

**PCC CMS SELECT COMMITTEE SUBMISSION: EXECUTIVE SUMMARY**

- The PCC welcomes this inquiry as a chance to demonstrate the range of its work in protecting the privacy of individuals (para 1);
- Since the last Select Committee inquiry in 2003 there have been major reforms at the Commission, bringing much greater accountability and transparency (paras 3 and 8-12);
- The PCC is independently-run and has a clear majority of lay members on the board. It is the most independent self-regulatory press council in the world (paras 5-6);
- The Commission undertakes a large amount of pro-active work aimed at preventing intrusion – including contacting people or organisations in the news; liaising between parties before publication; issuing Guidance; and training journalists (paras 13-14);
- Breaches of the Code will, however, occur – because individual men and women make mistakes. Only very rarely are they deliberate. But when things do go wrong there is a large range of remedies available which enables the Commission successfully to conciliate most breaches of the Code (paras 16-18);
- The Commission also makes formal rulings, which help set industry-wide standards regarding what is acceptable. Hostile rulings are a powerful sanction against an editor for a host of reasons (paras 23-24);
- A system of fines would be arbitrary, counter-productive and undermine the Commission's ability to resolve complaints. There is no sign that complainants or the general public support their introduction, with published and private apologies being more popular (paras 27-28);
- A privacy law aimed at the press would give comfort only to the rich, would be fraught with risk and would not be attractive for most PCC complainants. In any case, in the digital age many now believe such a law to be unworkable and anti-competitive (para 29);
- Despite developments in the courts, the Commission continues to deal with an increasingly large range and volume of privacy issues, from complaints about published material to pre-publication work (paras 40-43);
- The Commission regularly intervenes before publication to help ensure that individuals' privacy is respected by encouraging restraint on the part of newspapers (paras 47-50);

- Examples of other types of pro-active work behind the scenes include at the times of the Suffolk murders and the London bombings (paras 54-57);
- In 2006, the PCC made 231 privacy rulings with 96 complaints being resolved amicably and 19 going to formal adjudication, with the average amount of time taken being just 34 days (paras 61-62);
- Privacy concerns the whole of the British press, with more complaints being made about regional papers than nationals (paras 63-64);
- In considering privacy complaints, the Commission must not only balance a number of competing rights such as those to free expression and privacy, but also take into account numerous different factors arising from the particular circumstances of the case (paras 66-68);
- There are plenty of specific examples of how the Commission's rulings help set the boundaries of reporting, from medical issues to sex and relationships, privacy at times of grief, and what constitutes a 'reasonable expectation of privacy' (paras 70-81);
- There are also real examples of the Commission achieving meaningful settlements in conciliated cases (para 83);
- While there is room for improvement, corrections and apologies appear more prominently than before and can be negotiated following the involvement of the Commission (paras 91-92);
- The Commission has an excellent record at dealing informally and quickly with complaints about harassment by journalists and photographers. This is one of the invisible success stories of the Commission (para 93);
- The service is available to everyone, but a high profile example of how this worked involved Kate Middleton (paras 99-100);
- It works because it controls the demand for the pictures – through editors – rather than the supply by photographers (paras 104-107);
- The Commission operates a 24 hour helpline which people contact to ask the Commission to intervene in cases of harassment to ensure that their rights and requests are respected (para 110);
- The Commission proactively raises awareness of this service and takes steps to help minimise the chances of harassment occurring in the first place, although one frustration is that the Commission's ability to act in this area is still not as well known as it could be (paras 116-120);

- The Data Protection Act is one of a number of pieces of legislation to which the press is subject (para 121);
- The Commission condemns breaches of the law and has offered to work with the Information Commissioner to raise awareness of the DPA and journalists' obligations under it, but it cannot be responsible for policing the terms of the DPA (paras 124-128);
- The Commission does not believe that the case has been made for increasing penalties for breaching the Act for journalists, and indeed thinks that doing so would inhibit legitimate journalistic inquiries (paras 129-131);
- Complaints about subterfuge are rare, but the Commission has clearly delineated when it is acceptable in the public interest and when it should be condemned (paras 132-133);
- The Clive Goodman case highlights the fact that, unfortunately, no Code or law can prevent a determined individual from breaching their terms. But the Commission has taken action – publicly condemning what happened; announcing an inquiry into the editor's application of the Code (which was adapted following his resignation); challenging the new editor to explain how he will ensure that there is no repetition; and launching an industry-wide review to ensure that best practice standards apply. This is the Commission and the law working to complement each other (paras 134-139);
- The internet and swift dissemination of information across the world pose new challenges. Imposed rules regarding editorial content have never been desirable but are probably no longer even viable in the digital age (paras 141-145);
- The PCC model of self-imposed regulation works well for an environment like the internet. Its flexibility means that problems can be resolved very quickly, and publishers' subscribing to an agreed set of standards helps consumers distinguish the quality of different information available online (para 146);
- To this end, the industry has just announced – with no external political or legal pressure – that the PCC's jurisdiction will extend to audio-visual information on its websites (para 147);
- Other legislators, including those in Europe, have concluded that old fashioned regulation is problematic in this new area and that self-regulation is a good alternative (para 149);
- In a global market, legal restrictions on speech in one jurisdiction would simply expatriate the location of the website rather than keep the information from being published (para 150).

**Submission by the Press Complaints Commission to the Select Committee on Culture, Media and Sport, February 2007.**

1. The PCC welcomes this opportunity to explain its record in relation to the protection of individuals' privacy and to discuss the implications for media regulation of the internet. It is a fascinating and complicated subject.
2. The PCC was of course the subject of a penetrating Select Committee inquiry in 2003, and we understand that the Committee's current inquiry is to be more focused on privacy (including harassment), undercover newsgathering methods and content regulation in the digital age. We do not therefore propose on this occasion to explain in detail the Commission's history; its record in dealing with non-privacy matters under the Code (which amount to about 75% of its work); its work internationally; or list all the work that the Commission does to raise the profile of the Commission and educate third parties about how to use the Code and the Commission to minimise the chances of anything going wrong in the first place. There is plenty of detail about these subjects on the Commission's website – [www.pcc.org.uk](http://www.pcc.org.uk) – and we are of course happy to provide the Select Committee with more information should that be necessary. A list of individuals on the Commission, Charter Compliance Panel and Appointments Commission is attached in Appendix 1.
3. Since 2003, there have been major reforms to the structure of the Commission with the aim of making it more transparent and accountable. There have also of course been developments in its approach, in particular with regard to a renewed emphasis on pro-activity and pre-publication work. This submission will deal with some of these important points first.

**Public confidence and PCC independence**

4. The PCC is often referred to as a 'self-regulatory' body. It does of course have some clear hallmarks of such an organisation – it administers a set of rules (the Code of Practice) written by the regulated industry, and it is funded at arm's length by the industry too. These arrangements ensure that freedom of the press from government interference is maintained while at the same time providing the public with a set of rules under which they can complain and the industry with a clear set of standards to which they agree to abide.

This element of 'buy-in' from the regulated industry – they have effectively volunteered for regulation – also helps towards the speedy resolution of complaints and the promotion of awareness of the rules by individual journalists, rather than simply sub-contracting compliance to dedicated compliance officers. It is a set up which is the norm for the press throughout Europe, and which is

increasingly popular as a model throughout the world. It is also very well suited for content regulation in the digital age, for reasons highlighted below.

5. Unlike the situation in most of the rest of Europe, however, and unlike pure self-regulatory bodies, members of the public clearly outweigh industry representatives in the PCC itself. Just seven of the 17 members of the board have a connection with the industry. Presently they are senior editors of national and regional newspapers and magazines drawn from across the country. Their presence is vital for two reasons. First, the professional input into the Commission's decision-making ensures that our rulings are relevant to the practicalities of journalism at the same time as being immune to illegitimate excuses from editors for breaching the Code. Second, and as a result, the presence of editorial members means that the Commission's approach is credible within the regulated industry. And they add bite to negative rulings against other editors.
6. But apart from these seven editors, every other person associated with the administration of the PCC – the ten lay members of the Commission and all the permanent staff – are members of the public who are not professionally associated with the newspaper or magazine industry. This amounts to a degree of structural independence that is unsurpassed in any press self-regulatory body throughout the world. The result is that the public at large should be reassured that, when breaches of the Code do occur, the PCC's only mission is to help members of the public.

