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GARETH WILLIAMS' MEMORIAL LECTURE – 12 JULY 2011

RT HON JACK STRAW MP

"Privacy & Parliament"

It is a great honour and privilege for me to have been asked to give the 2011 Gareth Williams' Memorial Lecture.

I first became acquainted with Gareth Williams in 1992 when he was appointed a Labour Life Peer. But it was only when he came to work with me, as Minister of State in the Home Office, following the 1997 General Election that I really got to know Gareth well.

The Home Office was at that time a sprawling empire, twice the size of the current Department. Ministers to whom one could safely delegate a large part of this work, and know that they would never drop a catch, were at a premium. Gareth was this Minister, beyond equal. As at the Bar, always on top of his brief, sound in judgement, and with that crucial self confidence necessary to know where to act himself, and where (very rarely) he should seek my view, he was simply brilliant, a joy to be with.

Unsurprisingly, he was promoted very quickly, first in 1999 to Attorney, and then after the 2001 Election, to become Leader of the Lords.

His charm, and wit, ever-concealing steel, meant that he had their Lordships, on both sides of the House, eating out of his hands .In Cabinet, he was incisive. But he brought to Cabinet meetings another quality often in short supply – humour. Many were the occasions when the whole of the Cabinet was engulfed by tears of laughter at yet another report from Gareth from the front-line of his battle for their Lordships' minds.

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Gareth's sudden death in September 2003, aged only 62, was a catastrophe for his wife Veena, and children, a terrible tragedy for his wider family, friends, Parliament, and Party. I hope that what I have to say in this lecture may do proper credit to his memory.

I chose the title "Privacy and Parliament" for this lecture just over eight weeks ago, in the wake of the press *furore* following the publication by the Lord Neuberger MR of his Committee's report[1], and the decision by two Parliamentarians to name individuals who had the protection of injunctions from their identity being made public.

At the time I had no idea that over the following two months we would be in the middle of the most serious crisis in the standards and ethics of the press in its post-war history. Given that, I decided to widen the agenda of this lecture to offer some observations about the live issue of whether, and if so, how far, Parliament should intervene better to protect the private lives of its citizens from unjustified media intrusion.

I want to begin with a crucial preliminary point. In the self-examination of the ethical failings of the British print media now taking place in the editorial columns of our newspapers, the argument for reform is framed as a four-legs-good, two-legs-bad choice between improved "self-regulation", good, and "statutory regulation", bad, sinister; and liable to undermine the media's important role in exposing abuse of power.

This, as I will explain, is however an entirely false dichotomy. In no free, democratic society can the media ever be wholly regulated by law; nor can it wholly be regulated by voluntary actions – "self-regulation" – independent of, or outwith, the law. That never has been the case; never will be. The choice is instead an altogether more subtle one, which is to identify the best balance between regulation externally imposed – by the law – and regulation which is imposed by the industry itself.

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[1] *Super-Injunctions, Anonymised Injunctions & Open Justice- 20/5/11*

The systems of self-regulation which have been used in the post-war period – notably the Press Council from 1953 to 1991, the Press Complaints Commission since then – have only been established as a defensive reaction to public and Parliamentary outrage at yet another egregious breach of standards, and in the face of clear threats that if the press did not act then Parliament would. These systems are, and can only ever be, supplemental to a framework of legal regulation, and – as the last half century has shown – a weak substitute at the margin for a legal structure.

The most obvious point at which the law intervenes to regulate the media is in respect of defamation. In some other jurisdictions, the ability, especially for public figures, to challenge untruths about them is more limited than it is within the jurisdictions of the United Kingdom. A strong, and well-constructed *corpus* of law which does deter, and sanction the publication of lies, or wholly distorted comments about others, is not only of supreme importance to those who are the subject of such lies or distortions, but is also a public good. Not least in the extraordinarily competitive environment of the British print media, in which comment, the political leanings of the proprietors, and facts are routinely intertwined in what are presented as "news stories", the public need to have some reassurance that what they read does bear some connection to the truth.

