



Privacy

Submission to the joint Committee on Privacy and Injunctions

Martin Moore

November 2011



Contents

Introduction.....	4
Summary.....	5
The need for privacy protection.....	6
What next?.....	13



Introduction

In May 2011, in response to week after week of headlines about the iniquities and impracticalities of privacy protection in UK law, the Attorney-General announced the formation of a Joint Committee on Privacy and Injunctions.

The terms of reference of this Committee were to consider privacy and injunctions, including:

- how best to strike the balance between privacy and freedom of expression, in particular how best to determine whether there is a public interest in material concerning people's private and family life
- issues relating to media regulation in this context, including the role of the Press Complaints Commission and the Office of Communications (Ofcom).

This report was originally written for the Committee, but also for a wider audience of those who may, like us, have been rather startled by the upsurge in anger and anxiety about privacy injunctions in the press in the early summer.

The report argues that the claims of those who attacked privacy protection within the law were misguided; shows how technological change has altered not only the cultural and practical constraints on privacy but also the role of the law; recognises the views of public; and suggests a route forward.

I am grateful to Gavin Freeguard and Joseph O'Leary for editorial support in putting this together.

Cover image from [walknboston on Flickr](#) (Creative Commons)

Summary

With respect to the legislative framework for privacy, the Media Standards Trust believes:

- The current legal settlement, in which privacy protection is based on Article 8 of the European Convention on Human Rights and accessible through the UK courts through incorporation via the Human Rights Act 1998, and is balanced by the right of freedom of expression as set out by Article 10 of the Convention, is the right one
- If, however, there is shown to be genuine public concern about the state of privacy law, then Parliament should consider whether to pass a privacy statute (a 'front-door' privacy law) with clearly set-out public interest defences
- Privacy injunctions should only be granted when there is a clear indication of potential harm from publication – for example in the case of children
- Sanctions for privacy intrusion should be strengthened such that enforcement becomes more effective (most notably punishment for breaches of Section 55 of the Data Protection Act)
- Publication of personal private information that breaches privacy law should be liable to exemplary punitive damages, taking into account public interest defences and adherence to press self-regulation

With respect to the regulatory framework for privacy, the Media Standards Trust believes:

- The new regulatory system ought to provide an accessible means of privacy protection to the public
- It should offer a pre-publication advisory service to public and publisher (as now) on issues of personal privacy/public interest
- It should include – within the code of practice – a clause stating that news organisations should notify people prior to publication, unless there is a clear public interest reason not to. Prior notification should then be taken into account if there is subsequent action taken
- It should monitor the press for evidence of breaches of clause 3 of the Editors' Code of Practice (on privacy)
- It should proactively investigate evidence or allegations of abuse of privacy
- It should have the power to fine newspapers and offer compensation to victims for serious breaches of privacy
- It should aim – and have mechanisms to support this – to have a learning effect on those it regulates so that repeat breaches are prevented or deterred

The need for privacy protection

Misguided press attacks on a 'back door privacy law'

There have been extensive, and increasingly shrill, attacks on privacy injunctions and Britain's 'back-door privacy law' by certain sections of the British press.

These reached their peak in May 2011. The attacks were focused on injunctions, and argued that:

- Current privacy protection under the law is illegitimate: e.g. 'A MARRIED Premier League ace who romped with a leggy model has become the latest star to use his wealth and power to gag The Sun... Prime Minister David Cameron has joined critics who have blasted judges for creating a privacy law by the back door' (*The Sun*, 14th May, 2011)
- The wealthy and powerful are increasingly resorting to injunctions to gag the press: e.g. 'The rich and the famous have obtained almost 80 gagging orders in British courts in six years, blocking the publication of intimate details about their private lives' (*Daily Telegraph*, 13th May, 2011)
- There are growing calls for legal reform: e.g. 'Call for 'gag shambles' law change' (*Daily Mirror*, 25th May, 2011)
- Injunctions have been made unsustainable by technology: e.g. 'Britain's worst kept secrets: Gagging orders are branded 'pointless' as millions trawl internet for names of celebrities linked to privacy cases' (*Daily Mail*, 10th May, 2011)

These attacks are highly misleading:

- Privacy protection based on Article 8 is not illegitimate. The precedents set around Article 8 of the European Convention on Human Rights (ECHR) are not illegitimate but are based on the usual way in which common law develops, and in particular how – since the passing of the Human Rights Act (HRA) which incorporated convention rights into UK law – the common law develops in UK domestic courts. Parliament discussed the implications of Article 8 during the passage of the Human Rights Act in 1998. Our own UK judges have made decisions on cases brought under Article 8 since the Convention was incorporated into UK law in 2000, as they were expected and required to do. These decisions are carefully

considered and nuanced, as can be seen in cases like Lord Browne v Associated Newspapers, Max Mosley v News Group Newspapers, and Rio Ferdinand v MGN Limited. Some decisions have gone in favour of the claimant, and some in favour of the defendant depending on the facts. The decisions have then formed precedents.

