Memorandum to the Leveson Inquiry

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Introduction

1. I submit this evidence as an independent academic expert, and one of the leading writers in the UK on the development of a common law right to privacy. My work in this area dates from 1996, and has been published in leading journals, including the *Modern Law Review* and *Cambridge Law Journal* and in my book with Professor Fenwick, *Media Freedom under the Human Rights Act* (2006, OUP); it has been influential on the development of the law in this area, as evidenced by citations in judgments of the Court of Appeal (in *Douglas v Hello*[2] and *McKennitt* v Ash[3]) the former House of Lords (*Campbell v* MGN[4]) and the New Zealand Court of Appeal (*Hosking v Runting*[5]). I have also recently given oral and written evidence to the Parliamentary Joint Committee on Privacy and Injunctions. [6]
2. In this Memorandum I comment on a number of issues raised by the Inquiry's remit, concentrating in particular on the notion of the 'public interest'; role models and the public's 'right not to be misled'; the position of celebrities and self-publicists;[7] the lack of press self-restraint; and Parliament's input into this debate via the Human Rights Act.
3. I am aware that the Inquiry has some specific points to decide, in particular about the future of press regulation and the PCC. The points I make in this memorandum are of a more general nature, particularly concerning the relationship between privacy, publicity and press freedom. By doing so I hope

[1] http://www.dur.ac.uk/law/staff/stafflist/?id=5039

[2] *Douglas* v. *Hello! Ltd* (No. 3) [2005] EWCA Civ 595 [2006] Q.B. 125.

[3] [2008] Q.B. 73.

[4] [2004] 2 AC 457.

[5] [2005] 1 NZLR 1.

[6] http://www.parliament.uk/business/committees/committees-a-z/joint-select/privacy-and-superinjunctions/publications/.

[7] At various places I draw on my published work, in particular *Media Freedom* (above). I also draw, with permission of the Joint Committee, on my memorandum submitted to that body.

that I may assist the Inquiry in developing the broad standards that it believes should underpin regulatory and other reform in this area. In addition, I believe that the Inquiry is already playing a role in promoting more informed public discussion of these issues. Inevitably the press plays a major role in leading and framing debate on this issue, as it does in nearly all matters of public importance: the problem is that it is institutionally biased in relation to this point; much of the media has a direct commercial interest in promoting the view that some notion of 'the public interest' justifies its frequent, gross invasions into privacy of the kind that the Inquiry has been hearing about so vividly.

4. I believe that more informed and balanced discussion of this issue by Parliament, the media and the public can have a wider public benefit in allowing for a better understanding of the issues than that fostered by the often hugely one-sided coverage of privacy cases in the press. Such coverage not only, I believe, encourages the public to continue to consume even the most grossly invasive celebrity gossip but also to feel a sense of grievance when intrusive stories are withheld from them by court orders. This in turn can lead to the kind of mass defiance of such orders that we saw in the Ryan Giggs saga; it can also tend to undermine public confidence in the courts (and the judges) as the proper and fair forums for resolving such disputes. Ultimately this can undermine the rule of law itself.
5. In terms of this kind of re-balancing public discourse, I wish above all to emphasise one key point:

> Without adequate protection for privacy, we risk the situation in which the rights and freedoms of individuals are sacrificed to the commercial interests of the mass media and the idle curiosity of the majority. Cases in which a media pack fuels sales by consuming an individual's life and reputation cannot without perversity be characterised as the exercise of a vital human right to free speech: or at least not without utterly surrendering the content and meaning of that rights to powerful commercial and corporate forces of a kind which John Stuart Mill, with his

famous defence of human liberty, never envisaged dominating the so-called marketplace of ideas.[8]

What the tabloid media wishes to be able to continue to do is engage in the *commodification* of the private lives – the personal information – of other people, in order to profit from it. This has very little to do with the exercise of free speech in its proper sense and often everything to do with its abuse. It is ironic that sections of the media often complain about the misuse or abuse of human rights concepts by the undeserving – prisoners, 'bogus asylum seekers', terrorists and the lke; but this is precisely what much of the media do when they obtain personal information, often by surreptitious means, and then publish it for profit, under the guise of 'the right to free speech'.