I spoke of the need for such a *corpus* of law to be both strong, and well constructed. In England and Wales, it is the former, but not the latter. The substance of the law is unsatisfactory, and so to a degree is the costs structure too. As Justice Secretary I established the Libel Working Party to draw up proposals for reform. That work has been taken forward by my successor, Kenneth Clarke, with his presentation of a draft new Defamation Bill. That Bill is now being examined by a Joint Committee of both Houses. Charlie Falconer, Patricia Scotland and I recently gave

supportive evidence to this Committee. There is every prospect that over the next two years reform will take place.

This reform, and a reform of the costs' system can come only through changes in the law. Both will benefit the media – something they might wish to bear in mind before they become rampant in their cries that in the wake of a 'phone hacking scandal, all Parliament is interested in is constraining the proper role of the press in a free society.

One element of any new system of regulation must be provision, available to ordinary citizens, to have redress for defamatory statements against them the subject of correction and apology adjudicated and enforced by a press regulator.

But dealing with statements which are untrue or comment which is unfounded is relatively straightforward compared to the issue which lies at the heart of the issue of press regulation: privacy. This is intellectually, procedurally, and politically, much more difficult to handle, because we are dealing not with lies about people, but truths – how far the law should constrain the publication of facts about other's private lives.

The concept of the modern law of privacy in common law jurisdictions is generally considered to have had its provenance in what US Judge Thomas M. Cooley described as the "right to be let alone".[2] That formulation was adopted by Samuel D Warren and Louis D Brandeis in their seminal paper "The Right to Privacy", published in the Harvard Law Review in December 1890.

The arguments advanced by Warren and Brandeis' are extraordinarily contemporary.

"The press is overstepping in every direction the obvious bounds of propriety and decency. Gossip is no longer the resource of the idle and the vicious, but has become a trade...To satisfy a prurient taste the details of sexual relations are...broadcast in the columns of daily

[2] p.29- *Cooley on Torts 2nd Ed (1888)*

newspapers. To occupy the indolent, column upon column is filled with idle gossip, which can only be procured by intrusion upon his domestic circle. The intensity and complexity of life...have rendered necessary some retreat from the world...[S]olitude and privacy have become more essential to the individual; but more enterprise and invention have through invasions upon his privacy, subjected him to mental pain and distress far greater than that which could be influenced by mere bodily injury."

The writers go on to propose the development of a claim in tort for invasion of privacy.[3]

In post-war Britain there has been series of attempts to build on Warren and Brandeis' work, to define a law of privacy and to propose a system for its adjudication. In 1972 the Younger Committee reported. This had been established in response to the largely hostile reaction to a proposed Right of Privacy Bill, based itself on a Justice Report of the same year, introduced in 1970 by the late Brian Walden MP.[4] The late Sir David Calcutt's review was established in 1989, in the wake of strong support for two Private Members' Bill.

In his first report in June 1990[5] Calcutt gave the media a last chance to establish an effective self-regulatory body. He held a *reprise* two years later.[6] Calcutt concluded in this second report that the new system, with the Press Complaints Commission at its centre, had not worked effectively. He set out in forensic detail how the media had watered down his original proposals. He recommended that a new privacy law was required.

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[3] They set out six principles for its determination of which the three most important are:

- "The truth of the matter published does not afford a defence."
- "The right to privacy does not prohibit the communication of any matter, though in its nature private, when publication is made under circumstances which would render it a privileged communication [under the defamation laws]."
- "The right to privacy does not prohibit any publication of matter which is of general or public interest"

[4] *Report of the Committee on Privacy,* Cmnd. 5012, HMSO,1972

[5] [Cm 1102]

[6] [January 1993, Cm 2135]

Unsurprisingly, the Government of the day rejected these recommendations and instead relied on the threat of statutory intervention to secure further changes from the industry, in the text of the Press Code on privacy and in the operation of the PCC.[7]

The former Cabinet Minister Lord (John) Wakeham became Chair, and served in that position from 1994/5 to 2002. Lord Wakeham is a man of great stature and experience. He worked hard to give substance to the expectations on the new PCC. Had he been succeeded by Chairs of equal skill and standing, the PCC might have become an institution to command authority and respect – as, for example, has the Advertising Standards Authority.[8] But that was not to be. The PCC's failure, not least in the face of the hacking scandal, has been abject. Its obituaries have now been pronounced, from across the political spectrum. All we await is the last rites.

