or material.

That puts the potential privacy claimant at a distinct disadvantage because they cannot defend themselves against an attack which they do not know is about to happen. The libel claimant on the other hand, is in a different position. Although the

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<sup>418</sup> p.(iv) <http://www.judiciary.gov.uk/Resources/JCO/Documents/Reports/super-injunction-report-20052011.pdf>

<sup>419</sup> <http://www.bailii.org/ew/cases/EWHC/QB/2011/1232.html>

<sup>420</sup> <http://www.bailii.org/uk/cases/UKHL/2004/22.html>

<sup>421</sup> <http://www.bailii.org/uk/cases/UKHL/2004/47.html>

media is not obliged to notify him of a proposed story which may contain defamatory imputations, the media will usually so notify him if they wish to be seen to act 'responsibly' for the purposes of a potential public interest privilege defence. The relatively minor damages awarded in privacy actions mean national newspapers often opt to publish a privacy-invading article without notification and face any financial consequences knowing they have, however, boosted their sales.

Max Mosley, the former president of the Federation Internationale de l'Automobile, sought in his application to the European Court of Human Rights to argue that the UK had failed in its obligations under the European Convention in not requiring pre-notification when private material is to be published. He argued that damages after the event were not a sufficient remedy and that the only real remedy for a claimant in a privacy action was an interim injunction to allow him to prevent publication and hold the ring before trial. The European Court of Human Rights did not find UK law to be in breach of the European Convention.<sup>422</sup> Moreover, his application to appeal to the European Court of Human Rights' Grand Chamber has also just been refused.

If the privacy claimant is notified of the proposed publication, it is then for the court to weigh up the various rights at play in considering whether or not to grant a privacy injunction – be it a 'normal' privacy injunction, an anonymised injunction or, in the past, a 'super-injunction'. Those rights will include the right to respect for private and family life, guaranteed by Article 8 of the European Convention, of the claimant; the right to freedom of expression, guaranteed by Article 10 of the European Convention, of the proposed publisher; and the rights of any third parties, for example sources of the story, who may wish to 'kiss and tell' and who may also have their own Article 10 rights to throw into the mix.

The courts assess these rights by considering the evidence of all relevant parties put before them and will not grant an injunction unless they are satisfied that the claimant is more likely than not to establish his or her claim in breach of confidence/misuse of private information at a full trial.

This careful analysis of the facts and the rights at play is far removed from the unilateral decision taken by a newspaper or other publisher to publish confidential and/or private information without providing pre-notification to the target precisely in order to avoid the possibility of any injunction application preventing publication, even if only in the short term.

The balancing exercise undertaken by the court on an application for an injunction is, therefore, appropriate and significantly fairer to both parties involved than the position in which the target of the publication will find him or herself should he/she not be notified in advance.

**Q2. How best to strike the balance between privacy and freedom of expression, in particular how best to determine whether there is a public interest in material concerning people's private and family life.**

Section 12 of the Human Rights Act 1998 was included in the Bill given the concern expressed at the time by the media that their rights to free speech would not be

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<sup>422</sup> <http://www.bailii.org/eu/cases/ECHR/2011/774.html>

properly safeguarded. This addition to the Bill, incorporated into the Act, gives the media express protection of its right to freedom of expression.<sup>423</sup>

The balance between the various rights at play is undertaken very carefully by the courts by way of an intense scrutiny of the facts of each case. We do not set out in this note the case law which has so evolved and which is well known. But it is certainly the case that the courts look at all the various factors and rights at play including: the precise nature of the material/information for which protection is sought; the identity of the parties and their relationship with and attitude towards the media; and the circumstances in which the material/information was obtained.

It is not in our view the case that the courts come to this balancing act with any preconceptions as to the parties or the balance to be struck. The court does not favour the claimant over the media, as some commentary might suggest. Indeed, were that to be the case, there would be a fundamental flaw in the administration of justice in this country, which is not being alleged by the media as to the way in which our courts generally operate. They reserve this for their denunciation of privacy injunctions.

Public interest in the material/information in respect of which protection is sought is not the only limiting factor to a claim in privacy, but it is that which is often used and which appears to cause the most concern – at least the most column inches in the media.

It is trite to say it, but what is interesting to the public is not necessarily in the public interest. While the public interest and interest of the public are undoubtedly closely linked concepts, the two are not interchangeable.

There is no doubt that a varied and diverse free press is vital for a democratic society. However, a free press does not have to be one that unjustifiably invades the private lives of others. Mankind is a social creature and he is interested in his fellow man – hence the burgeoning shelves of magazines with stories about celebrities and others. We as a nation of curtain twitchers are hungry for information about the private lives of others and the media is happy to serve up a feast of this for us. But we also need the opportunity to be able to live our lives in quiet seclusion from time to time, not always cheek by jowl with others and with strangers looking over our shoulders and into our private lives. A balance must be struck.

