Comments on the future of press regulation

Submission by working group led by Lord Prescott

Submission to the Leveson Inquiry

30th May 2012

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1. Executive Summary

At the invitation of Lord Leveson, this Paper utilises Lord Prescott's deep political and practical experience to volunteer some observations and suggestions on the subject of press regulation.

This Paper does not seek to address all aspects of press regulation. Instead, it makes comment on a number of key areas. The key findings are:

- The disastrous failure of the Press Complaints Commission in recent years would render any direct successor tainted by association. A complete clean break is needed with the past.

- The new regulatory framework has to cater for press activity across all media, should such parties choose to join. Any such framework restricted to the printed press is out of date now, and will be completely irrelevant in the near future.

- The European Convention on Human Rights already balances freedom of expression and press regulation adequately. Articles 8 and 10 should be the reference point for any new regulatory framework. Furthermore, the Courts are best placed to continue to be the final arbiter in resolving the tensions between Articles 8 and 10.

- It is both possible and desirable to have a voluntary regulatory framework, but this will require a cocktail of incentives to make membership commercially compelling to the press. Some of these incentives will need statutory support. There are useful precedents in the Irish Defamation Act on how some of these incentives can be brought into being.

- The regulatory framework should include an Ombudsman, which will encourage the press to resolve complaints in-house, and, if this is not possible, then seek to adjudicate on unresolved complaints in a non-legalistic way. This is of pressing importance at a time when the ability of most people to take the press to Court is becoming limited as the process become more expensive.

- The Editors' Code of Practice has a lot of useful guidance, and much of it needs no amendment. However there needs to be a wider debate on the definition of the Public Interest in today's society, especially if this is to provide defence in the Courts.

- The Inquiry has seen the good actions of the large majority of journalists undermined by the irresponsible actions of those who have abused the power of the press. The scope of the Editors' Code of Practice should be widened to address how each press organisation operates as an entity, in terms of its ethics and its governance.

In developing his ideas, Lord Prescott has worked with a number of experts in the areas of human rights, press regulation, privacy and data protection, some of whom are named as contributors to this Paper. Those named in this Paper are at your disposal if you have further questions on the points raised herein.

2. Scope of this Paper

This Paper has been drafted by the contributors following Lord Prescott's evidence to the Leveson Inquiry into the culture, practices and ethics of the press ("the Inquiry") on the afternoon of 27th February 2012[1]. During this Hearing, Lord Leveson expressed an interest in receiving Lord Prescott's thoughts on the matter of press regulation.

The Paper is intended to support the Inquiry's considerations, primarily with reference to Part 1.2.a:

> *To make recommendations ... for a new more effective policy and regulatory regime which supports the integrity and freedom of the press, the plurality of the media, and its independence, including from Government, while encouraging the highest ethical and professional standards.*

This Paper focuses on a number of areas where the contributors feel their experience and expertise enable them to best make comment. In passing the Paper makes comments that have relevance to other aspects of the Inquiry's scope, such as relations between politicians and the press.

[1] http://www.levesoninquiry.org.uk/wp-content/uploads/2012/02/lev270212pm.txt

3. There needs to be a Clean Break from the Existing Regime

Any new regulatory framework for the press in the UK (the "Scheme") has to be new, clear and distinct from the start, as a phased approach with more 'last chances' is likely to fail. There are two reasons for this:

- The current Press Complaints Commission ("PCC") is irretrievably tainted by its failures, and any association with the old regime will undermine the credibility of its successor; and
- The current state of affairs represents a one-off opportunity to get this right.

On the former point, the PCC's actions in recent times, in particular its repeated aggressive dismissals of allegations which are now known to be true, have sadly left it with zero credibility. Whatever the aims of the current organisation, it cannot be allowed to form part of the new regime. It is true that the PCC was efficient in supporting some areas of the Editors' Code of Practice ("the Code") through its mediation activities, but any good practice must be incorporated as lessons learned by a brand new regime, with different leadership, staff and governance.

On the latter point, it is noted that the last attempt to address this issue failed. The PCC was established in 1991 in the aftermath of a review by Sir David Calcutt QC ("Calcutt"). His committee had recommended the previous year that a voluntary Scheme be established and its success monitored after 18 months. Calcutt noted, 'This is a stiff test for the press. If it fails, we recommend that a statutory system for handling complaints should be introduced.' In 1993, Calcutt reported again. He was unimpressed by the PCC: 'I do not doubt that the commission commands the confidence of the industry, but it cannot, in my view, command the confidence of the public'.

