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HOUSE OF COMMONS

HOUSE OF LORDS

ORAL EVIDENCE

TAKEN BEFORE THE

JOINT COMMITTEE ON PRIVACY AND INJUNCTIONS

PRIVACY AND INJUNCTIONS

MONDAY 17 OCTOBER 2011

THE RT HON. JACK STRAW MP, THE RT HON. LORD WAKEHAM, THE RT HON. SIR STEPHEN SEDLEY AND PROFESSOR GAVIN PHILLIPSON

Evidence heard in Public Questions 1 - 32

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Oral Evidence

Taken before the Joint Committee on Privacy and Injunctions

on Monday 17 October 2011

Members present:

Mr John Whittingdale in the Chair
Mr Ben Bradshaw
Lord Black of Brentwood
Lord Boateng
Baroness Bonham-Carter of Yarnbury
Mr Robert Buckland
The Lord Bishop of Chester
Baroness Corston
Philip Davies
Lord Dobbs
George Eustice
Paul Farrelly
Lord Gold
Lord Harries of Pentregarth
Lord Hollick
Martin Horwood
Lord Janvrin
Eric Joyce
Mr Elfyn Llwyd
Lord Mawhinney
Penny Mordaunt
Lord Myners
Ms Gisela Stuart
Lord Thomas of Gresford
Nadhim Zahawi

Examination of Witnesses

Witnesses: **The Rt Hon. Jack Straw MP**, Home Secretary during the passage of the Human Rights Act 1998 through Parliament, **The Rt Hon. Lord Wakeham**, Chairman of the Press Complaints Commission during the passage of the Human Rights Act 1998 through Parliament, **The Rt Hon. Sir Stephen Sedley**, Lord Justice of Appeal, 1999–2011, and **Professor Gavin Phillipson**, Durham Law School, University of Durham, examined.

Chair: Can I welcome to the second part of this session this afternoon the two architects, I suppose, of Section 12, Jack Straw and Lord Wakeham, as well as Sir Stephen Sedley and Professor Gavin Phillipson?

Q1 Ms Stuart: Thank you very much, Chairman. We started the last session looking at this tension between Articles 8, 10, 12 and this notion that certain rights were beginning to trump others, which was quite a novel concept in British judicial thinking. I just wonder

whether either Lord Wakeham or Jack Straw would like to comment on the thinking behind Articles 8 and 10, and then Section 12 was introduced as a kind of sweetener. How does this fit in with our framework?

Lord Wakeham: I am very clear about that. As far as I am concerned, free speech, press freedom and self-regulation are absolutely fundamental in a democratic society, and therefore I accept them. If you go back to the time when the Human Rights Act was passed, both the Government and the Conservative Opposition said they did not want this to create a privacy law. One of the ways that some of us felt that this might be dealt with was to take the jurisprudence that had occurred in Strasbourg up to that period of time, where, in a whole range of their decisions, they had actually given the benefit of the balance towards freedom of the press. For example, one of the cases when I was chairman of the PCC was one where Earl Spencer took the British Government to Strasbourg, and lost on just this issue. That would be my view as to where the balance should be: of course privacy is very important, but I think freedom of speech is fundamental to a democratic society.

Q2 Ms Stuart: Before we move on, Lord Wakeham, can I just press you on whether you were satisfied that the British judiciary was actually prepared for rights trumping rights in a way that the Americans are quite used to, but I do not think the British judiciary was?

Lord Wakeham: I am the only one sitting here who is not a lawyer, so you will not get good legal advice from me.

Ms Stuart: That is why it is so important we hear from you.

Lord Wakeham: I am disappointed that Section 12 has not achieved what we hoped it would achieve when it was brought in. I do not actually think there is going to be any serious change of the law whatever you may say in your report, or whatever Lord Justice Leveson says. In my judgment, there is a very real possibility that, whoever is the Government of the day, when it comes to taking very statutory control of the press, they will not do it. That is why I want to see strongly reinforced self-regulation in this country, which is not happening because we will not get the other, in my judgment.

Mr Straw: The provenance of Section 12, which I think is well known, Mr Chairman, was that there was anxiety, as Lord Wakeham has pointed out, about how the courts without any further guidance would interpret their duties following the incorporation of Article 8, so the press, in the person of Lord Wakeham and his colleagues, made very strong representations to Lord Irvine of Lairg and myself, as the two sponsors of the Bill.

On our side we had no commitment to introduce a statutory law of privacy—I will come back to what we did think would happen—and I certainly wanted, if it was possible, a political consensus on the introduction of the Act. That was my overwhelming preoccupation, because I thought, with an issue like this, it was going to be absurd to end up in a situation where we got this on the statute book and then a successor Government made it a manifesto commitment in the following manifesto to repeal it—the whole exercise would have been nugatory from the start. It is for that reason that there were very detailed negotiations with the churches, which found their way into what is Section 13, and with the press, which found their way into Section 12.

To answer Ms Stuart's question directly, there was never any question that by virtue of this particular section we could give the courts, as it were, a trump card in respect of Article 8, which in all circumstances could trump the exercise of rights under Article 10. There was never a suggestion of that. It would have been dishonest to imply that, because the whole purpose of the Act was to incorporate the Convention articles, and to require under Section 2 the courts to take account of the jurisprudence. Even if our Human Rights Bill had failed, we would still of course be subject to Strasbourg, so we were clear about that.

The special anxiety of the press was about interlocutory injunctions in privacy cases. Lord Wakeham's view is that the section has not worked out as intended. I take a more sanguine view about this. Although there have been some highly publicised cases of so-called super-injunctions, the numbers are relatively small. That became evident in the report which Lord Neuberger of Abbotsbury produced, although as his report makes clear, there is a real problem about the data. For those of you who have not entertained yourself with this, the fact of the injunctions and their terms are confidential, and the Ministry of Justice's database was not recording them at all. Steps have now been taken to ensure that they do, but even so we know that numbers are relatively small. Looking at the way in which Section 12 has been interpreted, for example in *Cream Holdings v Banerjee*, a Law Lords' case which is one of the leading cases on this, I think they came out with a common-sense approach to the issue.

My final point is that, although Lord Wakeham is correct to say that Ministers made it clear at the time of the passage of the Human Rights Bill that we were not in the business of creating a statutory law of privacy, we were well aware of the fact that incorporation of Article 8 with the other articles would lead the courts to do that, and so were the courts. It is interesting that in the *Douglas v Hello!* case that Lord Phillips of Worth Matravers, then Master of the Rolls, recites the fact that Parliament said it was not going to pass statutes on this and then says, "The courts have not accepted this role with wholehearted enthusiasm", because it is really difficult. But it is one they have taken on, and I think on the whole, have managed to navigate with some facility.

Q3 Ms Stuart: Sir Stephen, do you have a particular view on trumping rights? Is that something that the judiciary was prepared for?