The Public Interest and privacy

6. It is generally accepted that the public interest in a given revelation may justify the publication of facts that would ordinarily be actionable as an invasion of privacy (in English legal terms, as a breach of the tort of misuse of private information; in Strasbourg terms, a breach of Article 8 ECHR). The Strasbourg Court indeed made this plain in its seminal decision in *Von Hannover v Germany.*[9] The question, of course, is what constitutes the public interest and who should decide when it is engaged? I consider three aspects of this issue in what follows: first, the underlying human-rights based reason why an independent body like the judiciary must determine the public interest rather than allowing the media or the public to self-determine this point; second, the 'personalisation' argument, which seeks to justify the use of private information to foster public debate; third, and closely related to the second, the argument for disclosure flowing from the alleged position of celebrities as role models. These points are taken in turn.

Why 'the public interest' cannot be simply mass curiosity

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[8] I draw here on an article critiquing US law's 'hands off' approach to the media: 'Trial by Media: the Betrayal of the First Amendment's Purpose' (2008) Autumn 71 *Law and Contemporary Problems* (USA) 15, 30.

[9] [2005] 40 EHRR 1.

7. I note that in evidence to the inquiry on 29th November, Paul McCullum defined the public interest simply as circulation: in other words, what people want to read about, as evidenced by their purchase of newspapers. In sharp contrast to this view, the judiciary and Parliament have traditionally drawn a distinction between the 'public interest properly so called' and merely 'what interests the public'; it is important to consider why this is so.
8. In one early decision under the HRA, the *Flitcroft* case, Lord Woolf delivered some comments in the Court of Appeal that were rapidly to become well known:

> Even trivial facts relating to a public figure can be of great interest to readers and other observers of the media. In many of these situations it would be overstating the position to say that there is a public interest in the information being published. It would be more accurate to say that the public have an understandable and so a legitimate interest in being told the information. If this is the situation then it can be appropriately taken into account by a court when deciding on which side of the line a case falls.[10]

9. While these comments were subsequently treated with caution by other courts, they are interesting as a means of allowing us to focus in clearly on what is wrong with the viewpoint they uphold (of course many in the press would agree with them). The objection is this: that such comments appear to lose sight of the fact that we are dealing with the circumstances in which *a human right* – the right to respect for private life – may legitimately be invaded. Human rights are generally conceived of as *counter-majoritarian* principles; their *raison d'etre* is, at least in part, to act as protection against the tyranny even of the majority. Such is the essential difference between a polity based upon utilitarianism, or the satisfaction of the majority, and one founded upon some basic notion of human rights, promising a basic level of concern and respect for all, including unpopular minorities.
10. Effectively, if the interest that Lord Woolf describes can outweigh the right to privacy, then we have arrived at a point at which the fact that large amounts of people do not want you to be able to enjoy a particular right is a good reason for overriding it - in other words, the precise *converse* of the notion of

[10] *A v B plc* [2002] 3 WLR 542, at 552.

human rights. The debasement of individual rights to the collective whim that this view appears to encapsulate brings to mind Professor Schauer's caustic comment: 'Increases in knowledge that admittedly increase the pleasure of the knower are necessarily valuable only under a theory that treats pleasurable punchings of others as valuable....[11].

11. It is essentially this view that often prevails in the US through the defence to privacy tort actions of showing that a given story was "newsworthy". The problem is, of course, that material appearing in the news media may by definition be accounted "newsworthy", so that the press *can* become judges in their own case. One commentator, Zimmerman, defends such a "leave it to the press model", arguing that it "may actually be the appropriate and principled response to the newsworthiness inquiry" because "the economic survival of publishers and broadcasters depends upon their ability to provide a product that the public will buy."[12] The problem with this view is that it renders the individual's privacy wholly dependent upon the standards of those who read a particular newspaper; the right to privacy is thus open to violation simply on the basis of public whim, legally recognized through the right to free speech. This view thus *precludes* any effective "right" to privacy, leading to what has been dubbed as "the failure of American privacy law." [13] As Professor Wacks has put it: "It is widely acknowledged that the...[US] 'newsworthiness' defence has effectively demolished the private-facts tort."[14] This is the inevitable result of an approach that, in effect, denies the status of privacy as a human right by submitting it to popular preference.

