PRESS STANDARDS BOARD OF FINANCE

Editors' Code of Practice Committee

Evidence to the Select Committee for Culture, Media and Sport

FEBRUARY 2007

THE EDITORS' CODE COMMITTEE

The Editors' Code of Practice Committee, comprising representative senior editors from Britain's national and regional newspapers and magazines, writes, reviews and revises the Code that sets the benchmark for the system of press self-regulation administered by the Press Complaints Commission.

Its current membership is: Chairman: Leslie Hinton, News International; Neil Benson, Trinity Mirror Regional Newspapers; Adrian Faber, Express and Star, Wolverhampton; Mike Gilson, The Scotsman; Jonathan Grun, Press Association; Douglas Melloy, Rotherham and South Yorkshire Advertiser; Ian Murray, Southern Evening Echo; Lindsay Nicholson, The National Magazine Company; David Pollington, The Sunday Post; Alan Rusbridger, The Guardian; Neil Wallis, News of the World; Harriet Wilson, Conde-Nast Publications; John Witherow, Sunday Times; and Peter Wright, The Mail On Sunday.

Editors' Code of Practice Committee

Evidence to the Select Committee for Culture, Media and Sport

Executive summary

- The Code can be seen to be comprehensive and robust in all the areas raised by the Select Committee. The protection of privacy is covered in 11 clauses of the Code, which is constantly evolving and often innovative in scope and approach. These strengths, inherent in a voluntary system, are not often available in a statutory matrix. However, the self-regulatory system is predicated on adherence to the law and expects that those who cross the line will pay the appropriate price in the courts.

- Just as the law cannot eradicate crime, the Code cannot prevent all journalistic excess. But self-regulation reduces lapses, improves standards and hastens remedies.

- Of the issues cited by the Select Committee, the Goodman case was a clear breach of both the law and Code and the law took the lead role. The journalist is in jail. His editor has resigned. The strength and validity of the Code in this area is not at issue.

- The Code already addresses the areas raised by the Information Commissioner. While some of the assertions of *What Price Privacy?* should be treated with caution, and the case for custodial penalties has not been made, the Code Committee will assist in providing better guidance and consider the ICO's proposed amendment.

- The case of Ms Kate Middleton demonstrated that where media interest becomes intrusive, there are well-tried self-regulatory contingencies to cope with it within the Code. They are effective and have been pioneered by the PCC.

- The self-regulatory system has led on the issue of regulating online activity, an area that has proved beyond normal statutory controls. It will bring an ethical dimension lacking elsewhere on the Internet: another first for voluntary self-regulation.

- The importance of the voluntary element cannot be overstated. It allows constraints to be put in place that would be inappropriate in law, and yet works alongside the law. But the distinction between the two must be clear and maintained.

- While the Code supports the law, it is not the law. The Code's role is as a powerful force in providing an ethical framework for the British press. There are dangers that, if it attempts to become a surrogate of the law, that will threaten not only the basis of self-regulation but also be inimical to the normal notion of a free press, both of which the Government is pledged to protect.

Editors' Code of Practice Committee

1. Introduction

1.1 The committee welcomes the opportunity to set out its views on the issues raised in the Select Committee's current inquiry. The protection of the proper balance of respect for privacy and of the maintenance of freedom of expression is at the heart of the self-regulatory system. The Code is central to that: a non-legalistic framework of commonsense rules by which disputes may be resolved speedily, and effectively, without recourse to slow, expensive and sometimes oppressive legal processes.

1.2 This does not put the press above the law. The Code of Practice demands high journalistic standards, and normal adherence to the penal code is implicit in that.

1.3 Current laws apply, to a greater or lesser extent, in most of the areas identified by the Select Committee's inquiry, including phone tapping, data protection and harassment. Of course, the law in these areas is not 100pc effective; it does not totally eradicate crime. Similarly, the Code does not eradicate all journalistic excess. But lapses are both reduced and remedied more effectively by the existence of the Code and the self-regulatory system, and legal incursions into this process could seriously undermine that.