Despite there being a clear intention to revisit the structure if it did not work, by the time Calcutt stated the PCC was structurally unsound there was no meaningful mechanism to revisit the issue and address Calcutt's concerns.

4. There Appears to be Growing Consensus around a New Model

The debate around what would replace the PCC has been running for a number of months now. It is striking how much of the discussion has evolved during that time; we have progressed a long way from the early 'black and white' discussions comparing a statutory mandatory membership model against an entirely non-statutory voluntary model. It appears that most proposals sit within a spectrum of ideas which favour a voluntary scheme, recognition of which may need to be created via statute, and involve a more effective regulator with the ability to adjudicate on complaints (whilst recognising the need to maintain access to the Courts) and truly hold the press to account. This range of ideas also appears aligned with Press Councils in other countries with similar societies to ours. The proposals in this Paper also sit within the same group of ideas.

5. The New Regulatory Framework Has to Recognise Convergence

Calcutt considered a world where the 'paper' press was a separate industry to other media, and the channels for conveying news were stable and well understood. That world has gone. Not only have alternative channels for news proliferated with the rise of blogs, tweets and the 'citizen journalist', but the newspapers themselves are evolving to reduce their reliance on print. These developments offer great opportunities for the 'integrity and freedom of the press, the plurality of the media, and its independence'[2]. However it means that most individuals use a combination of media platforms, and their likely usage will vary by factors such as age, geography and income[3].

The use of these media platforms, and what each platform offers, is changing rapidly; this evolution is unlikely to cease any time soon. Any 'static' analysis will be outmoded within a couple of years.

Therefore the new approach to regulation has to focus on content available in the UK, not delivery platform. It should be technology and media neutral, simply based on the balance articulated between Articles 8 and 10 of the ECHR, regardless of how the news was 'published' to others. As such the Code should move beyond the existing focus on the 'newspaper and periodical industry' and become technology neutral.

The obvious challenge is how such a Scheme integrates with existing areas of regulation. The key here is the voluntary nature of the Scheme. With appropriate incentives, the Scheme should capture all the intended members from the press. In addition, content providers from all channels may self-select to join the Scheme, driven by their risk appetite and their commercial imperatives, thus bypassing the need to draw artificial lines in the sand between media channels. In the short term, this option is unlikely to prove attractive for those content providers who are already heavily regulated (e.g. broadcasting), but this will not detract from the Scheme fulfilling its primary purpose of press regulation. However, as the various platforms and content providers evolve, the attraction of the Scheme to others may increase, widening the membership of the Scheme whilst retaining its core (press) participants.

[2] Leveson Inquiry Terms of Reference; http://www.levesoninquiry.org.uk/about/terms-of-reference/

[3] *Regulating for Trust in Journalism: Standards regulation in the age of blended media* by Lara Fielden, comprehensively analyses both the patchwork regulation in place across media, and how various demographic groups perceive these channels very differently: http://reutersinstitute.politics.ox.ac.uk/publications/risj-books/regulating-for-trust-in-journalism-standards-regulation-in-the-age-of-blended-media.html

6. The European Convention on Human Rights Balances Freedom of Expression and Press Regulation

Despite the string of incidents and the failure of the PCC, the balance articulated between Articles 8 and 10 of the European Convention on Human Rights ("ECHR") is still a robust and workable mechanism for considering privacy, freedom of expression, and the freedom of the press.

Any new framework should acknowledge the ECHR and the Human Rights Act ("HRA") as the conceptual foundation for ensuring that press freedom of expression and privacy are balanced appropriately, and should expressly require that any regulator has regard to case law under ECHR and HRA.

Furthermore, as is currently required by the HRA, the Courts should be the final arbiters on questions of privacy versus freedom of expression, subject to any primary legislation.

Any additional defences given to members of a new press regulatory Scheme ("the Scheme") who are compliant with the Code (see Section 8 below) could be aligned with the HRA requirement on the Courts to take account of the importance of freedom of expression and any 'relevant privacy code' (s12(4)).