- In most cases where a privacy injunction is granted the newspapers do not challenge them in court on the grounds of public interest.
- There are calls to change the law radically, but these have been overwhelmingly made by those within the press itself or very close to it. The headline in the *Mirror*, for example ('Call for 'gag shambles' law change'), came from Lord Wakeham, previously chair of the PCC and one of those who argued against such a law back in 1998. The public, when questioned, supports privacy protection (see below).
- Privacy protection is about much more than what personal information the press can and cannot gather or publish.

However, the press is right to say that we do now have, as a result of the incorporation of the Convention into British law, an increasing body of precedents (case law) around privacy.

This is not, as much of the press argues, a bad thing. It is an entirely natural development reflecting the development of common law and the disintegration of practical and cultural boundaries around privacy.

Technological change and the need for a privacy law

Most of the hysterical press coverage of privacy injunctions fails to acknowledge that technological changes are driving the transformation of boundaries between public and private life. Without such acknowledgment we lack the context to decide how privacy can be protected in the digital age. In the constrained media environment of the twentieth century there were practical limitations on the press' ability to report on people's private lives.

There was, for example, only a limited amount of material the press could access – in terms of photographs, video, phone conversations etc. There were also practical constraints on what the papers could and could not publish. They were not able to publish video or audio, and they could only publish as much as could fit between the front and back pages of the print paper.

For the most part these practical constraints no longer exist. The press – or anyone else – can access huge amounts of personal material themselves and through others. A reporter can legitimately find personal information published on the internet or source recorded audio/video from members of the public.



Equally, a reporter can illegitimately access private material or illicitly record personal moments or private phone calls. The papers can then publish as much of this material as they like – in text, audio, or video – online. Or anyone else can publish this information, on a website, on a blog, on a social networking site like Facebook, on twitter, on a wiki. The information can then ripple rapidly outwards across the net.

We saw, with the case of Tyler Clementi, a university student in the US, how easy it is for anyone to record people's most private moments and then publish them to the world, with tragic effects. Clementi, who had not come out as gay, was filmed in bed with another man. After the film was posted online he committed suicide.

The removal of the practical constraints necessarily means that, if we want to protect private life and maintain private space, then these practical constraints have to be replaced with something else. Preferably this would be cultural constraints. In other words, people would recognise the line between public and private and respect that line.

Yet the press makes a living out of transgressing this line. Sometimes these transgressions are legitimate – to investigate stories of genuine public interest. Sometimes they are illegitimate – hacking into voicemail searching for gossip or breaking into personal email accounts to gather confidential police or intelligence information (as in the allegations made by Panorama against the *News of the World*).

Where cultural constraints do not constrain publication, people have sought legal constraints based on the European Convention on Human Rights (ECHR). These people are, in effect, saying 'this is where I believe my private life begins and your right to publish ends'. It is natural that people should try to do this, and it is equally natural that journalists should question where this line should be and challenge it if it prevents public interest reporting or prevents other reporting which is not actually a breach of privacy. But it is absurd not to acknowledge the tensions between the two, as some of the papers have been doing.

The front line of the battle for legal protection of private life is sex. Sex sells. Sex between two celebrities sells even more. Therefore the idea that the sex lives of celebrities will be off limits to the press scares the living daylights out of the tabloids. It would undermine the business model that many of them have developed over the last few decades.

On rare but revealing occasions they are quite explicit about their fears. Paul Dacre, the editor of the *Daily Mail*, gave the best exposition of this in [his speech to the Society of Editors in 2008](#):

‘Put another way, if mass-circulation newspapers, which also devote considerable space to reporting and analysis of public affairs, don’t have the freedom to write about scandal, I doubt whether they will retain their mass circulations with the obvious worrying implications for the democratic process.’
Paul Dacre, speech to the Society of Editors, 9th November 2008

Mr. Dacre’s directness is helpful, if rather frightening. But generally the press is much coyer about the importance of privacy intrusion to their sales. Instead, they argue that privacy injunctions are a ‘legal weapon to the wealthy seeking to hide their failings from the public’ and that the law is being used simply ‘to hush up the sordid secret of a star’ (from [‘TV star’s shame hushed up forever’](#), [MailOnline, 21st April 2011](#)). The public, the *Mail* asserts, has a right to know such secrets.