The intervening period has, however, seen the introduction of a privacy law through the terms of the Human Rights Act 1998 (HRA), and its interpretation in a number of key authorities since.

There has been some suggestion in recent years that Parliament was not fully aware that the HRA would lead to issues of privacy becoming actionable in the British courts, and that the senior judiciary have, somehow, "overreached themselves"[9] in establishing and extending the law without Parliamentary authority. Neither assertion is correct.

Parliament, and the media, were fully seized of the fact that incorporating Convention Article 8 into British law was of itself the launch of a British law of privacy. It is precisely because of that anticipation that the press, through Lord Wakeham and the PCC, made strong representations to Derry Irvine and to me for the bar for the grant of *ex*

[7] http://www.pcc.org.uk/assets/111/Code_of_Practice_2011_A4.pdf

[8] Another self-regulatory body- http://www.asa.org.uk/Regulation-Explained/Control-of-ads/Self-regulation-non-broadcast.aspx

[9] http://www.dailymail.co.uk/debate/article-1390993/Super-injunctions-A-judiciary-danger-losing-publics-confidence.html

parte injunctions in privacy proceedings to be significantly higher than normal. It was the PCC too which specifically sought some statutory recognition for its own "self-regulatory" Code. By the terms of sub-section (4) (b) of section 12, "[t]he court must have particular regard to .... (b) any relevant privacy code." This underlines the point I made at the commencement of this lecture that the issue of future regulation of the press cannot be framed along simplistic "self-regulation versus state regulation".

Nor is it remotely the case that the judiciary, in seeking both to interpret and to apply the HRA, and specifically Articles 8 and 10, and section 12, have somehow exceeded their brief, and started legislating *de novo*.

As the current hacking scandal reminds us all, attempts to legislate for the protection of privacy takes politicians, in an age of overweening power of press magnates, into territory marked "dragons here". So it suited Parliament not to use the front door to legislate on privacy, but to go through the side door – via the HRA. In essence, we laid down the general framework of law, then conveniently passed the parcel to the courts. Everyone in Parliament understood that, and all parties agreed.[10]

Careful study of the decisions of our higher courts indicates that far from taking on themselves the right, as it were, to legislate, they jealously protect Parliament's exclusive right to do so – as for example, did the Law Lords in *R v Davies* (much I might add to my great inconvenience).[11]

Two inquiries into press behaviour in the wake of the hacking scandal have now been promised. One will be a judicial tribunal under the Inquiries Act 2005, forensically to consider the failing of both the police

[10] The Labour and Liberal Democrat parties were enthusiastic supporters of the HRA; the Conservatives opposed the Bill at Second Reading, but once amendments were made – especially those to be found in sections 12 and 13 – they accepted it, "wishing it well" at its Third (and final) Reading. [Rt Hon Nicholas Lyell MP].

[11] In that case, their Lordships declared unlawful a scheme for the admission of anonymised evidence which had been developed over decades, by the courts. Lord Brown of Eaton-Under-Heywood said "If... the government now think it right to legislate in this field, so be it. Meantime, however, the creeping emasculation of the common law principle must be not only halted but reversed. It is the integrity of the judicial process that is at stake here" . [2008] UKHL 36,39.

and the media in respect of hacking and associated abuses. That is essential.

The other, a non-statutory inquiry into "the culture, practices and ethics of the British press".[12] It's a natural response for any Government. But I frankly wonder what its consequence will be, other than, once the dust has settled, to kick the issue again into the long grass. I say that, because however distinguished may be the membership of this Committee, it is going to have to be the Government and Parliament which will have to make the decisions. This Committee would be unlikely to report before early 2013. Will its recommendations go the way of Sir David Calcutt's? We know now what the issues are; surely it would be far better for Ministers and Parliament to acknowledge their own responsibilities now, and, in consultation with the press and others, start to construct their own model of how an improved model of press regulation could operate.