The public interest as contribution to a debate on a topic of general interest?

12. One of the most influential arguments supporting the revelation of personal information as a valid means of sparking worthwhile public debate is the so-called 'personalisation' argument. It is important because it defends a very

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[11] F. Schauer, "Reflections on the Value of Truth" (1991) 41 *Case Western Reserve Law Review* 699, 711.

[12] D. Zimmerman, 'Requiem for a Heavyweight: a Farewell to Warren and Brandeis's Privacy Tort' (1983) 68 Cornell Law Review 291, 353.

[13] This is indeed the title of D. Anderson's essay on the US "private facts" tort in Markesenis, (ed) Protecting Privacy (Oxford: Clarendon, 1999).

[14] *Privacy and Press Freedom* (Blackstones: London, 1995), p. 113.

wide range of speech, going well beyond explicitly 'political' speech; it usually does *not* concern politicians, but celebrities, their relatives and those who for a short time and for a particular reason only are thrust into the public gaze (such the McCanns, the Dowlers and Jeffries). It is often, but not always, bolstered by the so-called 'role model' argument, which I discuss separately below. In what follows, while acknowledging that such speech *can* contribute to debate I want to cast doubt on the idea that this simple fact alone can justify overriding an individual's privacy.

13. The justification then is that such stories can contribute importantly to discussion of matters of general interest: as one American commentator puts it, '[The] media uses people's names, statements, experiences, and emotions to personalise otherwise impersonal accounts of trends or developments.'[15] Such speech is not overtly 'political'; however, to quote Lord Cooke, 'Matters other than those pertaining to government and politics may be just as important in the community'.[16] Such speech, which can 'inform the social, political, moral and philosophical positions of individual citizens'[17] can include revelations relating to matters as diverse as eating disorders, abortion, attitudes to sexuality, education and the like.

14. The German Federal Court in the well known the *Princess Caroline* case explains the way that such stories have become integral to the way the modern media works:

> Entertainment can also convey images of reality and propose subjects for debate that spark a process of discussion and assimilation relating to philosophies of life, values and behaviour models. In that respect it fulfils important social functions...When measured against the aim of protecting press freedom, entertainment in the press is neither negligible nor entirely worthless and therefore falls within the scope of application of fundamental rights...
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> The same is true of information about people. Personalization is an important journalistic means of attracting attention. Very often it is this

[15] Anderson, note 13 above, at 142.
[16] *Reynolds v Times Newspapers* [1999] 4 All ER 609, at 640.
[17] Zimmerman, n 12 above, at 346.

which first arouses interest in a problem and stimulates a desire for factual information. Similarly, interest in a particular event or situation is usually stimulated by personalised accounts. Additionally, celebrities embody certain moral values and lifestyles. Many people base their choice of lifestyle on their example. They become points of crystallisation for adoption or rejection and act as examples or counter-examples. This is what explains the public interest in the various ups and downs occurring in their lives.[18]

As a US commentator has put it:

"As least as much as [directly political speech], daily life matter speech – communication related to the real, everyday experience of ordinary people – indirectly but deeply affects the way we view the world, deal with others, evaluate their moral claims on us, and even vote: and its effect is probably greater than that of most of the paintings we see or the editorials we read."[19]