#### **Structural strength**

7. There are other structural reasons why the public should have confidence in the system. There have been major reforms since 2003 to bolster the Commission's transparency and accountability and to improve its public service. These checks and balances now include:
8. External scrutiny  
An independent body – known as the Charter Compliance Panel – has the power retrospectively to examine any Commission complaints file and look at other aspects of the Commission's public service. It makes reports to the board of the Commission and publishes an annual review about the quality of the Commission's service, including criticisms and recommendations for improvement where necessary. This has led, for instance, to greater publicity for conciliated complaints, an independent review of customer feedback, and new guidance on mental health reporting and how editors should deal with complaints. There are currently two people on this panel – Sir Brian Cubbon and Harry Rich – neither of whom is connected to the newspaper and magazine industry;
9. Independent review of handling

Complainants who feel that their case has been inadequately handled may appeal to an independent external individual known as the Charter Commissioner, who reviews whether the case was fairly handled. It is akin to an internal system of judicial review. Again, he makes recommendations to the board and publishes an annual report. In some cases, an investigation has been reopened and further action taken as a result of his intervention. The Charter Commissioner is currently Sir Brian Cubbon;

10. Transparency

There is a published register of interests for members of the Commission and the Commission's Director. There is also a clear and public procedure about what members should do in the event of a conflict of interest, which is available on the Commission's website;

11. Open recruitment procedures

Lay members of the Commission are appointed – following public advertising and interview – for fixed terms by an independent Appointments Commission, membership of which is not remunerated and on which only one (out of five) of the members has any connection with the press. The Appointments Commission may also veto editorial members of the Commission and the Code of Practice Committee (which is responsible for writing and reviewing the Code) which are nominated by the industry trade bodies.

12. Accountability

The Commission is further accountable to the public on occasions such as this through the scrutiny of Select Committees, and to the courts in the event of an action for judicial review. It also takes care to get feedback on its service from those who use it; to survey public opinion; and to review on an anonymous basis the views of interested parties in Westminster, Whitehall and beyond.

**Pro-activity and pre-publication work**

13. The Commission does not just react to complaints – although settling individual disputes is at the heart of its work. It has worked hard to raise the profile of the work it does proactively to prevent problems and to help people who are caught up in the news. Such work includes:

- contacting specific individuals or organisations at the centre of high profile stories to offer assistance – before they have to make a complaint;
- pre-publication liaison between newspapers and those in the news – resulting in stories not appearing or being altered for publication;

- approaching individuals to see whether they wish the Commission to pursue a matter when third parties have complained to the PCC on their behalf but without their consent;
- anticipating circumstances when people may need the PCC's help, and targeting information carefully. This includes ensuring that coroners' courts and witness rooms at criminal courts are well stocked with Codes of Practice and How to Complain leaflets;
- travelling round the country educating different groups of people about their rights under the Code;
- issuing Guidance Notes on specific issues such as the reporting of mental health issues and asylum seekers. Further details of this work are contained later in this submission.

#### **Training**

14. The Commission also sees that it has a general duty to help maintain or raise standards across the industry. It therefore provides lecturers and trainers for existing and trainee journalists who are on courses across the UK. The Director of the PCC hosts an ongoing series of training seminars for existing journalists by their type of work – so journalists from news, features, and picture desks, for instance, attend different events. This helps prevent the same mistake or type of intrusion from happening twice and contributes to the continuous professional training of journalists.
15. The industry itself has helped in promoting awareness of the PCC by producing an "Editors' Codebook" which illustrates, using real cases, how the PCC has interpreted all clauses of the Code. Copies of the Codebook, which is referenced at points in this submission, have been sent separately to the Committee.

#### **Putting things right – conciliation and sanctions**

16. There is therefore a robust system of checks and balances, a clear commitment to raise journalistic standards on the part of the Commission, and a programme of pro-activity that is as extensive as possible. But none of the above means that breaches of the Code will ever disappear. They occur because decisions made by individual men and women turn out to be wrong. Just as one cannot legislate for good manners, so no form of regulation can deliver perfection when regulating human behaviour in the field of journalism. But the overwhelming majority of breaches of the Code are either the result of an oversight or mistake, or a professional decision made in good faith that falls on the wrong side of the line.

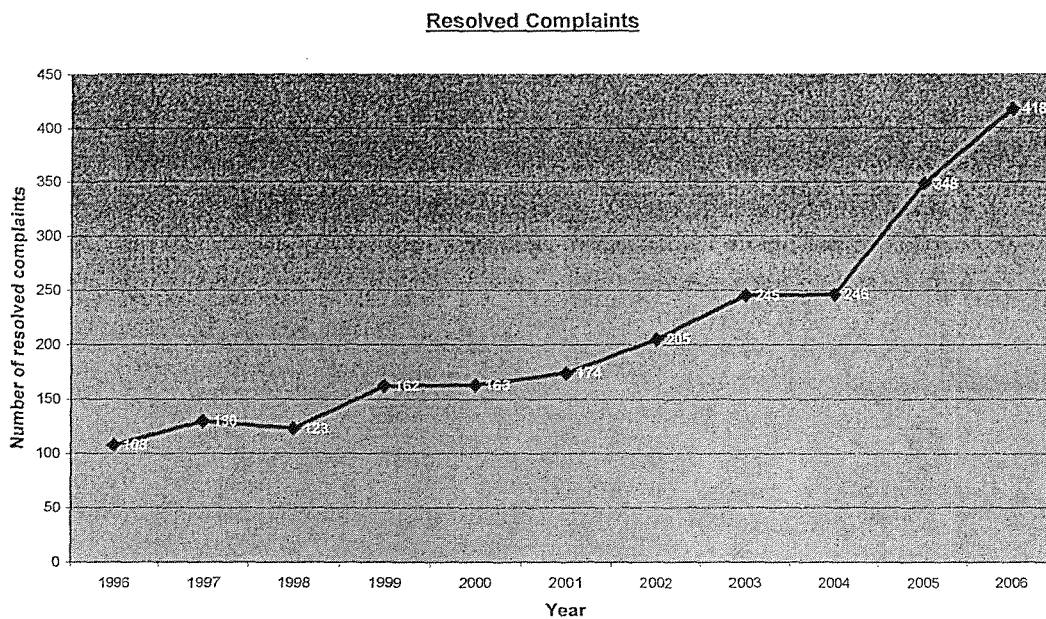
17. It is very rare in the Commission's experience for journalists or editors deliberately to flout the rules. However, as of course the Committee will be aware, this has regrettably been a feature recently in the high-profile case involving Clive Goodman. That shall be dealt with in more detail later, but it should not be regarded as in any way indicative of the general approach by journalists to the Code and to the law. There are, after all, tens of thousands of journalists working for thousands of publications and websites.
18. The question for the Commission is not to how to achieve perfection but how to raise standards and how to deal with the breaches of the Code that will inevitably arise. Over the years, it has developed a wide range of remedies. In the context of privacy intrusion, these include:
- The removal of offending material from websites to prevent swift and widespread dissemination;
  - The publication of apologies;
  - Undertakings about future conduct;
  - Positive agreed follow up pieces;
  - The destruction or removal from internal publications' databases of offending material;
  - Private letters of apology;
  - Confirmation of internal disciplinary action and retraining;
  - Organisation of a face-to-face meeting between the parties;
  - Calling off photographers or journalists from questioning individuals once they have asked to be left alone;
  - Along with any combination of the above, a full record of the complaint details to be recorded on the PCC's website – including for a time on its homepage – as a permanent and correct record of the complaint.

In addition, following negotiation the Commission also sometimes secures:

- *Ex gratia* payments;
  - Donations to charity;
  - The purchase of specific items in order to make amends.
19. Some actual examples appear in a later section.
20. Conciliated settlements such as these are popular because, in addition to them being meaningful:
- They are quicker to achieve either than formal rulings or certainly action through the courts – taking only a matter of a few weeks or sometimes days;
  - They are discreet and do not involve public argument;



- There is limited risk – there is not a ‘winner takes all’ outcome where the complainant may end up with nothing;
  - The process is designed to be harmonious and to take the heat out of a situation.
21. The flexibility of the Commission’s approach and attractiveness of the range of remedies on offer has led to the total number of resolutions increasing substantially in recent years, as indicated by the chart below.



22. The process of conciliation is now also sensibly a feature of court cases where offers of amends may be made and taken into account by the court.

**Adjudicated complaints: ‘formal rulings’**

23. There will be times when conciliation is not appropriate. These will either be when the publication refuses to make an offer – perhaps believing the story or picture not to break the Code – or when, in the Commission’s discretion, a complaint involves an important matter of principle that requires amplification and publicity throughout the industry. On these occasions, the Commission will make a formal ruling. If the complaint is upheld, the Commission requires that its criticisms are published in full and with due prominence in the publication concerned. This sanction is therefore in effect one of ‘name and shame’.
24. Some people question whether this is sufficiently robust. There are several reasons to believe that it is a powerful sanction:

- Losing a PCC ruling is professionally embarrassing, frequently leads to adverse publicity elsewhere in the media, and is regarded as a black mark against an editor's judgement;
- If editors were not bothered about the impact of a hostile ruling they would not take care to minimise the risk of one by making so many offers to resolve complaints, as outlined above;
- Compliance with the Code is written into the contracts of employment of many editors and journalists. In particularly serious cases, the Commission may enhance the power of a negative ruling by bringing the editor's conduct to the attention of the publication's management, which may trigger disciplinary action.