I offer my views:

First: there is a strong case for a resurrection of Sir David Calcutt's recommendation of a new tort of infringement of privacy. To some extent the need for this has been superseded by the HRA. But the duty under section 6 not to act in a manner incompatible with a Convention right applies to "public authorities" only. Since courts and tribunals are public authorities, courts have been able to ensure that these rights of individuals can, indirectly, be enforced against private persons, including media corporations. But it seems to me that there is important principle here. If there is a broad public consensus, as I am clear there is, for people to have a "right to be left alone" why should not individuals have the same explicit protection available to them as they do have in respect of defamatory statements, breaches of copyright, and every other tort?

[12] Rt Hon Jeremy Hunt- 11 July 2011 : Column 39 Phone Hacking and the Media 4.16 pm

Contrary to some assertions, the drafting of a tort of infringement of privacy is far from impossible. Calcutt suggested one formulation.[13] There are plenty of other similar drafts.

Nor need the drafting of defences pose any serious difficulty. Principal among these has of course to be that the publication complained of was in the public interest. That is common ground in all the formulations of this tort that I have seen. The term "public interest" does not feature in either Article 8 or 10, but in practice the balancing of these two Articles takes account of where the public interest lies, and it does specifically feature in our old friend Section 12.[14] The Courts also now have considerable experience of such balancing exercises required by the many sections of the Freedom of Information Act 2000 which provide a qualified exemption from publication.

Neither this nor any other proposal I make this evening is designed to hobble the press, or to prevent them from pursuing investigations, by lawful means, into abuses of power or other actions which are in the public interest to have disclosed. For anyone, a Strauss-Khan or someone no one has ever heard of, a right to privacy could never trump the public interest in the commission of crimes, where there is clear evidence in support.

For public figures, whether politicians, business people, "celebrities", newspaper proprietors or editors, the public interest in what would otherwise be aspects of their private life is bound to be greater than in respect of an individual who holds no such position. A politician who, in seeking votes, advertises him/herself as someone whose family life is perfect, but the reality of which is anything but, is asking for trouble. Where exactly the line is to be drawn has to depend on the

[13] A prohibition on the publication of information which "reasonable members of society would respect as being such that an individual is ordinarily entitled to keep them to himself, whether or not they relate to mind or body, to his home, to his family, to other personal relationships, or to his correspondence or documents". [Cm ?? para 12.17] - [Cm 1102 (1990) para 12.17].

[14] [(4)(a)(ii) by which the Court has to have particular regard as to the extent to which it would be in the public interest for the material to be published]

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circumstances of the case, and may occur at any point on a wide spectrum. But all public figures do have private lives which they are entitled to protect; in particular they will have other people close to them who, unless the law protects them, can be the wholly gratuitous victims of collateral harm from press intrusion. The courts have been quite right to seek to protect them.

Second, is the issue of "prior notice", and as to what circumstances anonymised injunctions should be available. I have yet to come to a conclusive answer on the first point. On the one hand, since it is the truth about their private lives which people seek to protect from publicity, the harm, irreparable in most cases, is done the moment publication takes place. The harm cannot be redressed later by correction or apology. On the other hand, there are well-documented examples from serious newspapers of instances where prior notice would in practice have constrained or rendered impossible publication of stories which were plainly in the public interest. I am unpersuaded of the necessity of an absolute requirement of prior notice. What might be better is for there to be a presumption in favour prior notice, with defendants having the onus on them to show in any subsequent action why it was in the public interest for prior notice not to have been given, with the prospect of exemplary damages where they fail to satisfy the court on this point.

Injunctions which protect the identity of the parties have to be available for any privacy law to operate. How far they should be anonymised has again to be left to the courts. The recent recommendations from Lord Neuberger's Committee seem to me to offer a sensible way through.

Third, is the critical issue of what machinery should be available away from the courts to enforce standards, both in relation to defamatory statements and to intrusions of privacy.

As Justice Secretary I was subject to very strong representations, on which I touched in my introduction, from the press about the "chilling

effect" which CFA's – and particular the 100% success fees, and After the Event insurance premium – were having on the press, especially at a local and regional level. I accepted those representations. Lord Justice Jackson's magisterial report on civil costs provides a satisfactory answer to them. But what the press should bear in mind is that to a significant degree they have brought the current burden of costs upon themselves. If the machinery of the PCC had been effective it would have been used by many people, who for want of anything better had to resort to law, and a CFA. Many ordinary citizens who have been traduced by the press, or had their privacy unreasonably invaded, are not particularly interested in damages, but in prompt and effective redress in other ways. In practice, the PCC has woefully failed to provide this.