2. History and role of the Code

2.1 The self-regulation system is voluntary, but relies on unchallenged compliance from within the industry. So, while the Press Complaints Commission has a majority lay membership to guarantee its independence, the Code is written and revised by editors and then endorsed by the industry. The guiding principle, since 1991, has been that only a Code drafted by editors would command the necessary authority to deliver universal compliance.

2.2 The fact that editors also serve - albeit as a minority - on the PCC increases respect for its judgments across the industry. A complaint to the Commission is taken very seriously and there is a genuine sense of failure and shame at being found in breach of the Code. Steps are almost invariably taken to minimise the risk of a recurrence. A measure of the industry's commitment to the system is that no editor found to have breached the Code has ever defaulted on the voluntary obligation to publish a critical PCC adjudication. It is a record rarely, if ever, matched internationally.

2.3 The Code cannot stand still and has evolved over 16 years through constant revision, most notably in 1997, following the death of Diana, Princess of Wales. In 2004, the Code Committee introduced an annual review, inviting suggestions for amendments to the Code from civil society.

2.4 As a result, the Code has been substantially rewritten to improve clarity and to take account of changing circumstances and public attitudes. For example, the zones of privacy have been extended to embrace digital communications and the discrimination rules expanded to cover individuals suffering prejudicial or pejorative references about their gender.

2.5 **The spirit of the Code**: The existence of a standing Editors' Committee within a voluntary system allows the Code to require of editors obligations inappropriate in a legal, or imposed, regime. Principal among them is that the Code should be followed "*not only to the letter but in the full spirit.*" It also requires editors and publishers to implement the Code and "*to 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.*"[1]

2.6 These requirements give the PCC greater latitude and extend the remit not only to freelancers and photographers, but also to non-journalists, effectively embracing developments in citizen journalism. Online versions of publications are included, which – as will be seen – takes the process further than have most other, parallel regulators.

2.7 **Balancing rights:** At the same time, the Code protects publication that is genuinely in the public interest, thus managing the balance between the rights of the individual - such as to privacy - and the rights of the public, including freedom of expression and the right to know.

2.8 While the Code, written by editors, outlines the balance to be struck, interpretations are entirely for the independent PCC to decide on a case-by-case basis, thus determining much of the Code's effect by creating a body of case law. The lay membership's influence in helping to shape journalism is profound and ongoing, adding authority to the process.

2.9 **The Editors' Codebook:** In 2005, much of this case law was gathered together in *The Editors' Codebook,* an official handbook, which showed, through PCC adjudications, how the Code worked in practice. It was sanctioned by the Code Committee following the Select Committee inquiry into *Privacy and Media Intrusion*, and published by the trade associations – The Newspaper Publishers Association, the Newspaper Society, Periodical Publishers Association, the Scottish Daily Newspaper Society and Scottish Newspaper Publishers Association.

2.10 The book was a pioneering development for self-regulation, both in Britain and abroad, and was praised by the European Union Commissioner for Culture, Ms Vivien Reding. Later this year, it is intended to put the Codebook online as part of a new Editors' Code Committee website, where it will be regularly updated with case law, Code changes and answers to frequently asked questions. Both the book and the proposed website are a testament to the British press industry's commitment to the process of self-regulation, which in scale and scope is probably unparalleled internationally.

2.11 Indeed, the UK Code of Practice is widely used as a template by self-regulatory press regimes in the Commonwealth and around the world. It is recognised as providing breadth, depth and simplicity in a practical, achievable format, rather than by setting Olympian standards unlikely to be observed, and which are a familiar flaw in some overseas regimes.

NOTE: A hard copy of *The Editors' Codebook* is supplied for each member of the Culture, Media and Sport Select Committee as an appendix to this submission.

[1] Preamble to the Code, *The Editors' Codebook* p93

3. The Code and the law

3.1 The Code of Practice does not set out to replace or replicate criminal or civil law. That is not its role, nor should it be. The Code will often ask more of journalists than the law demands, but never less. However, their cultures are distinct and their roles should not be blurred. The self-regulatory system is a voluntary regime, which - while conducting itself according to sound principles of natural justice - is by necessity, as well as choice, essentially non-legalistic in approach. There are sound reasons for this.