#### **Tougher sanctions?**

25. It would be complacent and wrong to suggest that the current system is without critics or critical friends who recommend improvements. Over the years, the Commission has accepted many ideas from third parties – including those emanating from Select Committees – which have enhanced the PCC's effectiveness. One suggestion that recurs in some quarters is to give the Commission the power to fine publications for breaches of the Code. The Commission has traditionally resisted such calls.
26. People are led to advocate fines because they believe that the Commission would look 'tougher', would be better able to command powerful negative publicity against the publication concerned, and that editors and newspaper managements are only concerned about money.
27. The Commission understands these arguments but believes that they are superficial, and that introducing the power to fine would in fact be significantly counter-productive. There are several reasons for opposing the introduction of fines for specific breaches of the Code:
  - it would seriously undermine the Commission's main work as a dispute resolution service. Editors would be less likely to offer remedies if they thought that by doing so they would be incriminating themselves or their publication in terms of a fine further down the line. At the moment, there are many borderline cases that are resolved to the complainant's satisfaction thanks to the goodwill of the editor because of the conciliatory nature of the system. Such cases would fall by the wayside;
  - although the amount of the fines would inevitably have to be relatively low (see below), the worst features of a compensation culture would inevitably be imported, with lawyers coming between the complainant and the newspaper to

prevent a speedy and common sense resolution to a complaint in search of more money. This would hardly be in the interests of the complainant;

- in any case, regardless of whether lawyers were involved in a particular case, negotiating the amount of the fine would delay the settlement, and be arbitrary;
  - the Commission would have to have regard, when fining the newspaper, to the legal framework. To take a celebrated example, Naomi Campbell was eventually awarded £3,500 after her action against the Daily Mirror (the case took three years and cost upwards of a million pounds as it progressed through various courts). Fines would therefore probably be in the region of a few hundred pounds to a few thousand pounds in order not to amount to a disproportionate interference with the publication's right to freedom of expression. Would this really be a deterrent to publishing interesting but intrusive information, when the publication, rather than the editor, would have to foot the bill?;
  - The Commission's authority would be seriously undermined if a publication refused to pay a fine. Without legal powers to demand payment, the Commission would be powerless to act in such circumstances. With legal powers, the system would no longer be self-regulatory. The current structure would have to be dismantled;
  - There is no evidence that complainants want such a system, and in a recent opinion poll members of the public did not think it particularly important either<sup>1</sup>.
28. Proponents of fines also ignore the fact that the industry has already in effect been 'pre-fined' to the extent of about £1.75m per annum, through the levy that participating companies must pay. This ensures that the system is free and devoid of financial risk for everyone – whether they are successful or not.

#### **What's wrong with a privacy law?**

29. Successive governments have shied away from introducing a privacy law aimed specifically at the press for a number of obvious reasons:
- Notions of what is private and what is in the public interest are impossible to codify, because they will vary from case to case depending on the behaviour of the individuals concerned and the particular circumstances involved. Each case will inevitably involve different subtleties and competing rights which could not conceivably be anticipated in a law;

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<sup>1</sup> A 2006 Ipsos MORI survey found that, of the options listed, the most popular form of resolution for a possible breach of the Code would be a published apology, followed by a private apology. Less than a third of respondents thought that a fine would be a good idea.

- Cultural expectations of where the private sphere begins and ends change over time, and because of their evolving nature are not suited to being captured in law at any given time;
  - A privacy law would mean that redress would only be available through the courts. This would give comfort to the wealthy and powerful of course – some of whom might exploit such a law by trying to suppress the legitimate publication of true but embarrassing information – but be beyond the reach of ordinary members of the public, who approach the PCC in their thousands each year for informal advice and support or to make formal complaints;
  - Taking a publication to court for redress under a privacy law for something that had been published is usually costly and risky (despite the introduction of conditional fee arrangements which have not been taken up widely by ordinary members of the public), always time consuming and drawn out, and – ironically – involve a large amount of publicity for the very information that the claimant wished to keep secret. This is clearly a feature in the small number of ‘celebrity’ cases that have gone to court which have used a conjunction of the Human Rights Act and the law of confidence. It would not be an attractive option for most PCC complainants, who appreciate the discretion of the service, the fact that meaningful resolutions are achieved without public fuss and the fact that, in many cases, rulings can be anonymised if the complainant wishes.
30. There are further points to add.
31. First, where specific behaviour can be identified – such as eavesdropping or paying for private data – there are already laws which protect personal privacy and which extend to everyone. In these cases, it has been possible to spell out the nature of an offence because it concerns identifiable and specific behaviour rather than trying to capture more nebulous notions of general privacy rights. It is therefore not true to argue that the press is a ‘special case’ because it is not subject to legal regulation. There are numerous laws that govern what can be published and how journalists can research stories. What there is not – and should not be – is a law aimed specifically at the press, or a government-run press council.
32. The requirements of the Code are over and above the press’s legal obligations, and capture more general rights to privacy which are interpreted, in the Commission, by an expert body which can take into account the particular circumstances of the case.
33. Even if a general privacy law were philosophically desirable and capable of codification, many people now think it would be anachronistic. Media convergence and the rapid developments in digital technology have revolutionised the manner in which people communicate. The implications of this seem to be something that the courts, for instance, are slow to grasp. Such changes have effectively made the case against old-fashioned, top down content controls of the

media. Such a law would not only be totally unworkable, it would be anti-competitive for UK media companies. This argument is developed further in the submission on online regulation.

34. This Select Committee therefore has an unprecedented opportunity to take account of the particular challenges for media content regulation and to the protection of privacy posed by the extraordinary recent technological developments.

### The Scope of the Commission's Privacy Work

35. The scope of the Commission's work on privacy is sometimes not well understood. Because it is discreet – necessarily so, given that those affected are motivated to complain by a desire to keep something private – some commentators wonder whether the main action is being undertaken in the courts.
36. It is correct that there has been a handful of high profile court cases that have stretched the current law of confidence, using the Human Rights Act, to give some redress for information published in newspapers. These rulings are taken seriously within the industry and the Commission naturally has regard to them. Indeed, section 12 of the Human Rights Act itself contains a reference to relevant privacy Codes – in this case the PCC Code – which judges must take account of when considering privacy applications (this in turn gives further authority to the Code and the Commission's application of it).
37. But while the Commission does not see itself in competition for business with the courts, it would be wrong to deny the existence of some concern within the industry about the courts' approach to privacy. Legal rulings have the power to create a climate of uncertainty – especially if they overcomplicate matters – and, if unnecessarily restrictive, they can have a major chilling effect on the freedom of the press to ask questions and publish true information. Unlike with the PCC – where decisions are taken by a large committee with input from the full time staff and professional advisers – the law concentrates power in a very small number of individuals. Appealing their decisions is crippling expensive.
38. That said, it is to fall into an obvious trap to conclude from this that there has been a major shift away from the PCC to the courts. The figures alone (below) speak for themselves. And the very thing that leads some to conclude that most privacy cases are dealt with in court – the extremely high profile of the individual cases themselves – is one of the reasons why people will continue to use the Commission, with its emphasis on swift and fair settlements and rulings, and private inquiries which do not further intrude into the individual's privacy by hearing the arguments and evidence in public. Our rulings themselves are frequently made anonymous on the request of the complainant.
39. It is of course in the interests of some lawyers to make the case that only the courts – through them – can offer protection, just as it is in their interests to recommend the passage of new laws. Perhaps the Committee will have this case put to it.
40. The scope of what the Commission can offer in any case goes beyond what the courts can consider under the HRA and law of confidence. Of course it deals with the publication of information and adjudicates on where the private and public spheres meet. But the Code's 9 separate clauses relating to privacy also cover

newsgathering, and the Commission undertakes a lot of invisible extra work: pre-publication support for editors, free pre-publication advice for potential complainants about how to use the Code to their advantage, and 24 hour protection from harassment.

### The Code

41. Clause 3 of the Code sets out broad privacy rights to which everyone is entitled. It says:

“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

It is unacceptable to photograph individuals in a private place without their consent.