The machinery of the PCC cannot however be effective as long as it is entirely voluntary. The press have over the years commendably led campaigns against self regulation by other powerful groups in our society – against the legal, medical and other professions, against the financial institutions; indeed against Members of Parliament, where the press were in the lead in the wake of the expenses' scandal in calling for outside, independent regulation. But the same arguments which the press have applied for other groups apply with equal, if not greater, force to the press itself. Self regulation is self serving. It is bound to be; at all times, and for all sectors.

In a democratic society a free press is essential. But so is a legal profession able to stand up to government. Because of the failings of self-regulation of lawyers, the system of regulation now has a statutory framework over it, though with a high degree of involvement by the profession itself.[15] I know of no one who has seriously claimed that as a result of this new regulation by statute the legal profession has become the creature of the state. By the same token it is absurd to argue that the mere passage of a statute concerning the regulation of the press will, by

[15] Legal Services Act 2007- http://www.legislation.gov.uk/ukpga/2007/29/contents

virtue of that fact, lead to "state control" of the press. It's nonsense, special pleading at its most abject. Everything turns, does it not, on what goes into the statute.

There is one profound difference between "classic" professions like lawyers, doctors, accountants, surveyors, etc, and journalists. Entry to and exit from those classic professions is controlled. It is a criminal offence for someone falsely to hold themselves out as members of one of those professions. Such arrangements for journalists would be wholly incompatible with the role of the press in a free society. But this does not render impossible the task of constructing a framework of statutory regulation which takes full account of these differences.

There are many serious voices in the press now calling for much tougher regulation of their activities, Thus *The Observer* in a full page editorial last Sunday[16] called for urgent consideration of "radical reforms of the existing regulatory framework; reducing the power of serving editors to stand in judgement on their own work; enhancing the investigative powers of the new body which is properly staffed and funded, and providing sanctions, including the power to levy substantial fines and insist upon prominent retractions of false claims." Hurrah to all that. But having willed the ends, *The Observer* then denies the means, asserting that all this should be considered "before we embrace statutory regulation with all the danger of political interference that threatens."

Absent a statutory framework, however, there is no power even to require all national, regional and local newspapers to take part in such a system. The recent decision of the Express Newspaper group to withdraw from the PCC speaks volumes to my point.[17] Then there is the question of powers for this new body which *The Observer* canvasses. How on earth can effective "investigatory powers", "sanctions

[16] [10 July 2011, p 38]- http://www.guardian.co.uk/commentisfree/2011/jul/10/observer-editorial-murdoch-phone-hacking
[17] On 11th January 2011 the Northern and Shell group withdrew from the PCC- http://www.pcc.org.uk/news/index.html?article=Njg3NA==

including...substantial fines, and prominent retractions" be enforced without a statutory framework? It is not possible.

New regulation by law is the only option. It is time for the press to come to terms with that reality – and acknowledge that sensitively constructed a statutory framework could enhance press freedom and help restore the trust of the British people in the endeavours of journalists.

What I propose is this:

1. A new body – it could be called simply "The Press Commission".

2. Its duties should include the protection of a free press in a free society, and the protection of the individual from harm, from defamatory statements and unwarranted intrusion into their privacy, in breach of the Commission's new Code.

3. Its membership would be balanced. It should include representatives of the Editors, and working journalists, but the majority of its members would have to be independent, and seen to be independent.

4. How this body should be appointed is a matter for consideration. The need to protect press freedom will, I think, mean that the appointment process itself will have to be at arm's length both from Government and Parliament. That would mean that there would have to be a separate Appointing Committee.

5. The powers of this body should be along the lines proposed by The Observer, but have to include effective powers to deal with the crucial area of intrusion into people's privacy, as well as statements which are defamatory. The new Press Code would have to be wholly consistent with the present law on privacy, and any new tort of infringement of privacy.

6. The principal sanctions of this body will have to be against the publisher, not the individual journalist, as they are now.