7. The New Regulatory Framework should be Voluntary

One of the most challenging questions is how to encourage or enforce membership of the Scheme. There is a big difference between enforced statutory membership of a Scheme, and statutory measures that provide tools for a voluntary Scheme. In principle, voluntary membership schemes are preferable, as any Scheme with mandatory membership has two weaknesses:

- It risks turning into, or being perceived as, a state licensing system, and thus having a chilling effect on the right to freedom of expression; and
- It raises questions of scope for new media, where there is a sliding scale from the occasional tweeter to the dedicated online news site.

However, a widely acknowledged weakness of the current regime is the ability of established publications to stay outside the Scheme. Therefore a 'carrot and stick' approach, offering a broad range of incentives and protections for membership, and risks for non-membership is preferable.

Whilst this Paper addresses some areas which would encourage membership, this Paper is not best placed to comment on what combination of incentives for membership will bring the right press organisations into the Scheme. Those in the industry (both the press themselves and associated commentators and experts) are best placed to advise the Inquiry on this. However, the opportunity to better utilise legal defences in libel, defamation and privacy proceedings appears to be a very powerful

incentive to join; this is one such idea which would require statute to bring into being. This idea is examined in the next section.

8. Legal Defences may Encourage Voluntary Membership of the Scheme

Among the advocates for a voluntary Scheme, several parties[4] have suggested that a powerful ingredient in this cocktail of inducements may be access to certain legal defences in libel, defamation and privacy proceedings. The general thrust of these models provides that:

- Legal defences are available to organisations that, in Court, can evidence their adherence to a set of principles listed in statute;
- The principles listed map to the (revised) Code in the Scheme;
- The principles recognise the public interest in publication of material in particular circumstances;
- Statute further recognises the existence of the Scheme and describes how the Courts may take adherence to the Code (partly evidenced through compliant membership of the Scheme) into account when considering the application of the Public Interest test and the legal defences applied[5].

In this approach, there may be other ways to evidence adherence with the same principles, but the intention is that membership of the Scheme is by far the most convenient and reliable way in which to evidence compliance and utilise the defences. As noted above, it is the press themselves who can best advise if such an arrangement would make voluntary membership commercially compelling. If this proved to be the case, then it is a very attractive option; it keeps the Scheme voluntary, and balances the need for there to be benefits for adherence to the Code with the recognition that, in some cases, recourse to the judicial system will be inevitable.

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[4] Such parties include Hugh Tomlinson QC (http://inforrm.files.wordpress.com/2012/02/proposal-for-msa-final.pdf), Alan Rusbridger (http://www.guardian.co.uk/media/2011/nov/10/phone-hacking-truth-alan-rusbridger-orwell), and Professor George Brock (http://jou.sagepub.com/content/13/4/519.abstract).

[5] The Irish Defamation Act 2009 provides an useful example of how this is articulates in statute, stating "the court shall, in determining whether it was fair and reasonable to publish the statement concerned, take into account such matters as the court considers relevant including...in the case of a statement published in a periodical by a person who, at the time of publication, was a member of the Press Council, the extent to which the person adhered to the code of standards of the Press Council and abided by determinations of the Press Ombudsman and determinations of the Press Council"

At the same time an organisation could remain outside the Scheme, accepting the risks that this approach brought, and trust in its own good governance and the Courts if it wished to utilise the legal defence available. Any voluntary Scheme should accept this may happen, whilst making the incentives such that it was an unlikely scenario.

A similar framework is already in place in Ireland[6]. Although the defences are yet untested in the Irish Courts, the framework has passed the first hurdle by having a full membership of all the major printed press organisations in Ireland, including some major UK titles which circulate there. The Irish example should be a major reference point if a similar Scheme is envisaged here.

The planned Defamation Bill, confirmed recently in the Queen's speech, may represent the correct vehicle for making these changes, if the timing of the passage of the Bill and the timing of your considerations are complementary.

9. The Structure of the New Regulator

The inability of the PCC to prevent malpractice in the press was due in part to its limited scope. The new regulator should continue to fulfil the basic function of the existing PCC, by mediating on simple complaints and having a role in the Code (although perhaps not ratifying it, see Section 13 below), but also having additional powers to address issues that have come to light before and during the Inquiry:

- The regulator should oversee the efforts of senior management in each press organisation to achieve compliance with the Code across the entity through robust internal governance measures (see Section 10 below);
- The regulator should be able, in exceptional circumstances, to go beyond simple requests for information and undertake its own investigations (which the Member would have agreed to submit to, as part of the initial contractual agreement to join the Scheme), using third parties to support its work where its own resources will not suffice (see Section 11 below); and
- The regulator should be able to better adjudicate on complaints where mediation has failed, with stronger powers to obtain equal prominence for apologies and corrections, and the ability to award compensation commensurate with the distress and damage caused (see Section 12 below).