3.2 First, the Press Complaints Commission has no vested legal standing or empowerment. It has no powers of discovery, cannot summon witnesses, and relies on industry adherence to voluntary obligations of co-operation rather than on legal instruments of coercion. It also avoids the major disadvantages of the legal system: legendary expense, complexity and slowness, which often make it inaccessible to ordinary people.

3.3 Second, the non-legalistic and voluntary approach permits greater latitude than is allowed in the penal code. The *spirit of the Code*, for example, excludes wriggling through loopholes as an option. The fact that the system is voluntary means it is not subject to constant challenge, and an editor's co-operation in trying to resolve the dispute is virtually guaranteed (non-co-operation with the PCC is itself a breach of the Code). These factors make the PCC an attractive route for dispute-resolution, compared with recourse to civil law. However, the courts remain an option, should complainants wish.

3.4 The criminal law is also available. While neither the Code nor the PCC attempts to replicate the law, adherence to the criminal code is both implicit and explicit within the system. The preamble to the Code states at the outset: *"All members of the press have a duty to maintain the highest professional standards."* It is unthinkable that this should not include normal adherence to the law, or that unlawful activity would be condoned.

3.5 But if the case needed stating further, it is made categorically in *The Editors' Codebook* three times.[2] Most specifically, it sets out the position unequivocally on page 9: "*Journalists must remember that they remain, as ever, subject to the same legal constraints as every other citizen – such as the laws of defamation, contempt, trespass, harassment and a hundred others. The Code will often require more of journalists than that demanded by law, but it will never require less.*" This could hardly be clearer.

3.6 So the Code and the law are complementary. The systems work while the two cultures remain distinct. Problems arise if they become enmeshed. It is sometimes suggested that the Code would be strengthened if it were amended to reflect the law. That would be dangerous because the voluntary ethos would be threatened and its benefits lost.

3.7 If the language of the law were incorporated into it, a breach of the Code would automatically be a breach of the law. Journalists committed to co-operating with the voluntary system would be put at risk of subsequent prosecution in the criminal court, a form of double jeopardy. The dangers of self-incrimination would often be such that on strong legal advice they would not be likely to co-operate. In the face of such advice, the PCC would usually have to stand back. Its ability to act speedily, cheaply and efficiently in an important area of its remit would be diminished.

---

[2] *Codebook*. p7: p9: pp 14-15

3.8 The Code and self-regulatory system are complementary to the law, creating an ethical penumbra around it. But they are not agents of the law. They perform different and separate roles. It is vital to a free press that the distinction is maintained.

4. The Code and privacy

4.1 The protection of reasonable expectations of privacy is central to the Code's purpose and to reflect that privacy issues are covered to a greater or lesser extent in 11 of the 16 clauses. These are: Clauses 3, Privacy; 4, Harassment; 5, Intrusion into grief or shock; 6, Children; 7, Children in sex cases; 8, Hospitals; 9, Reporting of crime; 10, Clandestine devices and subterfuge; 11, Victims of sexual assault; 12, Discrimination; and 14, Confidential sources.

4.2 The Select Committee has raised the question of the efficacy of Code of Practice with particular reference to the Clive Goodman case; the access to personal data highlighted by the Information Commissioner; and the treatment of public figures by photographers, clearly with Ms Kate Middleton in mind. These issues are covered principally by Clauses 3, 4 and 10, and before looking at their specific application to the cases mentioned, we should examine the breadth and depth of protection those clauses currently provide.

4.3 **Clause 3, Privacy**[3] was last revised in 2004. The asterisk indicates that it is subject to a possible exception if the action was in the public interest. The clause now states:

> **3. *Privacy**
>
> i) Everyone is entitled to respect for his or her private and family life, home, health and correspondence, including digital communications. Editors will be expected to justify intrusions into any individual's private life without consent.
>
> ii) 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.*

4.4 The clause was substantially revised in 1997, when zones of privacy were first included. The note defining private places introduced the novel concept of a reasonable expectation of privacy. It meant the PCC, with its lay majority, would decide what was reasonable in the circumstances. In 2004, **digital communications** were added to the zones of privacy and sub-clause ii was widened to include **all** photographs of individuals taken in private places without consent, unless there was a public interest.