*Note: Private places are public or private property where there is a reasonable expectation of privacy”.*

42. There are 10 further clauses setting out more specific protection for people, including: those harassed by reporters (Clause 4); those suffering from grief or shock (Clause 5); children (Clauses 6 and 7); patients in hospitals (Clause 8); relatives of those accused of crime (Clause 9); and victims of sexual assault (Clause 11). There are also rules on undercover newsgathering methods (Clause 10), on discrimination (Clause 12) and on the protection of confidential sources of information (Clause 14).
43. It is important to remember that the Code recognises that the behaviour of journalists in gathering news may be intrusive as well as the publication of private details. The Commission can take complaints about intrusive newsgathering methods – regardless of whether anything is published – under a number of different clauses.
44. The Code – which is reviewed annually and has been changed over 30 times since 1991 – is therefore comprehensive in setting out the areas where personal privacy will be protected.

### Pre-publication work: preventing intrusion

45. Preventing intrusions is as important – if not more so – than remedying them. Much of the PCC’s work in the area of privacy therefore falls outside the formal adjudication or conciliation process. The fact that such work goes on is public knowledge – but the individual details of each case are not of course ever published.

46. The PCC has no powers of prior restraint. As a body with no legal powers it cannot order publications not to publish information, nor would a body with such powers be easily reconcilable with the principle of freedom of expression.
47. However, this is not to say that the PCC is an entirely reactive body that has to sit on its hands until a complaint arrives after publication. Several hundred times a year, the PCC is approached for pre-publication help by potential complainants and by editors themselves. This can happen at any time as the Commission operates a 24 hour helpline, with Commission officials being in frequent demand at weekends. As a result, some stories or pictures are not pursued while the detail in others is altered.
48. By way of example and with no identifying features, the Commission has recently been involved with numerous examples of self-restraint on the part of editors, including the non-publication of:
- photographs of a member of the public who was a victim of a high-profile crime;
  - news of an operation on someone whose health had already been discussed publicly;
  - photographs of an actress;
  - stories involving family members of high profile people.
49. It is of course difficult to give details, and these are only examples of wider work which goes on every week which is undertaken to help everyone from those in the public eye to ordinary members of the public experiencing a brief encounter with publicity.
50. To take one example of the latter, in 2006 the PCC was approached by a distraught man (who was not in the public eye) whose adult daughter, a public sector worker, had just tried to commit suicide because of an apparently true story that was to be published in the next edition of a national newspaper. This was passed immediately (outside of office hours) to the newspaper, which after investigation decided not to publish the story in any form. When the PCC e-mailed this news to the man, whose daughter was by this stage in a distressed state in hospital, he replied:
- “I cannot thank you enough for all the help you have given my family and Sarah, you cannot know how much your e-mail has meant to us. As soon as Sarah was told she fell asleep and has remained that way”.
51. The story has never been published. This background information is illustrative of what can be achieved by working quickly and discreetly with the newspaper and the person affected. In 2006, there was similar pre-publication communication with newspapers on 40 different occasions. In none of these cases was it then necessary for the individual to make a formal complaint.



52. The section on harassment, below, explains how the PCC's pre-publication assistance can also help people who object to the physical presence of journalists and photographers.

**Pro-activity: helping the vulnerable**

53. The Commission does not need to wait for complaints or pre-publication approaches to spot that a developing story involves vulnerable people who may need the Commission's help at some stage. Sometimes the concern might be that they are unable to cope with questions or harassment (see the section on harassment). At other times, the Commission might act to tell them what can be done in the event of published information.
54. Recent examples of this include the Suffolk murders (see section below) and contact with the British embassy in Athens and the Consulate in Corfu following the death of two young children abroad on holiday.
55. Perhaps the largest scale news story over which the Commission took such proactive steps was the terrorist attack on London transport on 7<sup>th</sup> July 2005. By Saturday 9<sup>th</sup> July, the PCC had been in contact with key people involved in the establishment of the initial response centre, and couriered to the centre a bundle of information packs for distribution there. This included details of how to make a complaint, and how to contact the PCC at any time. Similar packs were also sent to the London hospitals that bore the brunt of the aftermath of the event. The PCC attended a meeting in August to discuss the media response to 7/7, with a view to improving communications still further; ongoing dialogue now occurs between government and the PCC in this area.
56. It also offered to help on the anniversary of the tragedy, liaising with the DCMS and communicating to the press the families' wishes for the occasion.
57. However, as a complaints body the PCC does not 'monitor' the press for possible breaches of the Code. The Commission does on occasion make discreet enquiries about particular items. But it is not actually possible to tell from just looking at a newspaper or magazine whether a story or picture breaks the Code. It will be unclear about the extent to which the subject of the piece has co-operated. In 2006, for instance, the Commission was unfairly publicly criticised for its 'failure' to prevent pictures of someone apparently in a distressed state in a Sunday newspaper.
58. The Commission was told shortly afterwards that the person's publicist had arranged publication, in order to garner public sympathy.

### Privacy – the facts and figures

59. The central question posed by the Select Committee is whether the PCC is an adequate mechanism for protecting individuals' privacy. The analysis below shows that the Commission is the preferred forum for resolving disputes about privacy, and that it delivers meaningful resolutions.
60. Since the last Select Committee inquiry in 2003, the PCC has:
- Handled **970** privacy cases that fell under the Code;
  - Successfully resolved **339** privacy cases to the satisfaction of the complainant.
  - Published **72** formal privacy adjudications;
61. In 2006 alone, the PCC made 231 privacy rulings – including 132 on cases under the privacy clauses outside Clause 3 (Privacy) – with 96 complaints being resolved to the complainant's satisfaction and 19 formal adjudications being issued. The remaining cases had private rulings which the Commission did not publish.
62. It took, on average, just 34 days for a privacy case to be concluded by the PCC, which offers another stark contrast with the legal process.
63. Privacy concerns the whole of the British press, and it is overwhelmingly ordinary members of the public for whom the service exists and who complain. More privacy complaints concern the regional and local press than any other sector.
64. The percentage of privacy rulings by sector in 2006 was as follows:
- |    |           |       |
|----|-----------|-------|
| a. | National: | 38.4% |
| b. | Regional: | 46 %  |
| c. | Scottish: | 8.9 % |
| d. | Irish:    | 1.3 % |
| e. | Magazine: | 5.4 % |

### Privacy – the Commission's approach

65. Ideas of privacy change according to events and evolving social and cultural expectations. This is one reason why a privacy law would quickly become out of date. The PCC's approach can reflect such developments. While the majority of possible breaches of the Code are resolved to the satisfaction of complainants, its adjudications on difficult or borderline issues help set the boundaries of what is

acceptable and what is not. They expand on the broad principles of the Code of Practice and set out precedents that editors will be expected to follow.

66. The Commission is usually faced with a number of competing rights which have to be considered. There are those of the complainant to a private life. There are those of other parties to freedom of expression, and to speak to newspapers about their own experiences which may involve other people. There are those of the newspaper or magazine to publish information.
67. The Commission also has to take into account different factors, such as whether the complainant has sold their privacy or otherwise indicated a disregard for their own private life before complaining about the same thing; whether the person had any public position which could justify publication in the public interest; whether the information was genuinely private or just concerned unwanted publicity; the extent to which the information was in the public domain, or was otherwise about to be published; the level of detail in an article, and whether privacy could have been protected by omitting certain non-essential facts; and so on.
68. These can be subtle considerations, and the facts of two cases are rarely if ever the same. While people may occasionally criticise the Commission for a variety of reasons, it is very unusual to see criticism on the grounds that its privacy adjudications are simply wrong. Whoever was responsible for the decisions would be faced with exactly the same balancing act.

#### **Setting the boundaries on privacy**

69. In a wide range of areas, the Commission has set benchmarks in the last few years that make clear where the boundaries of privacy and freedom of expression actually lie. Much of this case law is found in the Editors' Codebook. But the following cases since 2003 (the last occasion on which the Commission gave an account of itself to the Select Committee) give a flavour of how the Commission's thinking has developed and where it draws the line on privacy matters:

#### **Privacy and medical issues**

70. In 2005 the Commission adjudicated on a complaint from a cabinet minister's wife against the Mail on Sunday about a story that contained private medical details about her in a story that followed publicity about another aspect of her family life. The Commission was fiercely critical of the newspaper's justification for publishing the article, describing it at one point as 'feeble'.
71. In 2006 the Commission published a landmark ruling in relation to pregnancy. The actress Joanna Riding complained that the Independent had invaded her privacy by revealing that she was pregnant – without checking whether the information was well-known. The Commission agreed with her, criticised the

paper, and set out circumstances in which the press can break the news of someone's pregnancy.