Sir Stephen Sedley: I am not clear from Lord Wakeham's answer whether he favours any protection of privacy or not, but looking at it from a lawyer's point of view and the point of view of loyalty to Parliament's own legislation, one starts not with Section 12 but with Section 3, which begins by saying, "So far as it is possible to do so, primary legislation"—of course that includes the Human Rights Act itself—"must be read and given effect in a way that is compatible with the Convention rights." That immediately throws you on to what the Convention rights are.

When you turn to the Convention, Article 8 and Article 10 are coordinate and equal in their status. They are both qualified rights, qualified in various public and private interests, and they have to be married up with each other in any one case, so that although when you give effect to Article 8, you give effect to the right of free speech so far as it is relevant, and when you give effect to Article 10 you give effect personal rights such as privacy, so far as relevant, you have to come to the same answer under both, and that is what the courts have regularly done. Lord Wakeham may object to the balance that they have struck, but that they are striking a balance between two values—the value of free expression and the value of privacy—is beyond doubt. I think it is very plainly what Parliament intended—Jack Straw will confirm this I imagine—when it passed the Act.

Section 12 itself is not actually substantive in its content; it is procedural. It tells you what is to be kept in mind when the court is being asked to issue an injunction. It says at subsection (4), "The court must have particular regard to the importance of the Convention right to freedom of expression", but it has never been very clear what "particular regard" meant. It does not say "overriding regard". The courts have had particular regard, in fact, to all the Convention rights when they have applied them. One of the difficulties has been that the Convention right to freedom of expression is itself a qualified right. If you look at Article 10, it says that the exercise of the right of freedom of expression, "since it carries with it duties and responsibilities, may be subject to...conditions" and so forth "prescribed by law ... and ... necessary in a democratic society, in the interests", among other things, of "the

protection of the reputation or rights of others". You are therefore not taking your stand on a solid rock when you take a stand on either Article 8 or Article 10; you are taking the stand on a right that is itself conditional on respect for other rights and interests.

Lord Wakeham: As I was mentioned several times in there, I would like to say that is exactly my point, but put much more eloquently than I meant it. The fact of the matter is the lawyers and judges take Article 8 and Article 10, and Section 12 they look upon as something not too important, and that is a pity.

Mr Straw: Sir Stephen is right in his description of the Act. The earlier sections in the Act set the framework for the incorporation of the Convention articles and for the courts to take account of Convention jurisprudence. I recall the discussions that took place at the time, and the discussions we had with Parliamentary Counsel about various drafts of what became Section 12, which Lord Wakeham and his colleagues have put forward. I do remember, as it happens, a discussion about the phrase "particular regard" and whether it meant anything.

The earlier subsections were intensely procedural, particularly subsection (3), which has been the subject of detailed examination in our higher courts. It requires that no relief—an interlocutory injunction—is to be granted before trial unless the court is satisfied that the applicant is likely to establish that publication should not be allowed. There has been debate about what exactly "likely to establish" means, but put that on one side. We could not do what we wanted to do with subsection (4), and the press representatives knew this: we could not rewrite the effect of Article 8, nor could we say that Article 8 was an absolute right that trumped Article 10. In my recollection, there was never any suggestion that we could.

What we were trying to do, however, was first of all raise the bar in terms of interlocutory relief, and I think broadly that has been successful. Then we wanted to say to the courts and to judges like Sir Stephen Sedley, "When you come to consider this matter, you need to think very carefully and explicitly about freedom of expression within the terms that are laid down by subsection (4)." To a degree it is quite substantive in its effect, because not only does it talk about having particular regard to those items, but it talks about the extent to which the material is likely to be in the public interest, so it imports into the considerations of the courts this whole issue of public interest, which is the whole basis of the various tests in the PCC Code. Then, ironically for those who take a purist view about no statutory regulation of the press, we then included in paragraph (b) of subsection (4) a direct reference to "any privacy code", which meant the Press Complaints Commission Code. So indirectly that has been the subject of legislation.

Q4 Ms Stuart: Professor Phillipson, I am still not entirely clear whether we have struck a balance given that, before incorporation, we did not have a judicial tradition of giving weight to competing rights of equal status. In your view, has Article 12 struck that right balance? And if more so, have the judges taken that balance more rather than the politicians?

Professor Phillipson: The Human Rights Act as a whole ensures that neither Article 8 nor Article 10 has priority over the other, for all the reasons that have been given. If you want to have the American system of definitional balancing, where if one right applies the other does not, which some of the press want, you do not want the European Convention on Human Rights. It is very difficult to incorporate the Convention and then start tinkering around with it and trying to change the meaning.

The one thing that Section 12 did was change the test for interlocutory injunction, and that has been done successfully. It was followed loyally by the courts in the *Cream Holdings* case that has been referred to, and it has made it harder to obtain an injunction than it was before, but I do not think simply saying "have particular regard to freedom of expression" was a serious attempt to change the priority. Indeed, the Government quite clearly explained to Parliament that the Bill itself could not be made incompatible with the Convention. That

would be the ultimate irony, because we were trying to incorporate the Convention and we were laying on all public authorities, including the courts, a duty to act compatibly with it. I think Parliament was clear that this was not an attempt to radically change the balance between the two.

English law had not had the balance simply because there had not been a traditional common law right of privacy, but it was said many times—I have a quote from the former Lord Chancellor, Lord Irvine of Lairg—"The judges are pen poised ... to develop a right to privacy to be protected by the common law", and would probably now do so under the impetus of Article 8, which the Human Rights Act made something that should be applied by the courts in common law adjudication for the first time. That was why Section 12 happened, because everyone knew this was going to happen; it was the whole reason we had Section 12 at all, and why Lord Wakeham put forward his amendment which did not succeed, to try and stop the courts being public authorities when both parties were private. It was precisely because everyone saw this coming. Section 12 is designed to make sure the courts remember freedom of expression, and to particularly tackle the issue of interlocutory injunctions. It was not intended to make one right or another paramount, and indeed it could not have done so. You would have to have the American first amendment if that is what you want, not the European Convention on Human Rights.

Q5 Ms Stuart: If you had to explain to an undergraduate class in two sentences what the effects of Section 12 were, would you say it protected the freedom of expression or that it gave more power to the press?

Professor Phillipson: I would say it made it harder to obtain injunctions against the press, which it does, and directed the courts to have particular regard to certain matters, including the public interest, but it was designed to do what we have said.

Q6 Lord Thomas of Gresford: May I ask Lord Wakeham this: the claimant brings the action relying upon the right to privacy in Article 8; was it your intention, however it came out in the end, that the Article 10 freedom of expression should be a superior right, or were you simply trying to balance the fact that the claimant is relying on Article 8?

Lord Wakeham: I think I am going to answer this in an unsatisfactory way to you. My concern was to stop privacy cases by and large coming to the courts at all. I wanted people who felt they were done down by the press to go to something less than court. You only have to look in the papers the other day; it cost a footballer half a million pounds to bring a privacy action, which he lost. That is of no use to the vast majority of my old constituents, and I suspect most of you. It is a total and complete waste of time.