4.5 The clause is comprehensive. It covers newsgathering activity and breaches are not reliant on material having been published. It embraces the spread of modern zones of privacy, including digital information, which might also be covered by data protection law. The issue of what is intrusive is decided on the grounds of reasonable expectation, and the burden is on the editor to justify intrusions. This gives the PCC wide discretion to decide what constitutes an intrusion in any given circumstances.

4.6 **Clause 4, Harassment**[4] is equally unequivocal and comprehensive, having been revised in 1997, following Princess Diana's death. It states:

---

[3] *Codebook, p33*

[4] *Codebook*, p41

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.

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

4.7 Again, the Code targets newsgathering practices, and specifies activities that might be unacceptable, if persisted with. These include pursuing or photographing individuals once asked to desist. Finally, editors are required not only to control their own staff but also take care not to use material from other sources that doesn't comply with the rules.

4.8 This is one of the tightest clauses in the Code. It makes clear that otherwise legitimate journalistic activity could become unacceptable if persisted with, once asked to desist. This introduces an actual moment when the journalists might be in breach, even without any publication. That element allows the PCC to be proactive in passing on 'desist' messages to editors from complainants. Once told that a complaint has been received, or a 'desist' message issued, editors usually respond positively. The system has been very successful in reducing complaints of harassment, by stopping the problem at source.

4.9 **Media scrums:** Similarly, where large numbers of journalists and broadcasters congregate – a media scrum – otherwise valid media attention could become intrusive. After the Select Committee raised this in 2003, the PCC and the Code Committee led in setting up a cross-media system in which the PCC acted as a clearing house for 'desist' messages, passing them on not only to press editors, but to broadcasters, whose regulatory bodies were not proactive pre-publication. It has been successful in dissipating the media pack and the problem.

4.10 **Clause 10, Clandestine devices and subterfuge**[5] Britain has an honourable tradition of investigative journalism which, by its nature, often necessitates resort to practices that would normally be off-limits. The two clauses covering activities such as the use of listening devices and subterfuge were combined in 2004, to delineate the ethical boundaries and embrace a spectrum of surveillance methods. Clause 10 states:

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.

ii) 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.

4.11 The Clause now covers explicitly or implicitly the range of clandestine techniques, from hidden cameras to bugging devices and telephone taps, or text or email intercepts, thus reinforcing Clause 3's protection of digital communications. Even to seek to obtain

[5] *Codebook*, p65

such information by such means would breach the Code unless there was a public interest to justify it. That is a major barrier to their use, or abuse.

4.12 **The public interest** in publishing or obtaining information is a key factor in many areas of the Code, and never more than when the right to privacy has to be judged against the right of freedom of expression or the right to know. The public interest exception is available in nine of the Code's 16 clauses, signified by an asterisk in the title.

4.13 The Code includes[6] a non-exhaustive list of areas that might justify the public interest exception. It states: "**1.** *These include, but are 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 organization.* **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 how the public interest was served.* **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.*"

4.14 The list demonstrates that the balance will be struck in solid areas of the public's right to know, rather than in the margins of public prurience. The burden of proof rests on the editor. In cases involving children, it invokes a higher threshold – requiring editors to demonstrate an exceptional public interest to over-ride the paramount interest of the child. These are substantial hurdles, reflecting the high thresholds throughout the Code, especially those concerning privacy. The Code is no pushover for errant journalists to exploit. It is comprehensive, tough – and it works.

5. The Code and the Goodman case

5.1 As with the other privacy issues raised by the Select Committee, the Clive Goodman prosecution was for a practice proscribed by both the law and the Code. Although the seriousness of the offence made it appropriate to be dealt with by the courts, under the terms of the Code it would have been just as much an open and shut case had it come before the PCC.