Most of us would recoil at the idea of such a commercial Faustian bargain. The proposition that certain publications should be given the freedom to intrude as much as they like into people’s personal lives so they can keep selling papers would not strike most people as a fair trade.

Moreover, the public does not, according to law, have a ‘right to know’ such secrets. They do, however, have a right to privacy protection and most of them are glad of this right and do not want to give it up.

Public support for privacy protection

The majority of the public (59%) believe it is *vital* that people have a right to respect for privacy, family life and the home. Another 36% think it is *important* ([ComRes Human Rights Poll, September 2011](#)).

To be more specific still: ‘Most people still regard the following as essentially private: sex and sexuality; health; family life; personal correspondence and finance (except where public monies are concerned)’ (from [Stephen Whittle and Glenda Cooper, *Privacy, Probity and the Public Interest*, page 2](#)).

At the same time, the public recognises that privacy may need to be compromised where there is a public interest. Although even in these circumstances there are red lines the public do not think the media should cross. For example, research from 2002 found that 91% of people think that ‘No matter what someone has done, the media should never involve that



person's children' (56% agreed strongly, 35% agreed – from [David E. Morrison and Michael Svennevig, *The Public Interest, the Media and Privacy*](#)).

People also recognise that, if privacy is protected, then some stories will go uncovered, or at least partially uncovered. Two thirds of people think the media ought to respect people's privacy, even if that means not covering a story fully (66% agree, 27% strongly, from Morrison and Svennevig).

The corollary of this is that the public believes some people have a greater right to privacy from media intrusion than others. Children and ordinary people, the public believes, are entitled to greater privacy, for example, than celebrities or public officials. Although there is a general acceptance that everyone ought to have a right to privacy.

At the moment, people think the media intrude on people's private lives far too often. A 2009 YouGov poll commissioned by the MST, conducted before the phone hacking revelations came to light, found that 70% of people think 'There are far too many instances of people's privacy being invaded by newspaper journalists' ([A More Accountable Press, page 40](#)).

Nor do the public think the decision whether to act in the public interest can be left solely in the hands of newspaper editors. In the same survey only one in ten people said they would 'trust newspaper editors to ensure that their journalists act in the public interest'.

So concerned were the majority of people at the extent of intrusion by the press that 60% said they thought 'The government should do more to prevent national newspaper journalists from intruding on people's private lives'. The Media Standards Trust does not support government intervention, but does support the legal protection that now exists under Article 8 of the Convention, as long as it is supported by a more effective self-regulatory system.

Arguments against privacy protection driven by commercial interest

Personal private information is, for certain media outlets, a commodity that can be bought and traded. As Sharon Marshall writes in [Tabloid Girl \(2010\)](#):

‘a tabloid hack can get any information they want. On anyone. There are ways and means. Newspapers used fixers. Bloggers... There was one freelancer who was known for being able to pull people's medical records – no-one quite knew how he did it’.

Sharon Marshall, *Tabloid Girl*, page 254

Indeed one could draw up a price list of different types of private information, based on what different outlets will offer, and what they will pay (the two often being different).

For the covert video of Max Mosley's sex session the *News of the World* offered £25,000 to 'Women E' (from [Mosley v News Group Newspapers](#)). To Alfie Patten, the 12-year-old 'baby father' – who turned out not to be the father – *The Sun* agreed to pay £25,000 for photos and a video interview (from [The Independent, 15th February 2009](#)). The *Mail on Sunday* paid a reported £100,000 and £6,000 to two former partners of Brian Paddick for their 'kiss and tell' stories (from [The Guardian, 19th December 2003](#)).

These are commercial transactions, done with commercial aims in mind. The high minded pursuit of truth or freedom of expression does not enter into the calculation.

In fact, had these transactions been regulated in a more commercial manner then the papers could well have been prosecuted for breach of contract. Each of the people involved in the first two examples was reportedly paid less than half the originally agreed amount (see court records in Mosley case and the *Independent* report above).

What would a world without privacy protection look like?

What would happen if, as some newspapers appear to want, the right to privacy protection under Article 8 was somehow reduced or removed, or access to its protection further restricted?

For the popular press, barter and blackmail would take over. Newspapers would gather large caches of private personal information which they would then publish or trade for other information with a promise not to publish (as there is evidence to suggest the *News of the World* did, with its dossiers on public figures, celebrities and others such as the victims lawyers – e.g. [The Guardian, 3rd September 2011](#)).

Such a world would suit the editors of the popular press and would suit traders in personal information, but would be anathema to a fair and just system, and would, in many cases, lead to the suppression of the truth rather than its exposure.