I am not saying it should be abandoned. What I wanted was something better than that for ordinary people, so I wanted Section 12 to try to encourage the use of the Press Complaints Commission and I wanted the judges to take more notice of the Code that we had at the Press Complaints Commission, and therefore people would not come to court nearly as much so we could deal with it. The vast majority of the cases I had to deal with were local newspapers revealing things about people, for example, the name and address of a warder of a prison in Birmingham where there were IRA prisoners, in order that their IRA friends could throw bricks through their window. That was an invasion of privacy for which an ordinary person had no possibility of going to court. I wanted to achieve that. That is what I was after. I was not interested in all these millionaires and villains.

Q7 Lord Thomas of Gresford: Did you think you had succeeded in making freedom of expression superior to the right of privacy?

Lord Wakeham: No, I do not. I think there was a balance, but the balance was not absolutely even-steven. There are two things really. What I thought I had achieved was what Jack Straw said in the House of Commons when he introduced Section 12; I thought he got it exactly right at that time. It has not worked out like that, and I am disappointed. I hope that the Clerks can send you round what he actually said. That is what I thought we had achieved. However, we have not, and I am not saying that the privacy law is going to disappear because we have got it. I just want to find some way of dealing with ordinary people.

Mr Straw: Lord Wakeham kindly reminded me outside of what I said. I think he has the exact quotation in front of him, but it was words to the effect that the introduction of Section 12 should make these interlocutory injunctions pretty rare, and people in general would go to the Press Complaints Commission. We can argue about the extent to which they are relatively rare. There has been a lot of publicity about individual ones, but they are fewer in number than is imagined.

The second thing is that I certainly hoped and believed—on good evidence—that the Press Complaints Commission would be able to take on a more active role. I set out why I believed this in a lecture I gave in July, so this is not just soft soap for the man sitting next to me. I believed that because I had seen Lord Wakeham operate as chairman of the Press Complaints Commission and thought that he was doing a first-class job. He had the skills and the gravitas to ensure that PCC did take on this role. Sadly in my judgment, since he went the PCC has become a shadow of what it was at the time he was running it, and it has not been able to fulfil the expectations that were there. That is one of the reasons why we now face these serious problems and one of the reasons why this Committee has been formed.

Professor Phillipson: Can I just add there was nothing in Section 12 to suggest that cases should be steered off to the Press Complaints Commission? Section 12 tells the courts what to do. It does not say anything about whether or not someone would prefer to go to the PCC and there is nothing in it to say that injunctions will be rare. It simply says that injunctions will be granted only if the court thinks that the claimant has the stronger case. If the claimant has the stronger case they will get an injunction.

Q8 Lord Thomas of Gresford: Nor is it limited to interim injunctions, of course. It is any relief.

Professor Phillipson: Anybody can claim damages.

Mr Straw: Can I just add this caveat to what Professor Phillipson has said? The purpose of the reference to any privacy code at the end of subsection (4) of Section 12 was to allow the courts to make a judgment about whether the defendants—the press—had intruded unfairly on someone's privacy. To that extent, we were drawing the PCC Code into the adjudication of these matters even before the courts. I thought that was a very good thing.

Q9 Lord Harries of Pentregarth: Lord Wakeham, given all that has been said and the fundamental agreement about the need to make a judgment to balance two qualified rights, is there not some danger in pressing so strongly the fact that freedom of expression, which you equate with freedom of the press, is fundamental to a democratic society? Is it not true that protection of individual privacy is equally fundamental to a democratic society that is based upon the value of the individual and respect for the dignity of the individual; and respect for the dignity of the individual demands respect for their privacy?

Lord Wakeham: Of course both are very important, and the whole of this argument is about where the balance has struck. My own view is the balance has been struck in not quite the right place. I do not believe the legislation is likely to end up changed, as I said to you at the beginning. We have got Section 12. I am sitting next to somebody who knows a lot more about this, but my instinct is the judges feel they are asked to administer Article 8 and Article

10 of the Convention, and to some degree they look upon Section 12 of the Act as something they were landed with that they did not really need, so it does not quite register the way that it should.

Secondly, I think the PCC has changed dramatically. Jack said some nice things about me, but I feel several things have changed dramatically. I do not know if it will be helpful to the Committee to describe some of the things that have changed. First of all, in my day judicial review was not something that worried me too much. Today the chairman of the PCC would be worried stiff that he would be taken to judicial review if he rang somebody up and said, "Look, for God's sake stop being so silly. Why don't you stop what I am hearing rumours about?" and so on. I did not worry about that. Only one person ever took me to judicial review, Anna Ford, and we saw her off in about 20 minutes, so that was not of any great consequence at all. I told these people how to behave if I got the slightest hint they were likely to misbehave.

Sir Stephen Sedley: And if they were subscribers to the Press Complaints Commission.

Lord Wakeham: No. Oh, no, that is another thing. As far as I was concerned I dealt with the press. It was up to the press themselves to collect the money from the members; if the newspaper did not pay the money that was not my problem. I dealt with them in exactly the same way. If I was still there, I would have dealt with the *Express* in the same way as the others. As far I was concerned I was looking after the public interest in the press; who paid for it was for somebody else to deal with.

The next thing that happened, of course, was the judicial review that I have mentioned. Secondly, the Press Complaints Commission started talking as if they were a regulator. They were never a regulator; never ought to have been a regulator; never should have claimed to be a regulator. My job was to raise standards in the press. I assumed that newspapers were behaving in accordance with the law of the land. If I had still been there, I would have had nothing whatsoever to do with phone hacking. I would have said, "That is a criminal offence, go down to the police station and sort it out there."

When I had an editor of a newspaper who was alleged to have bought shares in a company that his paper was going to tip the next day, I told the editor, "This is nothing to do with me or with what is in the newspaper. It is to do with you and your staff, and you had better sort it out." When a solicitor rang me up and said, "It is outrageous, my client's privacy is about to be invaded by a newspaper", and then I discovered that he was actually trying to make an exclusive deal with another newspaper and he thought his exclusive deal was going to be lost, I rang up the Law Society and said, "I do not believe this is the way a lawyer should behave." I was in favour of high standards, but I was never an enforcer of the law. I made sure those who were dealt with it. That is what I did and it worked pretty well.

Q10 Mr Llwyd: When Lord Wakeham said that the Section 12 was not welcomed by the judges, I could see that Sir Stephen was anxious to have his right to reply. I wonder if he has any comments on that?