At a high level, this would result in a three-function regulator, with the scope of the functions outlined in the table in Figure 1. As is common among many other models internationally, there should be a clear

[6] *Regulating the Press: A comparative study of international press councils* by Lara Fielden, outlines the Irish model and compares it with various other Press Council schemes around the world: http://reutersinstitute.politics.ox.ac.uk/fileadmin/documents/Publications/Working_Papers/Regulating_the_Press.pdf

separation between the Press Council function, Ombudsman function and the Code-setting functions. However the establishment of separate bodies would be confusing for the layperson who may need their services. It is therefore more practical to have all functions within one body, but then to have the Code-setting function organisationally separate within the Regulator.

Finally, the Press Council function should have an obligation to report to Parliament on an annual basis regarding its ability to enforce the Code, ensuring that it continues to assess its own effectiveness, is subject to some level of challenge in its operations, and has access to Parliament for support if it requires.

	Function	Powers	Membership
Press Council	• Administers Scheme • Holds Scheme members to account • Provides guidance (e.g. pre-publication advice, training)	• Request information • Investigate possible systemic failures to adhere to the Code (arising from complaint(s) or from other factors as it sees fit), or commission a third party to do so on its behalf • Require improvements in internal governance from members • Expel member from the Scheme	• Senior management of Scheme Scheme Board • Administrative team
Ombudsman Function	• Receive complaints on alleged failures to adhere to the Code affecting the individual who has complained • Adjudicate on said complaints	• Request information • Mediate, adjudicate • Order remedial action from a member (e.g. apology, equal prominence correction) • Award compensation to the complainant commensurate with the distress and damage caused	• Full time Ombudsman staff
Code Committee	• Drafts, updates, amends Code	• Draft, amend, update Code, which is then approved by an external party (see Section 11)	• Mix of industry practitioners with some independent and lay members

Figure 1: Scope and Powers of a Three-Function Regulator

10. Making Press Management Accountable and Responsible

A new regulatory framework should focus on the role of senior management. Responsibility should primarily lie with the organisation, not the individual. The Inquiry has seen many examples of management failings:

- For too long News International management attempted to blame a small number of 'rogue' individuals for phone hacking. It is now clear that this was not the case.

- From submissions to your Inquiry it is now clear that following Operation Motorman, several newspapers continued to engage Steve Whittamore for work. In hindsight, this is extraordinary behaviour, and is indicative of the relative importance to the newspapers of the information Whittamore was supplying, compared to the ethical and reputational issues arising from his continued engagement.

Doubtless your Inquiry has focussed the minds of the press, and standards may be higher right now. However, commercial imperatives and old habits mean that a 'return to form' by some parts of the press is likely over time, if steps are not taken to improve the 'business as usual' operations of the industry, by ensuring management are responsible for operational compliance with the Code.

Other regulated industries place great weight on maintaining a culture which supports good governance, in areas such as the activities of senior management, the training of staff, and the monitoring of compliance to assess the effectiveness of the controls in place. Each press organisation should take responsibility for their staff, and also take responsibility for enforcing robust measures to promote good practice in the newsroom. Only if the organisation can demonstrate that the journalist was operating in breach of its own guidelines, and that those guidelines had been properly communicated and implemented by management, should the focus fall on the individual journalist rather than the organisation.

The compliance requirements of the new Scheme should therefore go beyond the current Code, which focuses on the immediate journalistic activities, and also incorporate the way the organisation itself promotes and enforces the Code, so that senior management have assurance that their staff are adhering to the Code in their 'business as usual' behaviour.

In turn, the new regulator should have within its remit an obligation to consider if a member of the Scheme appears to have an appropriate internal governance structure to adequately promote and internally enforce the Code. If it suspects a member is not doing this, it should have measures in place to require that the member improves its governance, and ultimately it should have the power to exclude the member from the Scheme if it feels this failure is systemic and non-recoverable.

11. Maintaining Access to Justice for Complaints Against the Press

The large majority of those with a complaint against the press lack both the legal background to understand the full range of options available to them, and the funds to pursue such channels effectively. The proposals put forward by other parties for various levels of mediation, adjudication and arbitration are well thought out, but may be overly complex. They will confuse the layperson and have the potential to be drawn out and legalistic.