15. The argument I suggest against the *non*-consensual use of a person's private life to provoke discussion in this way, efficacious as it may be, is as follows. It posits an extraordinarily weak utilitarian argument against a powerful principle - that privacy-invading disclosures are a gross violation of individual autonomy. Such media stories amount in effect to *forcing* a person to provide highly personal information for the purposes of fuelling public debate; they thus amount to one of the clearest breaches one could imagine of the Kantian imperative to treat persons as ends in themselves. It is a little like a group of friends who want to discuss the topic of monogamy, and decide to read an absent friend's letter to his wife, confessing infidelity, in order to lend the discussion some focus and bite. It treats the person as a mere means – something to stimulate discussion. We would I think, all be shocked and incredulous if prying friends offered this as a justification for reading our correspondence or otherwise grossly intruding into our privacy; yet such a justification is routinely advanced by the press.

16. It is apparent that such an approach would have the effect, as in America, of virtually destroying the right to privacy, since almost all pieces of personal

[18] Quoted in *Von Hannover* at [25].

[19] E. Volokh, *Freedom of Speech and Information Privacy: The Troubling Implications of a Right to Stop People from Speaking About You* (2000) 52 *Stan LR* 1049, at 1093.

information about a person in the public view could be seen as 'relevant' to some area of public debate. Against this point then, the opposing utilitarian argument – that the information will stimulate discussion – is extremely weak. This is because in the modern media environment there is an enormous outpouring of information, much of it highly personal in character, available quite consensually. One can hardly turn on the television without seeing either a "reality" show such as Big Brother, in which participants' daily lives can be minutely analysed and pored over, or a discussion show, such as *Jerry Springer*, or one of the numerous English equivalents, n which contestants happily pour out their innermost thoughts and feelings on subjects such as sexual identity, infidelity, homosexuality, family conflict or ageing, for the benefit of the public at large. Anonymous blogs abound on the internet, discussing every personal issue under the sun, often in excruciatingly intimate details. We are scarcely a culture suffering from a lack of personal information about its members. To the contrary: we are drowning in a sea of it. To suggest that, in such a climate, it is important to invade a person's privacy in order to add one further tiny jot of information about their private life to the vast pool of such information that our popular culture swims in is to posit the weakest of possible benefits to outweigh the clear and sometimes ruthless use of individuals' intimate personal details by the media.

17. From this it follows, in my view, that more should be required from the media, by way of a 'public interest' argument than simply the contention that the revelation of a given piece of personal information – such as a footballer's affair – 'contributes to a public debate'. Instead, the standard, where the information is plainly of a private character and published without consent, should be that it makes a *unique and substantial contribution to an important public debate* – in other words, that it brings something genuinely new to the table. I stress that a different standard should apply where the information relates to the fitness of an elected politician for office (although very few cases concern this point). In such a case, it should suffice that the information could be reasonably considered to be of relevance to an assessment of the person's fitness to be elected to, or

continue to hold their office. Such are the demands of democratic accountability.

Role models and the public's 'right not to be misled'

18. A common line of argument that media bodies use to defend publication of personal information about celebrities or other public figures is the proposition that the figures in question, while not politicians, are 'role models' and that it is important for the public not to be misled about such people. This notion appears in the Press Complaints Commission Code to which the courts must have regard under s 12(4) of the Human Rights Act. However, in my view it is too often advanced by media bodies, whether in particular cases or as a general argument against privacy laws, with too little clear justification. On occasions also, courts have accepted it with too little analysis. For example, in the Court of Appeal decision in the *Flitcroft* case[20] Lord Woolf said:

> [A] public figure may hold a position where higher standards of conduct can be rightly expected by the public. [He] may be a role model whose conduct could well be emulated by others. He may set the fashion.[21]

Applying this to the facts of the case, which concerned a 'kiss and tell' story about a footballer's affair with two lap dancers, his Lordship found:

> ...it is not self-evident that how a well-known premiership football player chooses to spend his time off the football field does not have a modicum of public interest. Footballers are role models for young people and undesirable behaviour on their part can set an unfortunate example.[22]

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[20] Note 10 above.

[21] At para 11 (xiii).

[22] Ibid at para 45.