Sir Stephen Sedley: Yes. If it were true, as I noted in Lord Wakeham's remark, that Section 12 is regarded as something that the judges were landed with that they did not really need, it would be true of quite a lot of the statute book. *[Laughter.]* The fact is that judges do not ask themselves whether they really need it. We are remarkably loyal to the law laid down by Parliament, and we do our best to make sense of it. We do not refer to *Hansard* because if you did, you would find contradictory and sometimes unhelpful explanations. We refer to the text of the statute and make the best sense and application of it that we can. The *Cream Holdings* case, to which Jack Straw has referred, is a very good example of how loyally the courts do that. Anybody, including Lord Wakeham, is entitled to their own view as to

whether the courts have done it correctly, but that the courts do it loyally and pay considerable attention to the wording of the statute is, I hope, beyond dispute.

One particular aspect of that is the requirement of Section 12, subsection (4)(b), for the courts to have particular regard to "any relevant privacy code". If you have a look at the PCC's Code it is very good on paper on privacy, and nobody has any problem about the courts having regard to it. What it does not say is that the courts are to defer to the PCC or hand over to them issues that are actually questions of law, and nor would one want it to. Anybody who, like myself, has had to deal with the PCC, polite and helpful though they are, will know exactly why they are not regarded as a great deal of use when it comes to violation of human rights.

Lord Wakeham: One sentence: Lord Woolf did not quite agree with that. He was very supportive of Section 12 and the PCC when he was doing it, and one or two of his judgments were extremely helpful, but standards have slipped since then.

Q11 Chair: You say that Section 12 is not achieving what you intended and you would like the PCC to have had a more active role, so that people would not have to resort to law, so what is your prescription now?

Lord Wakeham: My prescription—I will write you a paper for it, if you like, but I cannot give it to you in five minutes—is that there is a lot that needs to be changed in the PCC; a considerable amount. If we get it right, then I would like to see the position that where these things arise—I am not in favour of legislation—I would take away the rights of the courts to deal with it as it is, but I would expect a judge to say, in all normal cases, "Have you been to the PCC with this case? Have you tried to find out what they have to say about it? If not, I will have to take that into account when I come to make my judgment." I think in those circumstances, a changed PCC would be a great help to the courts. It would not take the power away, the judges could still do what they want to do, but a PCC operating properly would mean that most people could be able to get reasonable justice at no cost to themselves

Mr Straw: Could I just demur from Lord Wakeham on this? In respect of actions that would otherwise be taken for defamation, I think Lord Wakeham has a strong point. If someone is defamed what has happened is that an untruth about them has been uttered. That is relatively straightforward to correct after the event by correction and apology, and sometimes by damages. The fundamental flaw in his argument, and of those who argue similarly, that there should be no law buttressing what the PCC is doing in respect of privacy is this: what you are dealing with is not the publication of untruths about somebody, but publication of truth about them where, however, there is another—and it would be said overriding—argument that those truths should be kept private.

The reason why great debate about interlocutory injunctions has arisen in respect of privacy cases is very straightforward. If you look behind the headlines, it emerges that the mere fact that a newspaper is about to publish details about someone's private life can of itself be very damaging—yes, maybe to the expensively paid footballer or pop star, but usually if you go behind the cases, you find that the courts are not so much trying to protect the expensively paid footballer or pop star as the jilted lover who is left with a love child; all she and the child have left is their privacy, and that too is about to be blown apart. In those circumstances, it seems to me entirely right for the courts to have the power to make an injunction in advance of publication, and in certain cases—limited ones—to provide as part of that order that there should be no publicity of the fact of the injunction. I do not know how any PCC could operate that system unless it was actually a body with statutory powers, essentially operating as a court.

Lord Wakeham: I would expect the judge to do that. I agree entirely with what Jack has just said, and under the proposals I will send you in writing, it is covered completely. I have no difficulty about that—it is an absolute real point.

Chair: We look forward to it.

Q12 Lord Gold: Is it not the reality that the newspaper telephones the victim at 4 o'clock on a Friday afternoon and announces that they propose to publish a particular piece? Is it possible for the PCC to come in and do anything in those circumstances? If there is a remedy at all, is it not to go to the judge?

Lord Wakeham: Are you asking me?

Lord Gold: I am asking both of you.

Mr Straw: That is my view. There is also this issue about whether there should be a prior publication rule, which arose in the Max Mosley case. I do not think you can have a prior publication rule, by the way, because I think there are cases where it is in the public interest for the newspaper or media outlet legitimately to ambush the person, because what they are exposing is serious criminality or wrongdoing. The provisional view I came to in that case, which I set out in a lecture in June, is that there should be a presumption in favour of prior notice. Where the courts subsequently find in favour of the claimant, it should be open to the claimant, and obviously to the court, to award exemplary damages if there was no reasonable grounds for ignoring a prior notice presumption.

Lord Wakeham: I do not disagree with that. Of course the Code already has in it a requirement on the newspaper to be accurate in what it says, so if the newspaper does not tell the full story or the right story, then there is an action against it. On the question of how I would deal with the prior thing, which is dealt with in the changes I want, which can be done without legislation, I would be perfectly happy for a judge to say to somebody who went to the court, "I will give you an injunction to give you time to go to the PCC to deal with it." That seems to me a perfectly reasonable thing to do.

Q13 Lord Thomas of Gresford: Will the two progenitors of Section 12 now agree that the context has changed so much that Section 12 should be changed, altered or dispensed with? The context in which both of you were talking was that the PCC was a strong body, ably chaired. That is no longer the situation and may not be the situation in the future. Should we not look at it again and scrap Section 12?

Mr Straw: Personally, I would not scrap Section 12. I am open to recommendations, including from this Committee, about how it should be changed. These provisions are never the last word. May I just say this about the context? As has already been referred to by Professor Phillipson, the reason the press were concerned about this was that they anticipated, correctly, that the incorporation of Articles 8 and 10 would lead to the development of a law of privacy. There has of course been a very large debate going back decades about having a law of privacy. In his first report Sir David Calcutt says, "Leave it to the PCC", then two years later in his second report says that the PCC is not working and there should be a tort of infringement of privacy. We were alive to all of that, and that was only a few years before we produced the White Paper and then the Human Rights Bill.

Since Lord Wakeham left it, I think the PCC has proved inadequate to the task. What would I do? I would seek to codify the current law on privacy that the courts have developed into a tort of infringement of privacy. I think in a sense we owe it to the courts; it is no good blaming the courts for the fact they have done that, because we passed the parcel to them quite explicitly. Everybody had their eyes open. This was an issue on all sides of the House because we did not want to get criticised by this newspaper or that newspaper. We knew

what we were doing, so did the PCC and so did the editors. We said we were going to pass it to the courts.

I think Lord Phillips of Worth Matravers was entirely right to say that it was not a task that the courts have accepted with wholehearted enthusiasm, but to support what Sir Stephen has said, in my long experience the courts have been very loyal indeed to the intentions of Parliament, even where—and sometimes it has happened with me—one of the senior judges would say, "Well if this is the drafting, Jack, it is going to make my life difficult", and you might have to say, "Well I am sorry about that, but I have to get it through the House", and that is the reason. I would have a tort of infringement of privacy; it would not be that different from where the courts have got to. I would also have a framework of law under which the PCC would operate. I think it is perfectly possible to have that without all the anxieties that Paul Dacre adumbrated the other day.