A simpler Ombudsman system would address this, with one process for managing complaints received, and a set amount of administrative costs allocated to the Scheme Member for each complaint brought. The Ombudsman would only be available upon the conclusion of the organisation's internal complaints procedure, would encourage quick and mutually agreed solutions to the complaint, but be able to adjudicate on the disputed complaint when this was not possible.

The Ombudsman-driven 'cost-pre-complaint' approach could support this focus on internal governance by encouraging members to deal with complaints in-house when possible. This should be the preferred initial option for resolving complaints, which currently seem to be 'outsourced' to the PCC, making them seem distant from the ongoing operations of the newspaper in question. One measure of success for the new system would be, over time, an increasing number of complaints being resolved via the organisation's internal mechanisms, without any recourse to the Ombudsman at all.

Consideration should be given to the powers available to the Ombudsman when adjudicating on complaints. At the time of writing the UK has a system that has been thoroughly discredited and the Press Complaints Commission derided as toothless. In order for a new regulator to be recognised by the press and the public as credible, it must have financial penalties as a tool at its disposal. However, the ability to levy fines may prove problematic in a voluntary Scheme, where members are joining via a contractual arrangement which may exclude the ability to incorporate punitive financial penalties[7]. It may be that such financial penalties would therefore have to be limited to the award of damages. If this proves to be the case, the range of powers should focus on:

- Obtaining prompt equal-prominence corrections to quickly limit harm and/or redress the damage inflicted on the individual;
- Awarding damages, which are significantly material to genuinely recognise the distress and suffering caused to the complainant; and
- Referring the member to the Press Council function (see Section 9), when one or more complaints indicate that there may be systemic issues with how the member's internal

[7] *Regulating the Press: A comparative study of international press councils* by Lara Fielden, does not identify any of the Press Councils reviewed as having the ability to impose material fines, although it notes minor financial penalties in Denmark and Sweden

governance supports adherence to the Code, which may require further consideration or investigation.

The use of the Ombudsman could not in itself be mandatory, as individuals would retain access to the Courts without using the Ombudsman, or having pursued this channel and not accepted its verdict (one would assume that if the verdict was accepted then part of the agreement would be to agree to take no further action on the matter). However, the Courts could take into account the decision of a complainant to use the Courts without having first used the Ombudsman, or the decision of the Ombudsman if this channel was used.

12. Enabling the New Regulator to Investigate, if Required

It is clear the PCC was unable to react appropriately to the 'black swans', the seldom-occurring, very important cases, such as those which have the ability to affect large number of people, or affect the confidence of the public in the press. The new regulator cannot be similarly impotent if 'phone hacking II' were to occur[8]. The challenge here is that the regulator may operate for many years without having the need to undertake a large investigation, assuming that the members of the Scheme all co-operate properly to information requests and the Ombudsman function performs adequately. It may then need to 'ramp up' quickly to address an emerging scandal or a systemic governance failure at a member.

As it would not be proportionate or economic to have a 'standing army' of investigators waiting to be called on, there has to be a mechanism in place to enable the regulator to summon such resources on the rare occasion they were required. One solution to this may be found in Section 166 of the Financial Services and Markets Act 2000. This gives the FSA the power to appoint a 'skilled person' (e.g. a professional services firm with the appropriate specialists) to undertake a review on behalf of the regulator, at the regulated firm's expense, to address questions the regulator has. Although this power is based in statute, there is no reason why the same arrangement cannot be reached through a contractual agreement. Alternatively a variation of this mechanism could be achieved through statute, perhaps making it possible for the regulator to obtain court orders require an investigation to be undertaken at the expense of the member.

The mechanisms to enable these resources to be made available may be some of the most challenging to develop. A balance need to be struck between the low-probability of a major investigation being required, and the need for an investigation to be very effective if it were to happen. However, it is vital

[8] It is noted that Ofcom retains the power to investigate breaches of the Ofcom Broadcasting Code (http://stakeholders.ofcom.org.uk/broadcasting/guidance/complaints-sanctions/standards/), meaning there is some level of precedent for a regulator in a similar area, albeit within a context of licensed services, to have these powers (although as noted above, ideally such powers within the Scheme would be enabled by voluntary agreements, without resort to the statutory mechanisms).

that the new regulator has this tool at its disposal, lest it be left on the sidelines (again) as soon as a major issue arose.