5.2 So in deciding whether the Code of Practice in some way failed, it is necessary first to define success. If the test is the deterrent value in preventing breaches, then arguably there has been a failure of the Code. But equally there has been a similar failure of the law, with its much greater range of vested powers.

5.3 However, the law is not judged solely by its deterrent effect. If it were, prisons would not be overflowing. And if deterrent value is not a suitable test for the law, should it be so for the Code? Goodman broke the law, pleaded guilty and he is serving a four-month sentence. His action was indefensible and no one has attempted to defend it. He paid a very high price, as did his editor, who resigned as a result of the case. The clearest message has gone out that such action will not be tolerated.

[6] *Codebook*, p88

5.4 It would be for the independent PCC alone to decide on any wider action to ensure compliance with the Code in this or future cases. The Commission has initiated its own inquiry and has sought assurances from editors that their working practices conform with the Code in this area.

5.5 **Could the Code have done more?** The Code's privacy clause refers specifically to respect for *digital communications*".[7] There is a further provision in Clause Ten, covering clandestine devices and subterfuge, which includes: "*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...*"[8]

5.6 Undeniably, the Goodman breach was doubly damned by the Code, which could not have been clearer. No Code change appears necessary. Therefore, most debate on providing greater deterrence might normally centre on whether the Code's range of sanctions would have been sufficient. However, that is academic, given the existence of the law with a maximum two-year jail sentence. That was the ultimate deterrent. It did not work.

5.7 The Goodman case was shocking. But it demonstrates that however clear the language of the law, and however strong the sanction, a determined individual will always be tempted to ignore them. The low number of prosecutions of journalists, and close experience of the way in which they generally operate according to the Code, suggests at the very least that members of the press are no more likely than others to cross the line. They will not be totally immune. That is not a failure of the Code, any more than it is of the law.

5.8 The Editors' Committee is always open to constructive suggestions on how it might improve the Code and will consider any current options in its annual review in March.

6. The Code and the Information Commissioner

6.1 The Code Committee has engaged directly with the Information Commissioner since the publication of *What Price Privacy?* During the discussions, the Commissioner accepted that the evidence collected by police in Operation Motorman in 2002 did not necessarily establish any breach of either the law or the Code.

6.2 It established only that newspapers had paid for information that was covered by the Data Protection Act. Such activity would be permissible – under the law, as well as the Code – if the information obtained was in the public interest. No attempt has been made to establish whether such a defence existed in any of the cases cited. The working assumption was that the scale of press payment and the nature of the information sought suggested a large illegal trade. That may or may not be the case. We do not know.

6.3 However, a working assumption based on circumstantial evidence would be insufficient to secure a conviction and should be treated with due caution. This is particularly the case where the legality of the activity hinges on the presence or absence of a public interest defence.

---

[7] *Codebook*, p33

[8] *Codebook*, p65

6.4 Experience in investigative journalism has shown that, while there may be reasonable grounds to believe there is a public interest in an inquiry, by its nature it is often not possible to prove that interest at the outset; if it were, there would often not be any need for the investigation. The case for introducing jail sentences for journalists in this area has not been made. The current law allows for unlimited fines, but has been rarely used. Custodial sentences would have a chilling effect on investigative journalism and would be likely to seriously limit the PCC's scope in this area.

6.5 What is beyond doubt is that if such an illegal trade in personal information existed, it would clearly breach the Code, and the Editors' Committee would condemn it. The committee has therefore indicated to the Commissioner its willingness to assist in industry-wide initiatives to raise awareness of the issues raised in his report, notably the drafting – in close consultation with the ICO if he wishes it - of simple guidance for journalists. We intend to include such guidance in an online version of *The Editors' Codebook* to be launched this year.

6.6 However, the Commissioner seemingly wishes the committee to amend the Code to bring it more in line with the Data Protection Act. As shown, *(paras 3.7-3.8)* there are problems with the Code appearing to echo the law and these would need to be resolved.