In the absence of some statutory enforcement, albeit given to a freestanding, independent PCC, if you have an *Express* newspaper, which simply walks away from paying the PCC, or from accepting its writ, at the moment there is absolutely nothing you can do about it—there is no way at all. There has to be some way of saying, "If you are providing print or internet media services you are subject to this PCC."

Lord Wakeham: Can I just say that I am not in favour of a change in the law? I accept that we have to live with Section 12. We have got it and that is the position, but I believe that a PCC that is up to standard could make a very big difference to the situation. I have given one reason why I am not in favour of legislation; another is that the technological changes that are happening in the communications industry are now so fast that any Bill produced, debated, consulted upon, and finally enacted will be out of date by the time it becomes law. An example of that is the Communications Act 2003, which does not even mention the internet. I am not in favour of legislation years behind the game. I am in favour of doing what we can to deal with the situation.

Sir Stephen Sedley: Will you permit me to sound a note of caution about Jack Straw's answer to Lord Thomas of Gresford? Codifying the law, the tort of privacy, sounds like a pleasant and easy enterprise, but it will probably be a disaster. Not long ago I had the task of helping to advise one of the Australian states about enacting a privacy law. What started as a simple two-line formula reached two and a half pages of definition of unbelievable tortuousness by the time I bailed out of it. It seems to be beyond the parliamentary draftsmen in this country anyway, and elsewhere in the Commonwealth, to do anything simple apart from the Human Rights Act itself, which was a model of concise and lucid drafting. Unfortunately that is not the way that things are usually done.

Professor Phillipson: I do not know what else you would like Section 12 to do. As some of us keep trying to emphasise, if you have the Convention incorporated, you either have to broadly go along with it or you put the judges in the impossible position where you instruct them to act incompatibly with the Convention, which they will not do. They probably would then declare the Human Rights Act incompatible with the Convention, which would be an unfortunate outcome. Essentially, I do not understand what else could be achieved unless you want to make it even harder to get injunctions.

Q14 Lord Thomas of Gresford: Would it make any difference if you got rid of it?

Professor Phillipson: I think subsection (3) of Section 12 has made an important change. It has made it harder to obtain injunctions, and that was certainly a change of some significance. The Press Complaints Commission is not an alternative to giving people their legal rights: it does not enforce legal rights, it has no powers and it does not give damages or injunctions. In some cases someone may be happy with an apology, but in many cases they

will want their legal rights enforced, and however good the chairman of the PCC is, I frankly do not see that that is relevant. It does not have powers; it is not a substitute for the law.

Q15 Mr Bradshaw: In recent evidence to the Liaison Committee, the Prime Minister said the following—I imagine this must have been one of his motivations for setting up this Committee—"The problem is that judges have been trying to write a privacy law because Parliament has not really opined about what it thinks is right and wrong." Was the rejection of Lord Wakeham's amendment back then not Parliament opining on that very thing?

Professor Phillipson: Yes, it was. Parliament was given the chance to say that they did not want the courts to have regard to Articles 8 and 10 in private litigation. They rejected that and said, "In fact, yes, we do want the courts to apply both Articles 8 and 10, which we know will mean them developing a law on privacy." They then catered for that with Section 12, which, if you like, is Parliament's opinion on the matter.

Lord Wakeham: I am quite sure what the Prime Minister said when he said it was that they were faced with the consequences of the balance between Article 8 and Article 10. We have been spending most of the time talking about that, and that is the problem. The only way to avoid that is what I said in my letter to *The Telegraph* recently, about what was originally proposed in the Convention on Human Rights. Most of us will have forgotten, but the Convention on Human Rights was originally a convention to protect individuals' rights against the state. The only absolutely clear way to deal with this issue is to go back to that original intention of the Human Rights Act and remove the media from it completely. I guess that would be unacceptable so I am not advocating that, but that is the way to do it.

Professor Phillipson: It would also mean the media lost the protection of Article 10 in defamation cases and cases where the Government tried to sue them for breach of confidence and so on. I am not sure the media would like to lose the protection of Article 10.

Lord Wakeham: It is not going to happen.

Mr Straw: Mr Chairman, the truth is that, for all of us in our lives, there is a balancing all the time of freedom of expression with a demand that we have for our own privacy. These conflicts are inherent in the way we live our lives, and it is therefore unsurprising that they should sometimes be the subject of serious argument and dispute in the courts, but the courts are there to try and resolve them. No magic wand exists, unless you want a society where is rich press barons have total license or there is no freedom of speech at all. You think you can pass a law saying there will not be the equivalent of Article 10 or Article 8. We can come of out the Convention, we can have a British bill of rights, but that almost certainly would seek the same balance between rights of privacy and rights of freedom of expression.

Q16 Baroness Bonham-Carter of Yarnbury: We have been hearing a lot about halcyon days when the PCC worked, and indeed the Bishop seemed to think that there was a time when it was some kind of convention and nobody's privacy was invaded, whereas actually if you go back to the 19th century and throughout there have been invasions of privacy. Dickens and Trollope wrote about it and so on, and I think it has got a certain amount to do with who is actually running the newspapers, but that is maybe another point. You did state a very important point, Lord Wakeham, which is that any laws passed are going to be redundant because of the fast-moving state of technological change and so on. How do you see the PCC, or the PCC as you imagine it being reinvigorated, dealing with new media?

Lord Wakeham: I started when I was there by persuading all the newspapers that were subscribers to the PCC to agree voluntarily to the PCC's jurisdiction over anything they sent out on the internet, which is not the same as they put over on paper, which is quite often different. That was a start, and I think that it is beyond my capacity to say how we can do that worldwide, but I think it would be very difficult to do it by legal procedures, although we

might get some of the way there by it. All I am saying is that, if we think we can produce a law that will become an Act about five years from now, it will be out of date before it comes. That is why I am saying we stand a better chance of getting things moving in the right direction if we try to get some voluntary agreement about these different, very difficult issues.

Q17 Paul Farrelly: There seems to be a general agreement that the bar that was supposed to be set high by the Act, and which after *Cream Holdings v Banerjee* is generally working, is generally set high enough, given that injunctions are relatively few and far between. Is that the general consensus?

Sir Stephen Sedley: Yes, but if I can add one footnote, I suspect that we would be doing exactly the same in the courts even if Section 12 had not been passed. We would still be giving high value to the rights involved.

Q18 Paul Farrelly: I just wanted to stray on to confidence for a moment, Chair, which is mentioned by Professor Phillipson. Does the panel agree that in the area of confidence, where courts also grant injunctions, super-injunctions and anonymised injunctions, the bar is being set at a sufficiently high level in terms of weighing the public interest and the opportunity of the press to present its own case to contest, bearing in mind the high costs of the law courts?