13. Outsourcing Activities, not Responsibility

A theme of the matters discussed at the Inquiry has been the press' use of third parties, and in particular their use of third parties to do their 'dirty work'. Examples of this include:

- The use of private investigators to 'blag' people's private information, for use by the press;
- The use of private investigators to hack into people's voicemail accounts;
- The use of private investigators to 'tail' innocent people; and
- The use of paparazzi photographers to obtain photos of people, which are sometimes collected in intrusive ways by photographers using intimidatory tactics.

In other industries there are clear regulations or guidelines on using third parties to perform functions which support the organisation in question. The underlying principle is always the same – if the regulated firm outsources activities that it would otherwise undertake itself, it has to retain responsibility for the actions of the outsourced parties. It is therefore incumbent on the regulated firm to take measures to satisfy itself that each third party is behaving appropriately (e.g. an outsourced IT function is maintaining proper security standards, or an outsourced payroll function is not selling employee data to marketers).

The same principle should be applied to members of the Scheme. In the examples involving private investigators above, there would normally be some prior engagement with the organisation, and presumably some kind of contract. The organisation should have an obligation to ensure that any third parties it engages abide by its own commitments in the Code, in the same way they have an obligation over their own employees.

In some instances there will not be a prior contractual relationship. However, this should not be an excuse for the member of the Scheme to 'wash their hands' of the issue. The conduct of some members of the paparazzi is a case in point. The Inquiry has heard of many examples of paparazzi pursuing individuals which would fall under sections 4.i and 4.ii of the current Code:

> *i) Journalists must not engage in intimidation, harassment or persistent pursuit.*
>
> *ii) They must not persist in ... pursuing or photographing individuals once asked to desist; nor remain on their property when asked to leave and must not follow them. If requested, they must identify themselves and whom they represent.*

However section 4.iii states that '*Editors must ensure these principles are observed by those working for them*'. Whether a freelance paparazzi is 'working for' a member of the Scheme would be difficult to prove, given that at the time a photo is taken it may not be clear who will buy it. The onus should therefore be on the member of the Scheme to have an obligation to understand how the photo was obtained by the paparazzi freelancer, and to only buy it if they can assure themselves that it was obtained in a way compliant with the Code. The same principle should apply to any other content which is obtained by a third party not bound by a contract to the press organisation.

14. The Editors' Code of Practice: Ownership and Responsibility

It makes sense for the industry to remain the primary drafting body for the Code, as they best know how to articulate the Code in a way that the industry understands and can implement on a day-to-day basis. Legislation might acknowledge, as does the Human Rights Act, that there is a Code and it might mandate the kind of body which should draft it, perhaps being selected from working journalists and editors with a lay chair.

In order to maintain credibility in the eyes of the public, the Code should then be reviewed and endorsed by a body with the interests of the public, not the press, at heart, which could be the regulator, Parliament, or another body appointed by Parliament.

15. The Editors' Code of Practice: Acknowledging the Power of the Press

The Inquiry has laid bare the power that the press has been able to exercise over others. In the vast majority of cases journalists handle this delicate balance with skill and common sense, using the power they have to inform, challenge and entertain responsibly. However the Inquiry has seen the good actions of the many undermined by the irresponsible actions of those who have abused the power of the press, with three themes emerging:

- The tension between the positive role the press has in reporting on events in the public interest, in particular relating to the politics of the nation, and the ability of the press to influence those events (and those who wield influence and power), which has the potential to lead to corruption and the abuse of their power.

- The imbalance of power between the press and the parties they are writing stories about, which has the potential to lead to bullying and the abuse of individuals.

- The disregard of basic good practice and common sense in contacting the subjects of stories prior to their publication. In many cases, there is only a nominal attempt at prior notice, with the individual being told at the last minute that a story will run. This makes it impossible for an

objection to be raised, and gives the readers the false impression that the subject of the story was properly consulted before publication.

On the first point, the role of the press in investigating and reporting on matters of all kinds is acknowledged. In terms of our democracy, the reporting on matters of the public interest, in particular the dealings of public figures, is especially vital. We further note the current Code clearly states the press should be free to be partisan. There is nothing wrong with a newspaper trying to influence the political direction of government, this is an integral part of our democracy. However, the Code does not acknowledge that this role brings with it an ability for the same organisations to abuse the power they accrue from their ability to report on such matters, for instance by influencing politicians to act in the interests of that organisation. It is of course acceptable, and indeed positive, that some members make transparent their positions on issues through their Editorials and comment pieces. What is problematic is when stories are pursued, twisted, fabricated or withheld to suit the interests of the newspapers, to support those in positions of influence who may favour that organisation, or to damage those who may oppose it or its supporters.