Max Clifford has spoken openly about how this barter system works in favour or one person (his client) but against the interests of another:



‘With Jude Law [when he had an affair with his children’s nanny] I was able to use that to do all sorts of deals for other clients of mine. I could say to an editor, I’ll give you this story if you help publicise something else I’m involved with’

Max Clifford, quoted in the Daily Telegraph, 27th September 2005 (via Whittle and Cooper)

Another method is to approach a potential source of personal information and blackmail them: ‘We know this already and have a source who can reveal all. Tell us or we’ll do it anyway and make you look a lot worse’. This is reportedly what happened in the coverage of Will Young, and of Stephen Gately (Whittle and Cooper, pages 22-23). It is also described by Sharon Marshall in her memoir of the contemporary tabloid newsroom (Tabloid Girl, 2010).

This system, where no rule of law exists, works in favour of those who have media power and against those who do not. Those who have power can constrain or suppress information. Rebekah Brooks, for example, was able to prevent any coverage of her wedding to Charlie Brooks, despite a guest list including the Prime Minister, the Leader of the Opposition and many senior political figures. Those who do not have that power submit or broker what they can to protect their private life.

What next?

Does technology mean legal privacy protection is impossible to police?

Still, no matter what the courts or this [Joint Committee on Privacy](#) do or say in these cases, it will be increasingly difficult to police privacy injunctions in the internet era. That is the irony of the press outrage about pre-publication privacy protection. The breadth of some privacy injunctions is evidence not of their power but of their powerlessness. There is a certain absurdity to an injunction 'against the world' ('[contra mundum](#)') and the papers know it.

If people want to publish they can, and it is not then hard for the rest of us to search the internet and find who celebrity X and celebrity Y are. As David Aaronovitch wrote in *The Times*:

'It took me 15 minutes of googling to find out who the celebrity injunctors probably were. I got the actor through (believe it or not) a lower division football club's fan site. The TV personality could be guessed through hints provided by *Private Eye*. The football player I discovered through sources I may not divulge.'

David Aaronovitch, *The Times*, 21st April 2011

This is not to say that breaching such injunctions is in the public interest. As said above, in almost all cases it is not. Nor is it to accept the blatantly self-serving arguments made by the press about censorship. The popular press rarely champion free speech and use it as an argument here to disguise their real commercial interest in publication.

The future of privacy injunctions

However, laws have to be enforceable. If a law is very difficult to enforce and is broken too regularly without consequences, then that law loses credibility and its efficacy is undermined.

It is, therefore, with some reluctance that we think injunctions should only be granted in cases where there is a clear potential harm. For example if it is clear that a child could be seriously damaged by the publication of the story.

In other cases people would not lose their right to privacy; rather they would be given exemplary damages after publication.



The future of privacy law

There is no need for Parliament to pass a privacy law. The current law, based on a balance of Article 8 – the right to respect for private and family life, and Article 10 – the right to free expression, strikes the right balance (outside the specific issue of privacy injunctions).

However, if it can be shown that there is sufficient public concern with the current state of privacy law such as to undermine the proper functioning of that law, then Parliament should, we believe, consider passing a privacy law, with clearly set out public interest exemptions. Such a law could not define every circumstance, nor should it, but would set a framework upon which judgments would then create precedent (i.e. 'judge-made law').

The chief benefit of debating, and then potentially passing, such a law would be to give it greater democratic legitimacy. The process of arguing out, in our representative chamber, the need for all of us to have private lives, and to discuss where the lines should be, would help to create a societal consensus that does not currently appear to exist, and could deal head-on with the arguments of the popular press that privacy protection is somehow wrong. It would also help editors and journalists, for whom the lack of clarity can itself be constraining.

If, after debate, Parliament decided the UK should have its own privacy law, there is a good chance it would not be all that different from the current Article 8, balanced by Article 10. It would almost certainly, for example, recognise that everyone had a right to respect for his/her privacy. And, it would balance this with the right of people to free expression. The differences might be in the clarity of public interest defences.

The role of press regulation

The first thing that should be said about press regulation and privacy, whether by the PCC or another body, is that it represents a small part of the issue. Privacy is far bigger than the press and for this reason it would be myopic to focus too much on press regulation.

With this narrow focus in mind, there is certainly a place, in a reformed system of press self-regulation, for a regulatory body to play a key role, particularly if injunctions are granted in fewer cases.

Regulation ought, if effective, to be a much sharper tool than the law. It should be able to investigate and address problems before they escalate. It should be

able to take meaningful, and proportionate, action quickly. It should be accessible to everyone.