Professor Phillipson: It will be just the same. Section 12 applies when a court is considering giving any order which would affect freedom of expression. Confidence is always about stopping someone revealing something. A breach of confidence case is always about stopping someone speaking, or awarding damages when they do, so the test would be applied in the same way, in that it should be just as hard to obtain an injunction in a commercial confidence case. If anything, the media would be favoured where there is no competing right of privacy because confidentiality itself has not the same status as privacy in the Convention. Confidentiality is a mere exception to Article 10, but it is not a primary right. The primary right is Article 8, which is privacy rather than confidentiality

Sir Stephen Sedley: I would very warmly commend to the Committee the Master of the Rolls Lord Neuberger of Abbotsbury's report on super-injunctions. It seems to me, and to most people who have read it, to lay this issue pretty much to rest. They are very rare and the report has emphasised how rare they should be, but there must be some residual category in which an injunction can be granted that forbids the publication of the name of the person who has obtained it, as without that the injunction may be wasted. Very rarely, there may be injunctions the very existence of which cannot be disclosed, but only in the most exceptional circumstances. I respectfully suggest that that is probably the best answer that one is going to arrive at.

Q19 Paul Farrelly: You bring me very neatly on, Sir Stephen, because I put down the Trafigura question that lead to that very useful report. I have read that report and I have read your piece in the *London Review of Books*. Your piece, which is in the Committee's papers, would seem a priori to rule out any justification, whatever the circumstances, for a parliamentarian like me putting down a question like Trafigura. It would also seem to rule out any campaign within Parliament in any case of miscarriage of justice, such as with the Birmingham Six, because, on simple utilitarian grounds, it ran the risk of questioning a very happy constitution.

Sir Stephen Sedley: You speak from the moral high ground, I suspect. The Trafigura issue is probably the most difficult and contentious and, like everybody else, I do not know all the facts. That is one of the problems.

The question of MPs or peers being able to raise issues like the Birmingham Six does not arise. There is no court order that forbids that being done, and there is no rule of constitutional law which says that MPs or peers cannot do it. The difficulty that arose in the cases that I have mentioned in the *London Review of Books* article was that two members, one of each House, used parliamentary privilege to escape what would ordinarily be the consequence of a deliberate contempt of court by making a revelation in the House that had been forbidden by a court order, individuals having obtained an injunction. That did seem to me and still seems to me, after the controversy that arose and has settled to some extent, to be a very serious constitutional matter.

The deal that was arrived at at the end of the 17th Century by Article 9 of the Bill of Rights was that the proceedings in Parliament, which includes members disclosing matters, could not be questioned in any court or place out of Parliament. The quid pro quo for that was that Parliament itself has for 300 years refrained from interfering with court orders. If it does not like what the courts do, it changes the law. That is its sovereign power. While the courts are there to administer justice, Parliament has always respected how they administer justice even if they do not like it. That is where the naming of Giggs and Goodwin violated a very serious constitutional norm, and did not meet with the reproach of either Speaker. That seems to me to be serious, if I may say so, within the four walls of this room as well.

Mr Straw: Can I just say that I entirely agree with Sir Stephen on this, and just draw to the Committee's attention that, as Lord Neuberger of Abbotsbury's report brings out, Mr Farrelly in no way breached any requirement of the order? That is spelt out in some detail, and I was the Secretary of State, Mr Farrelly will recall, on the other end of this. In the other two cases, however, where Mr Hemming and a member of the House of Lords decided quite deliberately to undermine orders of the court, I thought that it was outrageous. It would lead to a breakdown of the rule of law, and I frankly think the Speakers of both Houses should have intervened. It is inevitable that the subjects of these cases are often going to be tendentious people who lack easy moral justification and so on, but that is beside the point. We have given the courts these powers and duties, and if we do not respect them, who else will?

Lord Thomas of Gresford: If I remember, Lord McNally did protest.

Chair: As did John Bercow.

Lord Wakeham: Absolutely. Can I just say, as the only living person who has been Leader of both Houses of Parliament, I absolutely deprecated what went on, and I believe overwhelmingly that members on both sides in both Houses thought so at the time. The only thing I would say, just to make sure we get it right, is that the Lord Speaker has absolutely no powers whatsoever to intervene and could not do a single thing about it. The House is self-regulated; the House could have done something, and it did not in these circumstances. It was something that I hope will not happen again.

Q20 Martin Horwood: I just feel I should point out that, actually, John Hemming maintains that he certainly did not deliberately break an order and did not set out to do so. His view was that tens of thousands of people already knew the identity of the footballer in question, and that he was applying the *Spycatcher* defence, that actually it was already in the public domain.

Mr Straw: I was there, I saw what happened. I think you have to be incredibly naïve to believe Mr Hemming.

Q21 Martin Horwood: Well it was already on Twitter. That is the point, so thousands of people already knew. But he certainly did not say that he was doing what you said he was doing.

Mr Straw: Just as in the old days, Mr Chairman, there was a difference between somebody putting up a poster or distributing paper flyers and announcing the same in the House of Commons, these days, there is a difference between somebody sending round a Twitter message and announcing it in the House of Commons. Just because there is some leakage, it does not mean that you should empty the whole reservoir.

Martin Horwood: I think the difference might be that more people follow Twitter than the House of Commons.

Q22 Paul Farrelly: I am glad, Sir Stephen, that you say that Trafigura may have been a little bit more difficult and more nuanced. Your opinion in your article did not give much scope for nuance because it was all circumstances and all the facts, but can I just say that the whole issue with Trafigura, as explained in the Master of Rolls' excellent report, was all to do about how the courts were operating on issues to do with confidence and whether the courts were masters of the process or were responding to very smart lawyers who would present injunctions off the word processor with the latest bell and whistle attached.

Mr Straw: Mr Farrelly, do not forget something: there is a key fact about the Trafigura super-injunction that *The Guardian* forgot to mention. Their lawyers had agreed the terms of the injunction—and this is brought out in Lord Neuberger of Abbotsbury's report—which is why the courts were not able to examine its detail. They were presented with agreed terms of an injunction. *The Guardian* needs to get its lawyers to explain why they did that, but that is what happened.

Paul Farrelly: That was not known to me.

Q23 Baroness Corston: This is addressed to Sir Stephen about what could be developing trends with the interpretation of Section 12. A few years ago, Lady Justice Hale gave the Longford Memorial Lecture, and she said that courts do not operate in a vacuum; they are influenced by public opinion and the media. You only have to look at what happened in the courts after the riots in August to know there must be some truth in that. If one looks at the disparity of the judgments in the Ryan Giggs and the Rio Ferdinand cases, do you think there is a possibility now of a rowing back by the judges on Section 12 after the drubbing they have received over super-injunctions?

Sir Stephen Sedley: When you say "rowing back" on Section 12, do you mean more rigorous use of it to deny injunctions?

Baroness Corston: No, I am suggesting that they might be taking fright. I cannot think of any other reason for the disparity in treatment of the two footballers' cases.

