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PRIVATE AND CONFIDENTIAL

From the Director

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13th January 2003

Dear Chris,

Witness payments

Thank you so much for coming to see us before Christmas. We all thought the meeting was extremely constructive and, I hope, points a way forward on a number of issues. As you will recall, I emphasised that the draft which we discussed was still under consultation and no final decisions has therefore been reached. That is why the discussion was most useful, and any further views would be very helpful.

The substantive point with which we dealt – and which I will cover first – related to our concern that there may be some incredibly limited sets of circumstances in which it could be necessary for newspapers to make payments while proceedings were active. To the best of our knowledge, this has not happened in the twelve years since the Code was established – so the issue is, in reality, hypothetical.

Nonetheless such hypotheses – which are set out in more detail in this letter – are conceivable, and we are concerned for obvious reasons to ensure that the changes to the Code we are discussing would not make them impossible to deal with. For that reason, the draft we are proposing introduces a concept of *supreme public gravity and urgency*, the stiffest possible test we could develop.

Both the Code Committee and the PCC recognise that cases where such a defence might be argued would be extremely rare; indeed, they may never occur. Editors would know that if they tried to argue such a case without the most powerful and demonstrable cause, they would face the severest censure: from the PCC; from Parliament and the public; and from their professional colleagues for bringing into disrepute the system of self-regulation to which they had voluntarily subscribed.

Below, as I noted above, are set out three admittedly hypothetical, but highly plausible, sets of circumstances where such a "gravity and urgency" test might apply. While they *are* hypothetical, they do however draw heavily on actual cases for their validity. The examples are not exhaustive, and it is not difficult to conceive of other matters of supreme public gravity and urgency which might also embrace issues such as risk of airline security in the face of terrorist attack, rail safety, and major imminent threats to public health.

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1. The hospital whistleblower

A nurse or doctor is a witness in a court case in which a colleague is accused of some form of criminal activity, negligence or abuse, not necessarily very major. During the hearing, the witness confides to a court reporter that "*if you think this is bad, I could tell you of much, much worse going on at the hospital.*" Effectively, it is the first clue to a major scandal, such as that involving the **Bristol Heart Babies**, where lives are being lost on a weekly basis because medical staff are afraid to speak out about professional incompetence by senior surgeons. The witness refuses to divulge more because he or she fears losing their job and becoming a pariah within their profession. By paying for their story, the newspaper effectively indemnifies them financially. However, if the payment is delayed until the end of the current trial, more babies would almost certainly die. Payment enables the story to be run. Lives are saved.

While it could be argued that the witness should come forward unpaid, the fact is that in the Bristol Heart Babies scandal, the problems were widely known throughout the hospital, and indeed the wider medical community, for years. They continued unchecked solely because no doctor or nurse would blow the whistle publicly. It was this ongoing waste of life which finally prompted the anaesthetist, Stephen Bolsin, to present his own dossier to health ministry officials. He became a professional pariah, unable to find work in Britain and was forced to emigrate with his young family to Australia where he remains years later. He believes that despite the subsequent publicity, and legislation aimed at protecting whistleblowers, he is still an outcast within the British medical community and could not return to his homeland to work.

Examination of the evidence of the Bristol Heart Babies Inquiry will confirm that lives were being lost - despite an internal hospital dispute over the surgeons' competence - because no one would go public and that the cover-up contributed to the toll. Early publication would have certainly saved children from dying. In our hypothetical case, if an editor paid a whistleblower and saved lives, would he or she not have been acting in the interests of public health?

2. The Palace eavesdropper

This scenario might sound implausible were it not based substantially on the circumstances of the **Paul Burrell** case. Burrell faced the prospect of prison for large-scale theft. He was saved by the Queen's timely recollection of a crucial conversation between them. But what if the monarch's memory had continued to lapse? Suppose she had not remembered - as seemed possible to the last moment – or, for whatever reason, could not recall the conversation?

In this hypothesis, there is an undiscovered witness, another palace servant, who was in earshot and who – unintentionally and unknown to Burrell – overheard the conversation between him and the Queen. The servant, avidly following media reports of the trial, realises the importance of what he overheard and recognises that if he remains silent Burrell could face prison.