#### **Privacy of emails and telephone calls**

72. The Commission criticised the News of the World in 2004 for publishing material that had appeared in an e-mail exchange between two members of the public (one of them had passed it to the paper). It made clear that the restrictions on publishing material in private correspondence can also extend to e-mails.
73. Upholding a complaint from Peter Foster against the Sun in 2003, the PCC made clear that even those at the centre of political controversy could expect to conduct private conversations without being eavesdropped on. It concluded that "eavesdropping into private telephone conversations – and then publishing transcripts of them – is one of the most serious forms of physical intrusion into privacy" and that "the Commission must set the public interest hurdle at a demonstrably high level".

#### **Sensitivity at moments of grief**

74. Much reporting concerning ordinary members of the public follows unusual deaths or accidents. Newspapers have a right to report such events, but Clause 5 (Intrusion into grief or shock) outlines the public's rights at such times, and makes clear that in cases involving personal grief or shock, enquiries and approaches must be made with sympathy and discretion and publication handled sensitively.
75. The Commission found that a report of a man whose dead body had partially been eaten by his dog overstepped the line of sensitivity in reporting. Upholding the complaint from a member of the public against the Rhondda Leader in 2004, it said that "the protection of the vulnerable is at the heart of the Code of Practice...[and] that close relatives of deceased people are particularly vulnerable in the immediate aftermath of a death".

#### **Privacy on holiday, at home and at work**

76. Much of the discussion surrounding privacy concerns where individuals may be photographed, and where they can reasonably expect privacy. The Commission's approach is more subtle than simply to ask whether the ground on which the person was photographed was privately owned.
77. For instance, there are numerous examples where the Commission has found that outdoor publicly-accessible places confer an expectation of privacy. In 2007, model Elle Macpherson complained about publication in Hello! magazine of photographs of her on a beach in Mustique. The Commission upheld her complaint, noting that she had made a particular effort to choose a private holiday location, staying at a private villa on a secluded island.

78. People in the public eye also have the right to be protected from the unwanted attention of obsessive fans. Upholding a 2005 complaint from JK Rowling against the Daily Mirror, the Commission found that – although the author’s full address had not been published in the paper – there were sufficient details to enable someone to find her London home. As she may have had problems with stalkers as a result – something she had suffered from in the past – the Commission upheld her complaint.
79. People have a right to privacy at work too. This principle was set down by the Commission in its ruling last year on a complaint from a member of the public against Loaded magazine. The publication had, in the course of a feature on somebody else, published a picture of the complainant behind a cashier’s desk in the bank he worked in. This was held by the Commission to be a breach of Clause 3 of the Code. This ruling further clarifies the areas where individuals have an expectation of privacy – even when they are in publicly-accessible buildings and not doing anything intrinsically private.

#### **A balance of rights – sex and relationships**

80. The central task for the Commission in considering where to draw the boundaries on privacy complaints is to balance the conflicting rights of privacy and freedom of expression. The complex nature of this balancing act was demonstrated plainly by two complaints adjudicated in January 2007 about articles that appeared in the Daily Mail and the News of the World. The articles reported an affair between a man and woman. The Commission found that one was intrusive in breach of the Code while the other was held to balance the conflicting rights properly. The article that breached the Code – in the News of the World – contained more private details, particularly concerning sexual activity. Intrusive details were omitted in the other piece, which managed to write the story, and give the person wishing to talk about the matter the chance to express her opinion, without breaking the Code.
81. The cases referred to above are just a fraction of those that have been made by the Commission in the last four years. Each ruling adds to the significant body of case law that has been built up since the PCC was established in 1991. Editors and journalists must keep up to date with the latest rulings, something with which the Commission assists with its regular news releases and training seminars.

**Conciliation:  
Meaningful and discreet remedies for privacy intrusion**

82. People who feel that their privacy has been intruded into usually want their complaint sorted out with the minimum of fuss. They dislike the attention and do not want the information under complaint repeated. This is why the Commission's emphasis on conciliation is popular. It brings the parties together towards a resolution. The process is not adversarial and the arguments – which would often be about the complainant's private behaviour – are not ventilated in public. It therefore spares the complainant further scrutiny and possible embarrassment.
83. Below is a small number of examples of the variety of privacy cases that are successfully resolved. It will be noted that the interesting-sounding subject matter of some of them would have attracted great but unwelcome interest had they been discussed publicly in a court.

- **Published apology**

Ms Rose Nelson of London complained in 2007 that an article had disclosed a detail which intruded into her privacy. The complaint was resolved when the newspaper published the following apology to the complainant: "In an article about a recent trial we mentioned a personal detail relating to Ms Rose Nelson. We apologise to Ms Nelson for any distress that may have been caused to her by the publication of this detail. It was certainly not our intention to cause any upset to Ms Nelson and we regret such an outcome".

- **Destruction of material**

Mr Ron McMurray complained in 2006 that a photograph had been taken of him at his previous workplace where he believed he had a reasonable expectation of privacy. The complaint was resolved when the newspaper destroyed all the photographs it held of the complainant taken in the circumstances and gave an assurance that they would not be republished or passed on to any third parties.

- **Alteration to website**

Mr AJ Kilker of Gloucester complained in 2006 that the newspaper had published a letter from him which included his full address. The complaint was resolved when the newspaper removed the details from the text of the letter on its website.

- **Private apology and donation to charity**

Sir Mick Jagger complained in 2006, through Smyth Barkham solicitors, that a magazine had clearly identified the exact location of his new property in West London, including its house number and the name on its blue plaque. The complaint was resolved when the magazine, which accepted that the publication of the address was a mistake, apologised and made a donation to a charity of the complainant's choice.

Mrs Carol Dickinson of Devon complained in 2006 that a newspaper had published a photograph – without her consent – of her grieving at the scene of the accident where her sister had been killed in an incident with a train. The newspaper first apologised to the complainant for exacerbating her distress following such a tragic accident. The editor sought to explain that the photograph came to be published because of a misunderstanding and accepted that in doing so the newspaper had breached Clause 5 (Intrusion into grief or shock) of the Code. The complainant appreciated the newspaper's admission but declined its offer to publish an apology as she felt that this would exacerbate the situation further. The complaint was resolved when the newspaper wrote privately to the complainant to apologise and emphasise that she in no way courted the publicity and had not welcomed it. The newspaper also made a donation to the complainant's charities.

- **Published apology and private undertakings**

Ms Allegra Versace Beck complained in 2004 about an article that speculated about her health and well-being, and was illustrated by photographs taken of her while shopping in London. The published apology accepted that the magazine should not have speculated about the complainant's health and well-being and apologised for the intrusion into her private life. The magazine also undertook not to repeat the article under complaint or republish the photographs complained about and not to publish in any format any further material concerning Ms Versace Beck's private life, health or general well being (including photographs of her taken without her consent while engaged in private life activities and not at any public event) except where those matters have been put into the public domain by Ms Versace Beck or her representatives authorised by her to do so.

84. Many further examples appear on the Commission's website – [www.pcc.org.uk](http://www.pcc.org.uk).

### **Customer Satisfaction**

85. The picture that emerges is one of a range of options where the outcome is proportionate to the original problem and reflective of what the complainant wants. It is notable that complainants hardly ever ask for financial compensation. But are they content with the service that the Commission offers?

86. The Commission anonymously surveys those who use it. The responses can be audited by the independent Charter Compliance Panel. There are numerous questions – and the Committee may see the full results if they are of interest – but of relevance here is that of those whose complaints had been resolved who returned the form in 2006 (143 people):
- 96% said that their complaints had been handled satisfactorily or very satisfactorily;
  - 98% thought it had been dealt with thoroughly or very thoroughly;
  - 81% were satisfied with the decision, with a further 13% expressing some disappointment but understanding the outcome;
  - 91% thought that the time taken to deal with the matter was about right – with 2% thinking it was too quick!
87. Customers may also make anonymous comments about their experience, and to offer criticism or praise. Such remarks include:
- “I had not expected a good response. I had expected a lack of support, interest or efficiency. I was bowled over by the amazing efficiency and support I received – quite wonderful. I have been praising [the] PCC ever since.”
  - “We have been impressed by the PCC’s due process [and] are relieved that our complaint against X was upheld. We are...disappointed that our complaint against Y was not also upheld, although it is obviously difficult to achieve the right balance between the right to freedom of expression and the right to a private life – so many rights!”
  - “I have been absolutely delighted with the work done on my behalf by the PCC and with the way in which my complaint has been resolved.”
  - “The PCC brought an independent view on the issue and the result was the best possible.”
  - “Please could I extend my grateful thanks to you and your staff for all the help, support and obvious hard work that you have undertaken on my behalf to bring this whole sorry and tragic event to a conclusion.”
  - “An excellent outcome and assistance from the PCC and much better than I anticipated with such a protracted issue.”