Sir Stephen Sedley: I can only speak for myself, and Baroness Hale of Richmond has spoken for herself. Of course judges inhabit the same world as everybody else—we read the same newspapers and we value the good opinion of neighbours and all the rest of it. That means that nobody, whatever judicial office they hold, is impervious to public criticism. There are times when you have to steel yourself against that and to say, "This is ill informed, to give in to it would be contrary to my judicial duty." There are other times when I suspect you cannot help being influenced, or even more so, you may think it better or right to go along with what appears to be public opinion.

I say "what appears to be public opinion" because nobody knows what public opinion really is in this country, or in most free countries. You have a press whose comment columns are very largely an echo chamber inhabited by certain public moralists and editors, who can make a great deal of noise and can either pass for public opinion or themselves condition public opinion. One can never be sure what is going on. On sentencing, for example, I think that over the 20 years or so since I first became a judge a relentless campaign of accusing judges of being soft on crime and under-sentencing has led to the escalation of sentencing,

which has now filled our prisons to bursting, about which it is recognised something needs to be done. That is insidious; it is very difficult to put your finger on any one newspaper article or case in which it has happened, but as a trend it undoubtedly has happened.

Professor Phillipson: A brief point on developing law, as it were: looking at the Ferdinand case next to the John Terry case, they are very, very similar on the facts because they both concern the England football captain. The Terry case happened before the injunction farrago, and they both went the same way. The point is that in these cases there is a very fine balance to be drawn between freedom of expression and privacy, and it will depend to quite a large extent upon the facts. And while there is now a fair amount of guidance from judgments of the higher courts, nevertheless these things are expressed in terms of fairly broad principles, often concerning in fact the degree of public interest in the story. Therefore, with two cases with fairly similar facts you may see different outcomes, but that is simply because one judge may decide it differently from another judge.

I do not believe in this thing of holding particular judges responsible for developing the law in the way that Paul Dacre has tried to do with Justice Eady, but you may get very fine gradations within the judiciary and also one case will turn upon its facts. I would not say that academics that are observing this area of law see a clear trend. For one thing, individual first-instance judgments cannot be reliably used to say that the law has definitely moved because they themselves cannot change the law; they are simply applying the law. The law itself is fairly flexible, though, so you will see a little bit of variation in how these cases are decided.

Q24 The Lord Bishop of Chester: I think we are up to Section 12 and the reference to privacy codes. Presumably "any relevant privacy code" means essentially the PCC privacy code; though it could refer to other codes, it refers to that one.

Lord Wakeham: The broadcasting one as well.

Q25 The Lord Bishop of Chester: The PCC code has no statutory weight as a privacy code at all; it is simply drawn up independently of the legal process. Is it not drawn up by practitioners—by editors—almost entirely? Is that not intrinsically an unsatisfactory state of affairs?

Lord Wakeham: No, I do not think so. It has a far better chance in self-regulation of working. If you get standards set by the practitioners you are more likely to be able to get them to enforce them. I used to frequently say to them, "These are your standards, they are not mine. This is what you said should be done." And they recognised that they had a great responsibility for it. I never once, in the seven years I was chairman of the Press Complaints Commission, had a newspaper editor who would seek to refute me on the ground that he did not accept the code. He would argue about the code, and maybe say I had interpreted it wrongly, but they were absolutely adamant that this was the code that they had agreed to, and their responsibility was to live by it. I think part of it strength was that it was originally drawn up by the editors, but also approved by the lay members of the PCC, so both have a say in it.

Q26 Lord Dobbs: Following on from the Bishop's question, when you are talking about the PCC having more powers and more influence in your brave new world, Lord Wakeham, does it actually need more powers of punishment in order to enforce its code? Does it need further financial or indeed other powers to get what it needs?

Lord Wakeham: I saw, or I heard, that the new chairman of the PCC says he is going to start with a blank sheet of paper, which meant that he has not come out with a view as to what he thinks. I will tell you what I thought at my time—of course it is now nearly 10 years since I was there. First, if you had powers of fining newspapers or something on the PCC,

you would almost certainly have to give up the balance between a majority of lay people and a minority of newspaper people, because you could not have the editor of one newspaper being party to fining another one, particularly if they might be commercial rivals. That was the first difficulty I had.

The second difficulty I had was a fine to one newspaper might put it out of business; a fine to another newspaper would be something that they would put across the headlines of their newspaper. You want to look at some of the newspapers in France. They put across the headlines how much they have paid in fines under the privacy law in order to bring you the stories that you want to hear. That is what they do. This was not in my view a practical way forward. It would not have helped raise standards. What I needed was a full commitment of the industry to it, and if I could not get it from the editors I rang the proprietors and said, "Your people tell me they are supposed to be behaving according to the Press Complaints Commission. I don't believe it. What are you going to do about it?" On the very first occasion, the proprietor said, "The conduct of this young man is unacceptable", and he said it publicly. That shakes things up a bit.

I do not think financial penalties were much use in my day, but the new chairman of the PCC, who I believe has a chance of getting the thing back on a steady road, has said he will look at it with a blank sheet of paper. I think he will probably come down against it at the end, but I do not know.

Q27 Lord Dobbs: Are the only alternatives moral outrage on the one hand and financial punishment on the other?

Lord Wakeham: If you get, as I did, total, complete support from all the papers that really mattered—and there were a few odd ones that did not—that is what you need. That is what you want. You want them absolutely determined to try. They do not get it all right of course; they get it wrong sometimes, but I did not have any deliberate breaches of the code where the editor was not prepared to argue with me on the interpretation of the code.

Q28 Lord Black of Brentwood: Lord Wakeham referred earlier to the PCC over the years having dealt with very large numbers of privacy cases, quite a lot of them about the regional press. There have been possibly hundreds, maybe even thousands, a year of these sorts of things. I obviously have to declare an interest: I was around at the time that he was chairman.

Mr Straw: And very good you were too.

Lord Black of Brentwood: Thank you. It helped give it a sort of deft touch in terms of dealing with privacy cases. Is part of the problem with what has happened since the Human Rights Act came in actually that the courts have not had that many good cases to deal with? If you look back to Sir Stephen's first case, *Douglas v Hello!* and so forth, it was not actually a very straightforward case because it involved the selling of commercial rights and so forth. We then go through Naomi Campbell, which was not a particularly edifying case, and a range of footballers, most of whom I have long since forgotten, but actually there has not been one particularly good case for the courts to be able to come to a proper balance between Article 8 and Article 10.

Sir Stephen Sedley: The Ferdinand case was a pretty skilful balancing act, which came down on the side of the media, but I am very grateful to you for mentioning the *Douglas* case. It was certainly complicated in the end by the fact that the Douglases had sold their privacy rights, and that was why my court said, "No injunction, it has to be a money claim for damages." We were later disagreed with by Lord Phillips of Worth Matravers about that when the case finally came on for full determination.