19. There are, I suggest, three problems with this view. First, the notion that footballers and others are 'role models' for young men and boys seems to be very commonly made, but very seldom actually evidenced. Public debate would benefit from an examination of evidence, instead of mere assertion, on this point. Second, even if the role model assumption is correct, the argument as it is generally made leaves it wholly unclear what actual harm to the public interest is entailed by people having incorrect impressions about the private lives of people such as pop presenters and footballers. If it is the case that those of the public who care about these things vaguely thinks that such and such a footballer is a faithful husband when he is not, that such and such a TV presenter would not ever visit a prostitute when in fact he has once done so, what is the clear public harm that can be identified? There may on particular occasions be such harm, but in my view, public debate would benefit if newspapers were required to provide a clearer explanation of this point than is often the case.
20. There is a third, more philosophical point raised by the assumption that having false impressions about celebrities is in some way intrinsically harmful. The argument that any deception of the public entitles the media to 'put the record straight' comes perilously close to destroying the very notion of the right to informational autonomy, or *selective* disclosure, which most commentators see as lying at the heart of the right to privacy. Such selective disclosure is something we all practice in our daily lives; arguably it is the only means of reconciling two fundamental human needs: to maintain some degree of privacy, and to communicate intimately about our lives with others in order to build and foster close relationships. Such selectivity in disclosure will, on occasions, inevitably lead to the creation of false assumptions about us in the minds of others. We may, for example, wish to give the general impression, as nearly all couples wish to, that our marriage is happy and secure, while confiding in a few trusted friends its real struggles. This undoubtedly 'misleads' those who receive the general impression of happiness. Indeed, such 'misleading' may be actively sought at times: for example someone who does not wish the fact that she is gay to be widely known outside her intimate circle of friends and family will inevitably be selective about whom she discloses this fact to. She may further, under

pressure, and if asked in a public environment, actively give a deceptive impression if asked about her sexuality, knowing that a refusal to answer will often be taken to give assent and thus effectively make the very revelation she objects to. Such a person has certainly "misled the public", but it does not seem persuasive to argue that this *per se* entitle a journalist who discovers the truth to 'set the record straight'.

21. In short, we cannot uphold – and ourselves practice – the right to selective disclosure and, consistently with that practice, insist that any and every misleading of the public is a wrong entitling the press to intrude into privacy to correct. Rather it should be asked whether that false impression actually matters in some way: for example, if the closet homosexual was an Anglican Bishop who supported exclusion of homosexuals from the priesthood, the revelation of his own homosexual acts would directly contribute to an important political debate as well as revealing a major piece of hypocrisy in the holder of a public office that is related to that office. But such clear public benefit from like revelations often seems sorely lacking.

'Waiver' of privacy by prior publicity?

22. A related argument often raised by the media in response to privacy cases brought by celebrities is the claim that the applicant has sought publicity in the past and therefore in some way has consented, or should be deemed to have consented, to a current revelation to which he or she now objects. As the PCC has put it in the past: 'Privacy is a right which can be compromised and those who talk about their private lives on their own terms must expect that there may be others who will do so, without their consent, in a less than agreeable way.' [23]

23. English judges in breach of confidence/privacy cases have in the past shown some receptivity to this claim and it is constantly put forward by the media and seemingly accepted by at least some members of the public as justification for intrusive coverage of the private lives of public figures. As to the notion of 'implied consent', the claim that previous, voluntary revelations constitute some kind of generalised, all-purpose consent to future invasions

[23] Quoted in D. Tambini and C. Heyward "Regulating the trade in secrets: policy options", in Tambini and Heyward (eds) *Ruled by Recluses? Privacy, Journalism and the Media after the Human Rights Act* (London: IPPR, 2002), at 85.

of privacy is simply not plausible: no-one can realistically suppose that when for example a celebrity gives an interview to a newspaper about particular problems in a past or current marriage, she thereby gives *carte blanche* to the media to publish any information relating to her personal life which they can obtain in future. Thus the 'consent' terminology is in reality merely a cloak for a purely normative contention: that since in the past the applicant has sought publicity for personal information, she should not be *allowed* to complain about this publication.