**Quality of resolutions: Prominence of corrections/apologies**



88. One issue guaranteed to excite people is the thorny one of where corrections and apologies appear. An old myth has it that they appear on ‘page 94’ or with the racing results. But the Code says that corrections must be made with “due prominence”. This in turn occasionally provokes further debate. Due prominence does not – and cannot – necessarily mean the same size and location as the whole of the original article for a number of obvious reasons:
- What is appropriate will vary depending on how much of the original article was wrong or intrusive;
  - The size of it depends on how much space the wording of the correction or apology will take up;
  - Sometimes it will be appropriate for it to appear further forward in the newspaper;
  - What the complainant actually wants needs to be considered;
  - The location may depend on how serious the original breach of the Code was;
  - Stretching a correction or apology to cover the size of an original article may look ridiculous given that the difference in the respective number of words in the article and in the apology.
89. These common sense points have not prevented one determined lawyer from regularly writing to the Commission with numerous complicated mathematical calculations to prove that there must be a formula!
90. The fact is that there is no standard answer. There will always be a fierce debate about this subject. Much has been achieved, and there is clearly more to do. But the PCC does take positive steps in helping to negotiate the location of the correction/apology as part of the conciliation process.
91. Since the last Select Committee hearing the Commission has started to monitor the prominence of the published corrections and apologies that it negotiates. The 2006 figures show that **74%** appeared on the same page or further forward than the original item under complaint, or in a dedicated corrections column. When apologies alone were examined, this proportion rose to **80%**.
92. The appearance of a correction further back in the publication than the original does not necessarily mean that it has been given too little prominence. Nonetheless, the Commission always retains the option of upholding a complaint on the basis that a correction has not received due prominence as this requirement is part of the Code.

*Prominence of corrections/apologies/clarifications 2006*

Corrections appearing further forward in the paper:	34%
Corrections appearing on the same page:	26%
Corrections appearing up to five pages further back:	10%
Corrections appearing more than five pages further back:	16%
Corrections appearing in a dedicated column:	14%

### Privacy, newsgathering and harassment

93. The protection of individuals from harassment is one of the ‘invisible’ achievements of the PCC. It is invisible because success is measured by something that is not, or is no longer, happening.
94. This section concerns how the PCC deals with complaints of harassment and how its approach can help people who are subject to cross-media attention, not just that of the print media.
95. The Commission recognises that being at the centre of a media scrum can be frightening. Nobody suggests that there should be a law banning photographers or broadcasters from taking pictures of individuals who are in the news when they are in public places. The question is how to balance their right to do so – which is effectively the right of the public at large to see images of people who are in the news – with the rights of the individual concerned not to be intimidated or pursued when they have asked the photographers to desist. It also has to be recognised that there may be a public interest in pursuing an individual for answers even when they are uncomfortable with such scrutiny, and that individuals may be at the centre of a fast-developing news story when attention on them may be unrelenting for a few days at a time.

#### The Commission’s approach

96. The starting point for the Commission in the Code of Practice is Clause 4, which says:
- “(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”.
97. These rules were devised during the review of the Code following the death of Diana, Princess of Wales. There was obvious concern at that time about the behaviour of photographers and how it might be dealt with.
98. In early 2007, there was comment about an incident involving Kate Middleton. It has been correctly reported that her lawyers were in touch with the Commission

for help in dealing with the matter. Some of the information about her specific case must remain confidential. Some of it is in the public domain however. Some cuttings relating to it are attached in Appendix 2.

99. Some people have remarked that the Middleton case reveals a cause for concern. But it is actually instructive of how these things can be resolved using existing procedures without the need for legislation. For it must be noted that, since the incident which provoked the most concern – attention on her 25<sup>th</sup> birthday, which followed speculation about an imminent engagement – no British magazine or newspaper has published a photograph of her taken when she has been going about her daily business without Prince William. This is no coincidence. The PCC has been active in signalling to editors that it regards harassment of individuals as one of the most serious forms of intrusive behaviour, and that in this case it stands ready to investigate a complaint of harassment. It has passed messages from her lawyers to editors (see the procedural points below). And attention has also been drawn to a passage in a 2006 speech by Sir Christopher Meyer in which he said:

“On the whole British publications are pretty careful to ensure that the photographs they print have been taken in accordance with the Code. People would be surprised at the amount of material that is not published because editors cannot be certain of the manner in which a photograph had been taken. I cannot, of course, speak for foreign publications. The London paparazzi feed a global, not just a British, appetite for celebrity photos.

But it is right to warn that it will probably be only a matter of time before the Commission is asked to investigate, on the back of a photo published in Britain, a serious complaint of paparazzi harassment that is backed up by video or other evidence. If it is, and there is no public interest justification, the industry can be assured that our condemnation will be swift and harsh. It is not right that the physical safety of individuals should be compromised in the pursuit of a photo.”<sup>2</sup>

100. Publications covered by the Code took heed of these warnings, and it has not in fact even been necessary for a complaint from Miss Middleton to be formalised. The Commission hopes that this will remain the case.

### **Controlling the market**

101. Of course, an individual does not have to be going out with a senior member of the Royal Family to be on the receiving end of publicity or the attention of photographers. Ordinary members of the public can be temporarily thrust into the

<sup>2</sup> Speech to launch PCC 2005 Annual Report, 25.05.06

public eye for a whole variety of reasons. The PCC's service is as much for them as for anyone – but the important thing is that it can work no matter what the scale of the attention.

102. The starting point in the Code is that people who are in the public eye – even if only briefly – may be photographed if they are in a public place. Once they feel the attention has crossed the line, however, they are entitled to ask the photographers to leave them alone. At this point their rights under the Code are engaged. If their wishes are ignored, and there is no public interest in continuing to photograph them, editors who use the photographs will probably have breached the Code.
103. The obligation is on the editor to stay within the terms of the Code. There will be many photographers of varying degrees of professionalism who work as paparazzi. Individual freelance photographers do not directly sign up to the Code – although it is notable that some agencies, eager to be seen as reputable, have publicly stated that they follow the Code's guidelines voluntarily.
104. There are two ways of trying to manage the behaviour of photographers. The first is to deal with the demand for their product – i.e. editors who buy photographs. The second is to try to deal with the supply – i.e. individual photographers. It is widely regarded that the second option would be fraught with difficulty. Legislating for the behaviour of individual men and women who have a right to use a camera and to walk down a street would be a minefield. Who would be caught? How would you define 'paparazzo'? What about 'citizen journalists' taking pictures with their mobile phones and cameras of celebrities? Would there be a general law applicable to all members of the public about taking photographs in public? Such a restrictive law would have few supporters in a free society.
105. Dealing with the demand side is easier, and this is how the Commission approaches the problem. For a start, those buying the pictures are by and large a homogenous professional group. They have collectively signed up to a professional Code of standards and submitted themselves to an external adjudicating body, which may also give advice about the application of different parts of the Code.
106. If they jointly stop using photographs from freelancers when the circumstances suggest that the Code is being breached, they close the market to the photographers. There is then no incentive for the photographers to continue taking pictures, so they disappear. The problem is therefore dealt with from the top down, rather than the bottom up. It is effective, and it has been used to the satisfaction of many people over the last ten years.
107. Sometimes the journalists or photographers work directly for the publication concerned, in which case they are called off directly.

108. So how does it work?

#### **Desist messages**

109. For those individuals whose objection is to the presence and behaviour of other people, their concern is to deal with the 'real time' problem as soon as possible and not wait for legal wrangling to begin and be resolved. This is where the PCC's structure and procedures – aimed at working with the industry to resolve problems as they arise – is again an advantage over more formal regulation.
110. Most of the Commission's work in this area is aimed at quick informal remedies to problems, which will remove the need to make a formal complaint. These are the steps that take place:
- An individual, or their representative, will contact the Commission with details of the problem. This will usually amount to a request to send those contacting the individual a message to desist from their attentions. Such approaches can take place 24 hours a day as the Commission operates a round the clock helpline, details of which are available on its website;
  - The PCC will then disseminate this request, normally via e-mail, to relevant publications. If it can be established which publications' representatives are present, the message will be sent only to them. If there is uncertainty, or if the story is high profile and likely to involve a large number of people, it is sent to a general list of editors, managing editors, and lawyers. An example is attached in Appendix 3;
  - The recipient of the message, acting for the publication, will then either call off their staff photographer or journalist, or take a decision not to use information supplied by third parties. They sometimes call for the PCC for further advice.
111. The Commission has intervened in this way in over 100 cases since 2003. In each case, the process has been successful and removed the need for a formalised complaint of harassment.