On the second point, the press should be able to report on whatever matters are of interest to the public, within the scope of the Code. However the Inquiry has heard from a range of people who have been bullied, manipulated and coerced by some of the press, who have exploited the imbalance of power between an individual and a newspaper. Sometimes this has been to get an individual to be a 'willing' contributor to a story, in other cases it has been to belittle or demean individuals who are seen as enemies of that publication. These activities are morally wrong, and it is difficult to envisage an organisation which allowed such practices to occur having good internal governance on other matters.

On the third point, the Inquiry should consider if the Code should be amended to recognise that there are situations where the publication of a story may lead to irrecoverable harm to the individual, which cannot be fully redressed through equal-prominence corrections or the award of damages. This is primarily the case where someone's privacy is breached unjustly, and no amount of corrective action can lead to the 'un-knowing' of the private matter now in the public domain. The Code could recognise the practical and reasonable use of prior notice as good practice, to be followed unless it is in the public interest to print without consultation[9]. The regulator could play a role here with supporting its members with pre-publication advice.

A further option may be for the Ombudsman to play the same role on pre-publication complaints as it would in post-publication complaints (if there was an objection from the subject of the story). This role for the Ombudsman would involve it directly in the question of publication of some stories, but it would

[9] There is some precedence here in Ofcom's Broadcasting Code: *'Practice 7.11; If a programme alleges wrongdoing or incompetence or makes other significant allegations, those concerned should normally be given an appropriate and timely opportunity to respond*' and '*Practice 8.6; If the broadcast of a programme would infringe the privacy of a person or organisation, consent should be obtained before the relevant material is broadcast, unless the infringement of privacy is warranted*.'

address one of the imbalances of the current system, where only those with the wherewithal and the funds are able to apply for an injunction to prevent publication. Giving the Ombudsman this role would be a significant extension of its scope, and should only be done if it was proportionate and acceptable given the shape of the overall regulatory framework. Such a role would also place pressure on the Ombudsman to be able to deal with such objections swiftly and decisively, which would mean the Ombudsman would have to be well resourced to enable it to have the right standard of staff with around-the-clock availability.

The first two points are principle-based, and require consideration of the ethical principles underlying the way the press works, rather than the operational areas covered in the main body of the Code. Therefore the Code's preamble should be further developed to address the issue of the potential for the abuse of power by a press organisation to further that organisation's interests.

The third point requires careful consideration by the Inquiry, as there are many practical considerations to incorporate around the need for the press to publish the news while it is still topical, and to avoid cynical stalling tactics by individuals using the system to stifle valid stories. However the underlying principle, that the press should in most cases tell someone they are going to run a story about them, would go a long way to re-establishing the credibility of the press with the public.

16. The Editors' Code of Practice: Definition of Public Interest

In the current Editor's Code of Practice a number of the issues covered in the Code, such as privacy and harassment, allow a 'public interest' exception. The current drafting of 'public interest' in the Code is not wholly without merit, but the Inquiry has seen that the interpretation of the 'public interest' has been abused in its application in recent years. This is not a new issue; Calcutt's 1993 analysis of the Code criticised the breadth of the public interest exemption (as then defined) as well.

The public interest exemption needs to be redrafted with direct reference to the balance articulated between Articles 8 and 10 of the ECHR. Furthermore, the ECHR/HRA case law balance should be the backbone of the privacy/freedom of expression aspects of any code. Any articulation of public interest should take this as its starting point and adopt and apply the relevant case law.

A new regulator would be well placed to take the lead on this issue. The more public discussion and debate around this vital area, the better. As case law evolves and the debate continues, the regulator should have a stated aim of continuing to provide authoritative interpretative guidance to help the press apply the public interest test as best it can.

17. The Editors' Code of Practice: Promoting the Code

Finally, the Code should be at the heart of press regulation, and should be a document that the public, the press, and the rest of the world look to, as an exemplar of articulating the balance between privacy, freedom of expression, and the freedom of the press. As such the Code and its contents should be positively promoted to the public, and members should be encouraged to proudly tell their audience of their compliance with the Code

18. Contributors

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