But the witness is faced with a dilemma. He has been pensioned off from the Palace but lives out his retirement in a grace-and-favour apartment, which is entirely in the

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Queen's gift. If he goes to the Queen to remind her of the conversation, there is the chance she might think him disloyal and react accordingly. In his mind, he risks losing his retirement home which is unlikely to be protected by whistleblower legislation. If on the other hand, he goes straight to the defence lawyers, he will almost certainly forfeit the Queen's trust and – should the palace react badly and withdraw his home – he would face a grim retirement with no likelihood of any compensation from Burrell. He decides the only way to see justice done, without risking becoming a potential victim himself, is to offer his story to the press at a price. If the newspaper does not make an offer – because it would involve a payment to a potential witness – then the man will stay silent. The accused Burrell, unaware of his potential star witness, might face jail. There would be a major miscarriage of justice.

This example highlights a dual hazard. First there is the obvious danger of a miscarriage if the newspaper does not pay and the witness remains silent. It might be argued that the newspaper could report the matter to the defence and the servant be forced to give evidence under subpoena. However – setting aside issues of breach of professional confidence or protection of sources - even this might not be an available option under a complete ban on payments to witnesses in current proceedings. If the eavesdropper ***knows*** *newspapers are totally bound – without any defence - by rules preventing them from paying him, then that alone might make him more likely to stay silent and not even make the approach. The risk of injustice could actually increase.*

3. The witness to a war crime

British soldiers are accused of a war crime, several years earlier. A key potential witness is tracked down by a newspaper who finds him living abroad, in a remote area. He has been lying low during the trial because giving evidence, either for the prosecution or defence, exposes him to intense personal risk - from victims of the alleged war crime, their relatives or possibly even from his former comrades.

He will only be persuaded to give evidence if he is paid, since he does not wish to expose himself to these risks without substantial compensation. His evidence, however tainted by payment, remains crucial to the outcome. Should the newspaper pay? Would it ultimately damage the case?

There is a parallel in the **Bloody Sunday Inquiry** hearings. Important evidence emerged from an ex-wireless operator who challenged his former paratrooper comrades' version of events in Londonderry. He suggested they fired on the marchers, indiscriminately and unprovoked. It is believed the State has had to pay him a five-figure sum, provide him with a new identity and protection in order to persuade him to give evidence – even though no one is in the dock and any proven wrongdoing would be likely to be immune from prosecution.

But, in our scenario - with soldiers in the dock - what if the State had not tracked down the witness, or had not been particularly anxious to find him, since his evidence would be highly sensitive and damage the credibility of the government, or the security forces, or cast doubt on the care and vigour of previous investigations?

If a responsible newspaper or TV station found such a witness and feared he was deliberately not being offered protection or compensation by the state, the only way to persuade him to come forward would be to pay him for his story.

Would that not be justified, in the interests of justice – especially if his evidence proved crucial to the ultimate court verdict and securing a fair trial where soldiers were in the dock?

I hope these examples are useful: we would of course be delighted to provide further information, if that is helpful.

Let me turn next to the other issues which we discussed – principally the division in sub clauses (ii) and (iii) of the draft between arrest and charge.

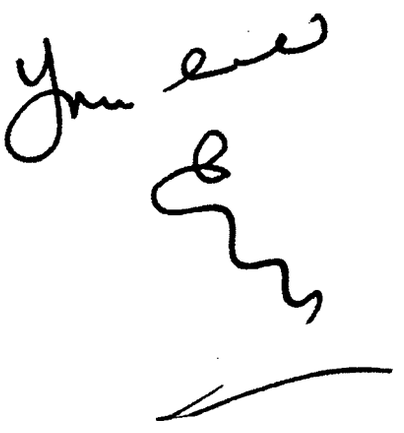
This is, in short, a recognition of the fact that there are many cases where an arrest is made long before any charge takes place – during which time considerable amounts of evidence which is potentially of public interest might be made available to newspapers. In some other cases, of course, no charge follows an arrest – and it would be wrong to stop newspapers from being able to make payments for a prolonged period where it was clear that no charge was ever going to be made.

The exceptionally high threshold for public interest therefore "kicks in" at the point of charge because that is the only point at which it is clear that a trial is obviously going to take place. Of course, this is an area at which we could look further if you continue to have concerns here.

We undertook, also, to look at whether there might need to be something in the Code to deal with potential witnesses in likely proceedings (before an arrest had taken place) where it was clear that there was – at some point – going to be a trial and any particular individual might be a witness at it. The Code Committee will need to consider this point in the light of the feedback it is receiving from the industry as part of the consultation on the proposed changes. The deadline for that consultation is 30th January, so I hope to be able to let you have firmer proposals at that point.

I hope that this covers the main points of our meeting. It would be useful to have some guidance from you about the points raised in this letter at your convenience.

With very kind regards.



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