#### **Broadcasters**

112. The 2003 Select Committee noted that there was no similar system for broadcasters as a result of the regulatory boundaries outlined in the Communications Act. It recommended that the PCC, Ofcom and the broadcasters co-operate to establish procedures to deal with the worst aspects of the 'media scrum' when this involved different media. This recommendation was accepted and, following discussions, it was agreed that the easiest way to approach this would be for the PCC to act as the initial point of call, passing desist messages directly to the broadcasters where necessary. This has been a feature in a handful of cases since 2003 (including Kate Middleton).

**Pro-activity**

113. As well as helping people who feel they are being harassed, the PCC also works to minimise the chances of such circumstances arising in the first place.
114. The PCC has produced a leaflet entitled “What to do if you are being harassed by a journalist”. It has been in circulation for some years and is now in an easy-to-use pocket-sized format. Some copies are enclosed with this submission. They are despatched in a number of different circumstances:
- When someone who feels they may be about to be the subject of press attention – those who are about to be involved in a court case, for instance – request help in advance;
  - When the Commission itself identifies organisations or individuals who generally represent people who may end up in the media: lawyers, Citizens’ Advice Bureaux and so on;
  - Along with other PCC literature, they are sent to criminal and coroners’ courts so that witnesses are aware of what they can do if they are unhappy with media attention;
115. At times of major incidents, the PCC seeks out suitable third parties who might be in touch with people unknown to the Commission but who may be being approached by the media. A good recent example followed the Suffolk murders, when the PCC realised that there may have been relatives and friends of the deceased unaware of what to do if they felt overwhelmed by the press attention. The Commission therefore approached Suffolk Constabulary liaison officers. In fact, on that occasion, the feedback was that the press was behaving well.

**Harassment – a controllable situation**

116. In relation to harassment, the Commission is confident that the current arrangements work well in calling off journalists and photographers when their attentions are unwanted and there is no public interest in their being there. They have been finely-tuned over the years, and not only deliver results for the complainant, but do so in a discreet, quick way which does not involve lengthy arguments or even, in some cases, any written submissions.
117. However, that conclusion is not to indicate complacency. There is always more to do to make the fact that this service exists better known. There was a reminder of this at the PCC City Open Day in Liverpool in 2006, where the Chairman and Director of the Commission were upset to hear from one couple who outlined what could only be described as harassment. Unfortunately they had not known that the Commission would have been in a position to help them.

**Privacy, newsgathering and the Data Protection Act**

118. It is a misconception in some quarters that the PCC is the only form of regulation for the press. The press is subject to plenty of different pieces of legislation as well. There is a complex mesh of criminal and civil law which restrains newspapers' investigation, newsgathering and publication, in print or online. It grows ever wider and denser as Parliament adds new offences while the courts develop the common law and interpret the latest statutory additions. Meanwhile, Parliament is already considering additional restrictions, the government proposes yet more and others are wending their way through the EU institutions. To this extent, there is already statutory regulation for the press. The regulatory arrangements overseen by the PCC are self-imposed and over and above legal obligations. What this means is that there is a division of responsibilities between the self-regulatory authority – the PCC – and law enforcement authorities. Sometimes the rules may meet in the middle. On the rare occasions that they overlap the Commission must – as a body without legal powers – give way to any police or other investigation.
119. One of the pieces of legislation with which journalists need to comply is the Data Protection Act, overseen by the Information Commissioner, to which a public interest exemption is available for journalists.
120. The Information Commissioner has published two reports entitled *What price privacy?* and *What price privacy now?*, which the Committee will have seen. These reports include sections devoted to apparent disregard by sections of the press to the DPA. There are now moves to increase the penalties for breaching the Act to two years imprisonment, because the Information Commissioner is not satisfied that the current penalties are a sufficient deterrent.
121. The PCC of course condemns breaches of the law, including the DPA when there is no public interest. Sir Christopher Meyer has made this clear publicly on a number of occasions. Last year, in response to *What price privacy?*, he reiterated the PCC's position that offering money for confidential information, either directly or through third parties, may be illegal and that journalists must have regard to the terms of the DPA.
122. It is no secret that the Information Commissioner remains disappointed with how the PCC has reacted to his reports and the challenges that he set the industry and the PCC. But the Commission has always made clear that it is willing to work with him – as has the industry, which has put a number of proposals to him. In addition, the Commission has repeatedly made clear publicly, and through a Guidance Note on Best Practice in relation to the DPA, that journalists must follow the terms of the Act.



123. There is a problem, however, in doing anything that would blur the responsibilities of the Information Commissioner and the PCC. This would certainly be the case if the Code was amended in a way that effectively incorporated the Data Protection Act rules on paying for confidential information.
124. There is a further difficulty in that the Information Commissioner has proposed increasing penalties to two years in prison for breaking the Act, including for journalists.
125. The PCC's constitution makes clear the difficulties of acting when there is an alternative legal forum, and it is almost certain that publications would not volunteer information if there was a danger of a further investigation by a legal authority which might put one of their journalists in prison. In these circumstances, there is little chance of the Commission being able to investigate overlapping matters satisfactorily. If the Information Commissioner was proposing the amending the terms of the Act to exempt journalists and leave sole responsibility for them to the PCC then that would be a different matter, but he is not.
126. The Commission does not, in any case, believe that the case for greater penalties has been made out. While there may be practices to condemn, there seem to be several problems with the reports. They are:
- The evidence appears to have been gathered after a raid on premises in November 2002. The behaviour criticised must therefore be some years old, but there is no evidence about the extent to which such activity reflects current practice. It is therefore not possible to test whether the current penalties are acting as a deterrent. The Information Commissioner has done a lot of work to raise the profile of the Act in this area, as is his job. But there has been no assessment of what the recent impact of this has been before ploughing ahead with tougher penalties;
  - Despite this, the Information Commissioner's findings have curiously been cited as contemporaneous following the more recent Clive Goodman conviction;
  - There is an impressive-sounding but superficial list of 305 journalists who were alleged to have been involved in this trade. But there is no indication of whether the behaviour was illegal or whether, if it was known to be, it would have qualified for a public interest exemption;
  - There is little to no evidence about whether and when information sought actually led to anything being published. It seems in some cases that the requests were for contact details. In another case relating to a decorator, it seems that his identity was being confirmed in order to discount him from further inquiries, as nothing was (apparently) published about him.

127. It is the job of journalists to ask people questions and find things out that are in the public interest. Perhaps obtaining contact details in a way that breaches the Data Protection Act in order to ask such questions is something to be condemned, although that will be a matter for debate. But either way it is hardly worthy of a jail sentence, particularly when a range of other penalties is available.
128. There are two further points to make about the proposals to increase penalties for breaches of the Act, including journalists. Even though the government regrettably appears to be moving forward with the idea, it is worth saying that:
- Whatever protection the Information Commissioner believes is inherent in the Act for journalists acting in the public interest, the truth is that there will inevitably be a chilling effect whereby journalists simply do not bother to initiate investigations if they think they may end up in prison. A public interest defence is not something that is always neatly apparent. There may be suspicions or rumours that lead to something. But unless the journalist has total proof that there will definitely be tangible new information as a result of obtaining data, they will be unlikely to pursue it. The result will inevitably be that stories in the public interest do not get investigated;
  - The Commission's work internationally has brought it into contact with many people and organisations from countries which used to, or still do, have repressive regimes which jail journalists for asking uncomfortable questions. What is repeatedly made clear is the extent to which the British system of law and self-regulation is used as an example of good practice. This should be a matter of some pride. But sending out a signal that it is acceptable in Britain to jail journalists in the pursuit of information will be noted, and undoubtedly bring comfort to those it is not intended to.

### **The Commission and Subterfuge**

129. While it may be difficult for the Commission to investigate complaints where the subject matter clearly also falls under the terms of the law, the issue of subterfuge generally is something on which the Commission has a long and consistent record in dealing with, even though complaints about it are rare (amounting to just 0.5% of all complaints in 2006).
130. In particular, the Commission has set out that journalists must have legitimate grounds for using subterfuge, and been harshly critical when this has turned out not to be the case. More detail on the case law in this area is set out in the Editors' Codebook in the section on Clause 10. The Commission has been absolutely clear that journalists cannot use undercover means for speculative 'fishing expeditions' to look for information when there are no grounds to do so. These standards now guide the industry at large.