6.7 The Commissioner suggests there should be a third sub-clause to Clause 3, Privacy, which would state, subject to a public interest exception:

> iii) It is unacceptable, without their consent, to obtain information about any individual's private life by payment to a third party or by impersonation or subterfuge. It is unacceptable to pay any intermediary for such information which was, or must have been, obtained by such means.

6.8 Although the Code Committee has yet to formally consider the suggestion – and will do so in March - a possible issue is that the Information Commissioner's wording appears to go beyond the remit of either the current Code or the law. First, it makes the obtaining of any private information – not just protected data - an automatic breach, thus widening the remit. Second, it makes the act of payment to a third party a critical test. This would bring a new dimension to the Code, where the current test is whether a failure to respect digital communications constitutes an intrusion into privacy. If it does, it is unacceptable, whether or not payment is involved.

6.9 It seems curious that an activity that is acceptable without payment becomes unacceptable if money is involved. Is information automatically tainted by payment? Would a genuine intrusion of privacy be any less so, if payment had *not* been made?

6.10 However, the Code Committee will consider the proposal as part of the annual Code Review and decide on any amendment. Any alternative wording would normally be discussed with the Commissioner before a final decision was taken.

7. The Code and the treatment of public figures by photographers

7.1 The media attention surrounding Ms Kate Middleton might appear to raise similar issues of privacy as in the Goodman case, because of the royal connection. But, Prince William apart, the issues were very different. Goodman's activity was calculated and illegal. In Ms Middleton's case there was, for valid reasons, a spontaneous explosion of international media interest whose effects needed to be dissipated.

7.2 An outburst of media interest is not against the law or the Code, and could be legitimate in many circumstances. Those would include responding to intense speculation that the subject of the attention might soon be named as a future Queen, a matter greatly in the public interest.

7.3 But the presence of large numbers of press and broadcasting personnel could itself be intrusive, and so while the media interest might not itself breach the Code, a failure to manage it could do so. As previously mentioned *(paras 4.8 - 4.9)*, the self-regulation system has pioneered arrangements to cover this after a 'desist' message has been issued. In Ms Middleton's case – as with many others – a 'desist' request was made and acted upon, via the PCC. The media scrum quickly dispersed.

7.4 Whether this was sufficient remedy in all the circumstances, might yet have to be decided by the PCC, and it would be improper to anticipate that. But what is clear is that a voluntary, workable mechanism exists to manage the problem; it is used regularly with success; and it is effective in a way legal constraints could rarely be.

7.5 Properly used, and recognising the balance of legitimate media interest and the right of privacy, this system is not a flaw of self-regulation, but one of its many quiet triumphs.

8. The Code and the regulation of online news

8.1 Regulation of the online press is another innovative area. Although control of the Internet has long been seen as unsuited to statutory regulatory processes, online versions of newspapers and magazines have been within the voluntary Code's remit since 1997. To keep pace with developments of digital publishing, such as the increasing use of audio-visual material, PressBof and the industry have co-operated to produce clear, simple guidance on which areas of online publishing should fall under the Code.

8.2 The guiding principle has been the extent to which the material appearing on the newspaper and magazine websites can be judged to have been properly the responsibility of the editor. This would rule out, for example, user-generated material, such as chat rooms and blogs, and streamed or syndicated material that was live – and therefore not subject to editing - or pre-edited to confirm to the standards of another media regulator.

8.3 These guidelines fit with the Code's general approach, which is to have rules that are pragmatic, flexible and achievable. The test of editors' responsibility meets with users' expectations and it means the relevant online material will match the ethical standards of the press generally. Thus, issues of taste and decency, and the right to editorialise for example, will be matters for the editors' discretion, but obligations of accuracy, privacy, and so on will be covered by the Code.

8.4 The strength of this is that it will provide users of newspaper and magazine websites with a clearly stated ethical benchmark, backed up by a system of remedying breaches, neither of which will be matched in most other areas of cyberspace.

■ *The Code Committee would be pleased to contribute further on these issues to the Select Committee, if required.*

.....