24. It is often not recognised that this notion - that a previous voluntary disclosure of private information prevents an individual from being able to complain about an *involuntary* disclosure - is in fact wholly incompatible with the core privacy value identified above, of the individual's right to *control* over the release of personal information. As discussed above, all of us exercise this right to selective disclosure in our social lives: we may tell one friend an intimate secret and not another; at times be open, at others more reticent. No one denies our right to do this. A friend who is shown a personal letter on one occasion does not assume that he has thereby acquired the right to read, uninvited, all other such letters. In other words, to suggest that public figures should be treated as estopped from complaining about unwanted publicity because they had previously sought it would deny them the very *control* over personal information that is inherent in the notion of personal autonomy; previous disclosures amount not to an *abandonment* of the right to privacy, but an *exercise* of it.

25. It should be conceded, however, that, while the above argument has considerable logical force, we cannot completely disregard an individual's own attitude to publicising their private life, particularly where they have done so for gain. If this were so, then the fear would arise that celebrities could manipulate the media and enrich themselves through selective disclosure of personal information,[24] using privacy rights to shut down the unwanted disclosures and thus maintaining a favourable public image. I queried above whether such false impressions really matter, but accept that in some cases prior self-publicity must be taken to be relevant, in the

[24] See Tugendhat and Christie, *The Law of Privacy and the Media* (Oxford: OUP, 2002), at 344.

following way. A law of privacy cannot protect the right to selective disclosure in relation to any and all information relating to a person; only information that in some way relate to *private life*. There may be situations in which a claimant has, voluntarily, thoroughly and repeatedly placed details about the same subject matter which it is now proposed to publish to such an extent that it may be inferred that the information in question is not any longer, to that person, truly private or personal.[25] Where the information has been sold to a magazine by the celebrity this inference would be stronger: there is a clear difference between confiding a private fact to certain people in order to enhance one's relationship with them, and simply selling it. Thus in cases where a celebrity has, quite genuinely commoditised an aspect of their personal life, it may be concluded that it has lost its private character. However such an approach would appear to be apposite only in cases of clear, voluntary, and extensive publicity given to ones *private life.* This appeared to be the approach adopted by Lord Nicholls in *Campbell*:

> When talking to the media Miss Campbell went out of her way to say that, unlike many fashion models, she did not take drugs. By repeatedly making these assertions in public Miss Campbell could no longer have a reasonable expectation that this aspect of her life should be private. Public disclosure that, contrary to her assertions, she did in fact take drugs and had a serious drug problem for which she was being treated was not disclosure of private information.[26]

Only a law for the rich?

26. Allied to the self-publicity is the argument that privacy (and defamation) laws only protect the rich. The media and some politicians have made much of this point, arguing that, because privacy injunctions or other remedies are only available to the rich, they are somehow suspect and that this is in itself a good restriction for restricting or abolishing privacy remedies. This is a frankly risible argument. First of all, the assumption is not even true, since CFA ('no-win no fee') arrangements allow people who couldn't otherwise afford it

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[25] Note that under the Data Protection Act 1998, the data controller has a defence in relation to processing of 'sensitive personal data' if that information has been made public as a result of steps deliberately taken by the data subject' (Sch 3, para 5).
[26] *Campbell,* at [24].

access to justice. But in any event, the argument is perverse in its own terms. By this logic, we would abolish all areas of law for which legal aid is not available on the grounds that they are only available to the rich. That would mean getting rid of an awful lot of our rights, including, for example, the entire law of libel. The problem of inadequate legal aid and high legal costs giving the wealthy disproportionate legal power is a general one, and not peculiar to this area of law. The answer to it is obviously not to abolish whole areas of law, but rather to improve access to justice and find ways of obtaining faster and cheaper apologies and corrections, either through the courts or a different route, such as an improved media regulator.

The failure of the press to self-restrain.