**Newsgathering and phone message tapping**

131. The recent convictions of Clive Goodman and Glenn Mulcaire have drawn attention to the unsavoury, unethical and illegal practice of phone message tapping.
132. The Code of Practice was amended in 2004 to make such snooping explicitly contrary to the Code (although it would probably have been contrary to the general rules in the previous Code). Clause 10 (Clandestine devices and subterfuge) now says that:
  - “(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 e-mails; 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”.
133. What the Goodman case highlights is that unfortunately neither the law nor the Code can guarantee that a determined individual will never breach their terms. The question is whether there are suitable structures in place to deal with things when they go wrong, which hopefully will be rarely. In this case, while the police and the CPS were concerned with the offences under the Regulation of Investigatory Powers Act, the Commission had taken care to put its position on the record at all times. Because of the police investigation, it was under no obligation to act (it has not even received a complaint about the matter), but it publicly deplored the breach of the Code and the law, and made clear that it would be launching its own investigation into the editor’s conduct after sentencing. The law took its course and the men were convicted and imprisoned.
134. This is in fact a good example of the Commission and the law working together to deliver different things, and indicative of the added value – rather than duplication of others’ responsibilities – that the Commission can offer. The PCC announced that it would – regardless of what the judge had to say – launch its own investigation, based on the editor’s responsibility under the Code to take care that it is observed by their staff and external contributors. It seemed to the Commission that the case may have revealed some deficiencies in this regard that merited investigation.
135. The editor resigned before the Commission could begin its investigation into his application of Clause 10 on the newspaper. However, it takes the matter seriously

and promptly announced a wider-ranging review aimed at preventing a repetition of the affair. This is now underway. That will look at, among other things, how the lessons that have been learned from the incident will translate into different practice at the newspaper, and what the rest of the industry does to ensure that journalists do not behave in a similar way.

136. The outcome of the Commission's inquiries will be published in a report, in the Spring/early Summer of 2007.

### Online regulation

137. The Committee has called for evidence regarding what, if any, regulation should apply to information online. It is a sensible time to consider this question given recent rapid developments in online news services.
138. The Commission has always believed that imposed legal regulation for press content is wrong in principle. It is not for governments in a democracy to draw up and enforce rules about how people may communicate with one another through the press. But the internet probably means that it would now also be unworkable. The internet has revolutionised the way in which news is spread because:
- anyone can be a publisher – they do not need the resources to own a newspaper or television channel;
  - information travels at great speed to an international audience, swiftly diluting the effect of any legal rules applicable in one jurisdiction;
  - any attempt to introduce restrictive rules on what may be published would easily be circumvented by basing the website in a more liberal jurisdiction.
139. Some people might argue that in these circumstances the only chance of keeping things private would be to obtain an injunction from a judge. This is a false hope, but again one that only the wealthy could even try. Successfully obtaining an injunction may bring with it huge attention and speculation about the identity of the recipient. Perhaps not in every case, but there have been one or two recent cases about which the Committee will be familiar which illustrate the risk. The injunction cannot suppress the public knowing the broad thrust of the claims that are being restrained, only the identity of the person concerned. Gossip websites, private e-mails and chat rooms can – even while strictly complying with the injunction by not directly naming the person – swiftly identify the person to tens and hundreds of thousands of people, at least, through jigsaw identification or otherwise.
140. This is because, in a system which imposed rules about what can be published and discussed, individuals who know something but disagree with the order to suppress it will find other ways of getting it into the public domain. At the same time, commercial media companies would be disadvantaged by being barred from using the information.
141. It seems paradoxical, but a legal injunction may simply be too blunt an instrument to be effective if the claimant wishes matters to remain private. The opposite is true of a system of voluntary regulation, where the editor or journalist who has some information voluntarily agrees not to publish it – perhaps after discussion

with the PCC – and therefore has no reason to see it elsewhere in the public domain. In fact, to do so might harm their own product.

142. This being the case, there is a further point the Committee might wish to consider. It is the danger of a two tier information society, with the computer illiterate divided from the growing army of people who can share information that hitherto would have been confined only to a few lawyers and journalists. The effect would be unfairly to deprive people of information on the grounds that, for whatever reason – perhaps age or poverty – they did not have access to the internet.
143. The internet poses further challenges. A lot of poor quality information is circulated, with the presentation of rumours, conspiracy theories or propaganda as fact, and many sites devoted to gossip and innuendo. Such material cannot be directly regulated in a free society. It has been said that you might as well try to regulate conversation in a pub. The challenge here is not to require such sites or blogs to abide by a set of agreed rules, but to help the consumer distinguish between the different sources of information so that they are aware of their relative reliability.
144. One way to do this, for commercial information providers who wish to enhance user trust in their products, is to agree to subscribe to a set of rules covering accuracy, intrusion and so on – policed by an independent external body – which reassures the user that certain standards apply. The PCC fulfils this function for newspaper and magazine websites in the UK. Its non-statutory nature means that it can adapt very quickly to changes in technology. For instance, with no external pressure, the industry in the UK has recently announced that the Commission's remit will also apply to editorial audio and visual material on their websites. An agreed guidance note which sketches the new boundaries of the Commission's responsibilities was agreed in January 2007. It is attached in Appendix 4.
145. This voluntary step means that information on publishers' websites is in fact currently more regulated than that on UK broadcasters' websites, because broadcasters – through Ofcom – are obviously reliant on legislation keeping up to date with developments. It has to be said that there will of course be grey areas about where the regulatory boundaries are. The Commission is pleased to report that it has had a fruitful dialogue with Ofcom on this subject, something that it intends to continue.
146. Other legislators and officials who have reviewed how online content can be regulated have concluded that self-regulation is an attractive alternative to formal regulation, precisely because of its flexibility and the fact that its lightness of touch is proportionate to the regulated activity. Endorsing self-regulation of online content as a viable option, a European Union study has recently explained:

“Particularly in the digital economy, driven by rapid technological change and enhanced user control, traditional regulations are finding it difficult to keep up with the speed of technological, economical and social changes, and the problem of decentralised information. Traditional regulatory approaches also may suffer from enforcement problems.”<sup>3</sup>

147. There are three further problems with old fashioned ‘top down’ regulation for media content in the digital age:
- the difficulty of defining to whom the regulations applied. Would they be aimed at everyone from the bedroom blogger to Times Online? Would they be restricted only to those whose activity was commercial? If so, how would this be defined? Would there be exemptions for non-profit activity?;
  - If these problems were surmountable, there would be a high likelihood that forcing compliance on a defined group of companies would be anti-competitive and therefore unfair on media companies. They might well ask why legal regulations should apply to their activities but not to others disseminating information either in the UK or abroad;
  - Restrictive rules which suppressed information about, say, politicians, would only prevent the information from circulating on the sites to which the restrictions applied. Even if they applied to every website in Britain, a blogger whose site was hosted in another jurisdiction such as the USA – with its constitutional safeguards on free speech – could still publish to the British public. In all likelihood their sites would only become more popular for being able to break news that other media could not. With such popularity would come advertising, and with advertising financial reward. There are already examples of this – French bloggers have recently been dismantling that country’s taboo about discussing the private lives of politicians, for instance.
148. Pursuing state regulation of online content would therefore probably be totally counter-productive to the aim of protecting privacy, and would likely lead to the withering away of effective regulation as people found easy ways to avoid it.
149. That is why a self-regulatory model, with the crucial element of ‘buy-in’ from the regulated industry, is such a suitable one for media in the digital age. It should also be said that it is a model commonly pursued by other European countries. All European press councils and press complaints commissions are responsible for the regulation of online newspaper and magazine content, with all except one (Germany) also extending their remit to online audio-visual material.

#### **Suitability of light-touch regulation**

<sup>3</sup> European Commission statement on release of Hans-Bredow Institut’s study into self- and co-regulation in the EU, February 6<sup>th</sup> 2007.

150. The Commission has found that, when complaining about online information, complainants' wishes are slightly different from those complaining about the print product. With printed newspapers and magazines, the complainant is often principally after an admission by the editor that he or she had erred, perhaps by way of a correction or apology. But when the complaint is about information online, the main requirement is for the information under complaint to be removed – and quickly. This applies as much to inaccurate as intrusive material. Requests for the publication of follow up material such as apologies – while not unheard of – are less popular. There are obvious reasons for this relating to how swiftly information can be disseminated and cannibalised once it is published online.
151. The PCC's ability to achieve this type of speedy resolution is thanks to its structural advantages. It works with the industry to look for common sense, proportionate and quick resolutions to people's problems. It is not looking to punish mistakes in every case, but to rectify them. Nor does it see the advantage of engaging in lengthy inquiries in such cases, during which time the status of the information under complaint would be uncertain until there was a formal ruling. Because editors know that the priority is to get a speedy settlement to the dispute, they are comfortable with making quick offers.
152. A legal system could not hope to be so effective. It would inevitably involve lawyers on each side talking to one another, and lose this degree of editorial co-operation that is so vital to achieve the results that complainants desire.