7. There is absolutely no place in a democratic society for there to be any licensing of journalists, in the way of "classic" discreet professions. That makes problematic whether, and if so what, sanctions might be available in respect of egregious abuses by individual journalists. One way through might be a power to the Commission, after fair adjudication, to issue a finding that a particular individual had been guilty of egregious abuses. It would be a matter for individual publishers as to whether they continued to employ such persons.

There are three final issues I wish to consider: the internet, the criminal law, and Parliamentary privilege.

The Internet:

"Instantaneous photographs and newspaper enterprise have invaded the sacred precincts of private and domestic life; and numerous mechanical devices threaten to make good the prediction that "what is whispered in the closet shall be proclaimed from the house-tops,"" railed Warren and Brandeis in 1890.

The "mechanical device" which, from the 1990's on, has completely transformed our lives, is the internet. But, as this quotation illustrates, coping with the challenges of new technology in publishing is far from new.

Because the division between print and on-line media is so fungible, this new body will have to cover those internet sites which are connected with print newspaper, or which hold themselves out to be separate on-line papers. Drawing the line will be difficult, but not impossible. I do not accept that just because it is not possible, nor desirable, to seek to regulate all public sites on the internet, it is not possible to regulate any of them. Policing of the internet to sanction criminal behaviour already

takes place. The success of "CEOP" (the Child Exploitation and On-line Protection Centre) in working with Internet Service Providers (ISPs) shows that. ISPs cannot be above the law. The new body should have power to work with Ofcom where they consider that the ISPs could take more action to protect the public interest.

The criminal law:

Most of the terrible abuses by journalists which are now dominating our news involve serious breaches of the criminal law. Two key pieces of legislation for which I was responsible – the Data Protection Act (e.g. section 32) and the Freedom of Information Act (in respect of the BBC's journalism) – have special protections for journalistic endeavour. But there are some absolute prohibitions in our law – on tapping a person's phone without a warrant, hacking into their emails, health records, or bank accounts, for example – which have to apply to everyone.

Ah, say some in the press, "what about the MPs' expenses' scandal?" – that only came to light because of a stolen computer disk. The story is however a little more complicated than that. The computer disk would never have existed but for decisions by Parliament and the Courts – by the Commons insisting that the FOI Bill should be amended to cover Parliament, and the Court of Appeal deciding that it was in the public interest for most (though not all) of the details of MPs' expenses to be made public. Had anyone been mad enough to prosecute the person who stole the disk, no jury would ever have convicted.

But the law does need to be strengthened, not least to stop the unrestrained traffic in people's personal data not only be the media but many others, including a vast network of insurance companies, claims' companies, lawyers, health worker and the police, and others, who trade in details of motor accidents. I did change the law in 2008 to strengthen the sanctions available, (under s 55 of the DPA) for breach to include prison. I now greatly regret that I agreed with representatives of the

newspapers not to bring the new provisions into force for a period, and I hope that my successor will swiftly do so.

My last point concerns Parliament and the courts. When the Lord Chief Justice, Lord Judge, and Lord Neuberger gave their press conference on 20 May on publication of the latter's report, there were the most tendentious and ill-founded suggestions in some sections of the press that these senior judges were challenging the powers and privileges of Parliament. They were not, and Lord Judge said so in terms. The privileges of Parliament set out in Article IX of the Bill of Rights are fundamental. They have recently been used, with great force, and entirely appropriately, by for example my colleague Tom Watson. But just as fundamental is the separation of powers in a free society, especially that between Parliament and government, and the judiciary. We, Parliament, establish and fund the courts to protect people's rights – including rights against the state. Sometimes that protection requires the court to prohibit publication of details about an individual. The rule of law will break down if Parliamentarians use their privilege to circumvent orders of the Courts; and such action is not a breach of any rule of court, but Parliament's own rules.

Eight years after his death I still miss Gareth Williams greatly. I miss his friendship, his company, his counsel. I know that were he alive today, he would today be using his extraordinary skills to help us all navigate through the current pre-occupation of the nation – how the privacy of the individual can better be preserved, what role there is for Parliament, how a free press can be strengthened – with very great effect. I mourn his loss.

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