It is our view that while the public is served by a free press and that it is in the general public interest that there be a free press, it is not in the public interest to publish whatever that press freely wishes to publish where it impinges on the private lives or reputations of those it targets. Public interest must be set at a higher bar than that, and the tried and tested arguments of hypocrisy, iniquity and criminality have served us well so far.

Whether or not a statutory privacy law offers some guidance as to what constitutes the public interest, the subtle decision as to the correct balance will continue to be interpreted by the courts. And this should not be a concern. In recent years the courts have shown themselves adept at deciding where the line is drawn. For

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<sup>423</sup> <http://www.legislation.gov.uk/ukpga/1998/42/section/12>

example, Eady J in *McKennitt v Ash*<sup>424</sup> did not find it hypocritical of the singer to have fallen below the very high standards that she had set for herself and publicised on her website. We all have feet of clay, he pragmatically noted. Similarly, the courts are able to distinguish between real criminality, such as the cultivation of illegal drugs or the commission of child abuse, as referred to in that case (not on the facts and by way of example only) and the creative use of an argument of criminality such as that optimistically advanced by the *News of the World* to attempt to argue that its exposé of Max Mosley was justified in that it exposed the commission of a battery by the whipping of his buttocks by the ladies there present.<sup>425</sup>

Indeed, it is on the basis of hypocrisy that the most recent privacy case of *Rio Ferdinand v MGN Limited*<sup>426</sup> was lost by the claimant, with the court finding that the argument served as a limiting factor to what would otherwise be his right to privacy. Ferdinand had made a conscious and co-ordinated effort to project a public image that he was a reformed character and the *Sunday Mirror's* article showed that in respect of his fidelity, the image of change was false.

What the public interest is is a nebulous creature, and whether or not legislation can offer more guidance, the evolution of case-law has historically served the country well in reflecting what in fact constitutes the public interest.

**Q3. Issues relating to the enforcement of anonymity injunctions and super-injunctions, including the internet, cross-border jurisdiction within the United Kingdom, parliamentary privilege and the rule of law.**

It is clearly the case that modern technology has advanced to an extent where now every person with a computer is a potential publisher, every person with a mobile phone a potential photographer and everyone who has access to the internet and a whiff of a story could potentially breach an injunction of the court by a careless or well-crafted Tweet, blog or post. They may do so anonymously, thereby making it practically difficult to bring proceedings for contempt of court.

This does not of course mean that the courts should fling up their hands in despair and defeat on the grounds that Twitter has killed the injunction.

This issue was not addressed in the Report of Lord Neuberger's Committee on Super-Injunctions and shortly before it was published in May, the fears of many practitioners became reality when an anonymous Twitter user published details of a variety of privacy injunctions obtained by high profile individuals, in each case naming the applicant. The user's account remains active as of October 2011 and has more than 110,000 followers. It also spawned a host of copycat Twitter accounts, some of whom named other successful applicants for privacy injunctions, even providing direct links to the anonymised judgments. The mainstream media reported that the information was available on Twitter and although they held back from naming the relevant accounts, it was relatively straightforward for members of the public to identify them. This behaviour constituted a successful campaign of civil disobedience to circumnavigate a fair and considered court order. With legal action against such large numbers unfeasible, our view is that the only way of upholding human rights and asserting the rule of law is through careful, considered but pro-active regulation.

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<sup>424</sup> <http://www.bailii.org/ew/cases/EWHC/QB/2005/3003.html>

<sup>425</sup> <http://www.bailii.org/ew/cases/EWHC/QB/2008/1777.html>

<sup>426</sup> <http://www.bailii.org/ew/cases/EWHC/QB/2011/2454.html>

The internet is already being regulated. Hate speech, ‘trolling’, threats of violence and child pornography are all examples of issues that UK law and society will not tolerate online, and criminal repercussions fall on individuals involved in these activities. As the online world grows ever more ubiquitous and global, and becomes more and more the sphere in which social interaction is conducted, it is inevitable that governments will have to engage with the fact that the internet cannot continue to be an area where only the most ‘serious’ laws are enforced.

The example of Germany engaging with Google and Facebook in recent months over privacy threats shows a possible productive way forward. Government should engage with the multinational web giants - Facebook, Twitter and Google to name a few – to ensure mechanisms for redress and enforcement are built into the platforms of the online world. More stringent regulation at a domestic and international level will also be required.

Parliament should not fear engaging or legislating in the online world. Doing so can only make the internet a safer and more acceptable place for its citizens to inhabit. Failing to do so will perpetuate the idea that the internet is a lawless zone where individuals are not responsible for their personal actions.

**Q4. Issues relating to media regulation in this context, including the role of the Press Complaints Commission and the Office of Communications (OFCOM).**

On 17 November 2011 Withers with JUSTICE, the all-party law reform and human rights organisation, will be holding a round-table discussion with media experts on the reform of press regulation. We will make the conclusions and recommendations of that seminar available to the Joint Committee in due course.

6 October 2011