27. I believe that the case for proper regulation of the press by a body to replace the discredited PCC is bolstered by the failure of the press to self-restrain when publishing private information, even in cases in which severe damage may be expected from publication. There are a number of cases in which courts have made orders against the media to protect the identity of persons seeking rehabilitation in society after serving sentences for crimes that have attracted such notoriety that there appeared to be a well-founded fear that, were their identity and whereabouts to be revealed, they would be subject to harassment and possibly vigilante attacks involving serious violence. For example, in *Venables v News Group Newspapers,*[27] Butler Sloss P granted unprecedented injunctions against the whole world preventing publication of any material which might reveal the identity and whereabouts of Venables and Thompson, who many years previously, as juveniles, had murdered the toddler Jamie Bulger.[28] Such was the degree of public hostility to the two applicants that there was convincing evidence before the court that a failure thus to protect their anonymity could leave the court accused of failing to secure their rights to life and freedom from torture and inhuman treatment under Articles 2 and 3 of the Convention, in addition to their right to privacy under Article 8. Nevertheless, newspapers opposing the application for the injunction wished to reveal their identities.

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[27] *Venables and another v News Group Newspapers* [2001] 1 All ER 908.

[28] *X (A woman formerly known as Mary Bell) v SO* [2003] EWHC 1101.

28. An order was made in similar circumstances in *X (A woman formerly known as Mary Bell) v O'Brien,*[29] 'to protect the Article 8 rights of the applicant and her daughter, who had on five occasions been forced to move home following the discovery of their whereabouts and harassment by the press.'[30] A similar injunction was granted in *Carr v News Group Newspapers,*[31] to protect a woman convicted of perverting the course of justice for providing a false alibi for her partner who had killed two children in 2002, in a case that had attracted massive publicity. In each case, the court was able to hear an application before any disclosure was made, but without a claimant notification requirement, this is by no means guaranteed in future cases. These cases show that newspapers are quite prepared to publish information even where there is clear evidence that doing so may lead to a serious risk to a person's physical safety or mental health.

Section 12 of the Human Rights Act: Parliament's view on the developing right to privacy

29. I have given detailed evidence on this point to the Parliamentary Joint Committee and do not repeat that here. The point to highlight is simply that section 12 and its legislative history gives the lie to the misleading trope, obsessively repeated by the media, that the judges have introduced a privacy law 'by the back door', and that the issue has never been considered by Parliament. In fact, as the record shows, Parliament was well aware that the coming into force of the then Human Rights Bill would be likely to give the decisive impetus to the development in the common law of a right to privacy against the media; section 12 constitutes Parliament's considered attempt to address this matter, in particular by changing the law governing the granting of interim injunctions.
30. The second point to make is that, when considering the Human Rights Bill, Parliament rejected an amendment put forward by Lord Wakeham, then Chair of the Press Complaints Commission, that would have had the effect of excluding the courts from the definition of 'public authority' when 'the parties

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[29] [2003] EWHC 1101; [2003] EMLR 37.
[30] I. Leigh and R. Masterman, *Making Rights Real* (Hart, 2008), 284.
[31] *Carr v News Group Newspapers* [2005] EWHC 971 (QB).

to the proceedings before it [did] not include any public authority.'[32] Put simply, this amendment would have rendered the Convention rights non-applicable in private litigation involving newspapers, thus averting the perceived threat to the media from Article 8. This amendment was decisively rejected by Parliament,[33] something that is one of the most important legislative facts lying behind section 12 HRA. In turn this rejection gives rise to the following, clear inference: Parliament intended the Convention rights, including Article 8, to be applicable to some extent in private litigation – and indeed passed section 12 to cater for this fact. It is important to stress this point because the impression is often given – by politicians, as well as the press – that the judges have been off on a frolic of their own in recently developing a right to informational privacy. This is, most emphatically, not the case.

[32] HL Deb vol 583 col 771 24 November 1997, Amendment no 32.

[33] *Ibid.*

The Leveson Inquiry

culture, practices and ethics of the press

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