It should aim – and have mechanisms to support this – to have a learning effect on those it regulates so that repeat breaches are prevented or deterred and when they occur are subjected to stronger sanction.

At the moment, the Press Complaints Commission does its best given its resources and its remit. The PCC has enhanced its pre-publication advisory service, and now sends out regular desist notices to newspapers, magazines and broadcasters. It has a 24 hour service for people who find themselves at the centre of a media scrum.

Unfortunately its resources are scarce and its remit is narrow. It does not have the power or remit to properly investigate news gathering. It is not able to ensure a quick, prominent apology for people. It is not able to offer compensation or impose sanctions for privacy invasion. It is under-equipped to prevent the breach happening again.

To be effective when it comes to privacy protection a regulator has to do six things:

- Provide clear principles of privacy protection to member organizations
- Offer the public access to pre-publication privacy protection without recourse to the law
- Offer the public access to meaningful and proportionate redress for privacy intrusion post publication
- Monitor press coverage for evidence of privacy intrusion or abuse of news gathering methods
- Proactively investigate evidence or allegations of abuse of privacy
- Have a learning effect on those it regulates so that repeat breaches are prevented or deterred and when they occur are subjected to stronger sanction

The existing Editors' Code of Practice provides relatively clear principles, based closely on Article 8 of the HRA (although the public interest defences are too broad). The PCC offers advice and some protection for individuals prior to publication via desist notices and anti-harassment calls (although the effectiveness of this needs to be examined given what we now know about the extent of press intrusion).



However, when it comes to offering meaningful or adequate redress, monitoring news gathering methodologies, or proactively investigating, the PCC is not effective.

When it comes to privacy, the most meaningful protection a regulator can provide is pre-publication. This can include:

- Offering pre-publication advice (as now). This should include an strong indication of whether publication would breach the code
- Sending out desist notices or equivalent. Similar to current practice, though such notices should carry greater weight post-publication, if a news outlet decides to go ahead and publish
- A clause in the Code on prior notification. This would then be taken into account, both by the regulator and the courts, post-publication

However, pre-publication action is hard to enforce and becoming harder. The regulator should also have stronger remedies post-publication.

Greater post publication redress would not only give the regulator more leverage pre-publication, but would be both more proportionate and more meaningful than the current mechanisms available to the PCC.

Such redress could include:

- The power to direct an apology and/or a right to reply, within a specified time frame, and with the appropriate level of prominence
- The power to direct the publication to provide compensation, taking into account the value of the privacy intrusion to the paper, and its financial means
- The power, in exceptional circumstances, to fine a newspaper (for example when widespread malpractice is discovered)
- Actual mediation (as recognised in the courts) – which often involves actual face-to-face meetings with a mediator present

To be effective the regulatory framework has to be closely integrated with the law. The injured public will, inevitably, look at the options available to them and choose the one that they believe is accessible, independent, fair, and will provide them with adequate redress.

Privacy is so much bigger than the press

Aspects of our identity are now spread far and wide. Our financial details, our shopping habits, our medical histories, our parking fines, our relationships, our holidays, and our homes. Those who can access this information include banks,

insurance companies, supermarkets, the police, the courts, the government, our friends, our colleagues, and our families.

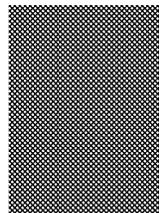
Any future privacy protection has to recognise that such protection may be necessary from each and all of these different parties. This is why the law, applied equally to all, is a pre-requisite.

However, though a law is a pre-requisite, such a law has to recognise that privacy protection must take account of context and circumstances. This is why the law itself needs to be set on basic principles. Principles which are then built on by precedent. These principles, and these precedents, then have to be balanced by people's right to free expression and the right to publish in the public interest.

Privacy

Submission to the Joint Committee on Privacy and Injunctions

In May 2011, a Joint Committee of both Houses of Parliament was announced to consider privacy and injunctions. The Committee was to look into the statutory and common law on privacy, and how injunctions and super-injunctions have operated in practice; how best to strike the balance between privacy and freedom of expression, and how best to define the public interest; issues relating to the enforcement of anonymity injunctions and super-injunctions, online and abroad; and issues relating to media regulation, especially with regard to the Press Complaints Commission and Ofcom.



This is the Media Standards Trust's submission to that Committee. It examines the current situation around privacy, the public interest and pre-publication injunctions, and what the future of privacy law, injunctions and regulation might be.

Media Standards Trust
5/7 Vernon Yard
Portobello Road
London W11 2DX

020 7727 5252

www.mediastandardstrust.org

Registered charity 1113680