The other thing that I think may matter to this discussion is that at least in my judgment I suggested that you did not need the Human Rights Act to establish a privacy law because the common law was getting there, and you take only one more step in order to turn what was an action for breach of confidence into an action for breach of somebody's privacy. Lord Nicholls of Birkenhead now has done much the same thing in the human rights field by describing it as an action for—what is it, Gavin?

Professor Phillipson: Tort of misuse of private information.

Sir Stephen Sedley: This is the way the common law works. It goes one very small step at a time, pretending that it is not moving, but in fact it keeps up with society rather well.

Professor Phillipson: It scores its runs in singles rather than boundaries, certainly no sixes. That is what you are saying.

Q29 Lord Harries of Pentregarth: Lord Wakeham, doesn't everything you have been saying so vividly about your willingness to ring up solicitors and proprietors underline the need to have a Press Complaints Commission whose structure and powers are such that it will be effective whether there is a strong chairman or a weak one?

Lord Wakeham: I think that there are changes that are needed to the structure. I would always think a strong chairman is probably better than a weak chairman, but I want to change the rules so that there are no inhibitions on some part of that body trying to keep things on the straight and narrow. I think then the judges will have more respect for what the PCC does, and more times when a case comes they will say, "Look, if the PCC think this was a breach we are absolutely sympathetic to that case." We do want rules that are better, and I would be in favour of better, but I am not actually advocating weak people instead of strong people.

Mr Straw: Could I just add to that? I was struck when I was dealing with the PCC when Lord Wakeham was there, and Guy Black was the then chief executive, that it was effective, but it was very much ad hominem—it depended on their personalities, not on the structure. That is shown by subsequent events in the absence of Lord Wakeham and Guy Black. That is the truth. I do not think you can have a body that fulfils such an important role in society simply depending so critically on the personality and skills of the individuals, though they will always be important.

I think that far too much was left to the personal clout of the chairman. It is not a strong institution is really what I am saying. To make it a strong institution you have to underpin it with some statute, which should not cause Mr Dacre any loss of sleep. For example, if I may say so to Lord Dobbs, I think there may be a case sometimes for fines, but I don't think we need to worry about that. What is much more important is the requirement for, as opposed to a requirement on the wording of, an apology and retraction, and its prominence. A few retractions and apologies put on the front page of the newspapers in the same position as the original story would of themselves raise standards very rapidly.

Lord Wakeham: And there is something very important about that. I had that problem, and when I and Guy were there, we insisted on an apology and we laid down where it had to be in the newspaper. The trouble is a lot of apologies were put together by solicitors without much experience in these matters: they got the newspaper to apologise and they did not insist upon where it should appear. Then people were starting to blame the PCC because the apology appeared on page 14 at the bottom in small type, and that was nothing whatsoever to do with the PCC.

I absolutely agree that it should appear with due prominence, but you cannot expect the editor to say it will absolutely be where the original thing was, because they used to say me, "Oh, if the Queen dies we'll put that on page 2 so that we can put your apology on page

1?" They have to have some discretion, but the chairman of the PCC of the day needs to be able to say, "That is reasonable, and we accept that."

Professor Phillipson: Can I just remind the Committee of a very important point? If we are talking about giving the PCC additional powers, whether it is ordering apologies or indeed fines, the PCC would then have legal powers to interfere with newspapers' right to freedom of expression. It would then probably have to comply with Article 6, the right to fair procedure under the Convention. Either it would have to itself introduce court-like procedures into it, which would then get rid of the very informality that we want to keep, or you would have to have very, very close and careful judicial review by courts to ensure that it was deciding it essentially as it should do. You need to be very careful. The PCC is a public authority, but it does not interfere with rights at the moment essentially because it has no powers. It can just advise newspapers or make findings that are non-binding.

Lord Wakeham: It has never been established as a public authority, as far as I know. The case of the Aga Khan and the Jockey Club is the main case there, and that was one of the issues that we did not deal with. Whilst Professor Phillipson is absolutely right, that is one of the reasons why I do not want legislation because I think the flexibility of our negotiations are better.

Chair: We are aiming to finish at half past four, but I have got three last quick questions.

Q30 Lord Janvrin: Just picking up this last point about apologies and their prominence, et cetera, surely that is beside the point in privacy cases because it comes back to Jack Straw's point that you are dealing with truths? Apologies are fine if you are dealing with untruths, but if you are talking about a privacy issue, an apology is far too late and has no effect. It is too late. In that kind of case how does the PCC have some kind of action or sanction?

Lord Wakeham: The newspapers took the criticisms that were made of them very seriously. If you criticised them for anything, including a breach of privacy, and you made sure that it was given due prominence in the newspaper, which I used to do, they took it very seriously indeed. For it to appear at the bottom of page 14 is not acceptable.

Mr Straw: If I could just add, it is of little comfort to the individual subjects, but a very prominent apology and recognition that it is a breach of privacy might change behaviour for the future. Also, of course, they will lose revenue and all sorts of things; it would be humiliating. It has a purpose, therefore, but much less of a purpose than in the case of defamatory statements.

Professor Phillipson: I agree very much with Jack Straw that the remedy of a quick apology and correction for defamation would be the kind of thing that we very much want in many defamation cases, but in privacy cases I think it is a very poor remedy indeed.

Q31 Lord Hollick: In your letter to *The Telegraph*, Lord Wakeham, you focus on unfairness. I think you make a very strong point that the Press Complaints Commission is likely to give fairer and more ready access to justice on these matters for those without deep pockets. I think that is a point well made. However, your main point is the unfairness that you interpret in what the Prime Minister says: that courts inevitably err on the side of the applicant and not the side of the newspaper. Is not the thrust of your argument that if the matter could be dealt with by the PCC, it would be slightly more in favour of the press's right to freedom of expression rather than of the individual's right to privacy?

Lord Wakeham: We have talked a great deal, and I wanted a moment to say this. I am not so much interested in the right of the press as I am in the right of the public to know the

truth of what is going on. That is what the freedom of the press is about. It is a right in a democratic society.

What I was worried about—and the experience over that period—was cases where a judge comes in from his round of golf on a Saturday to a big telephone call about him giving an injunction against the Sunday papers or something, and he hears the terrible story about what is going to happen to this poor fellow and his children and so on. Inevitably—I would be the same—he has a great deal of sympathy with that person. However, there isn't the same chance for the newspaper to deploy the fact that this individual—whatever he might be—is going to be exposed as having been with a prostitute or something, and the fact that a newspaper can then produce 11 or 12 other highly documented cases where he has also been with prostitutes, and they think it is time this chap's way of living—his private life—should be exposed because he is not the sort of person who should be collecting large sums of money for advertising his good, clean living by advertising shirts and all these other things.

It is the exposure of the hypocrisy that I want. The injunction happens, and in my experience—I go back 10 years because I have not been involved with it since—a judge understandably gets the sob story from the lawyers representing the person who wants the injunction and does not have chance before he has his shower after his golf to listen to the other side of the story

Mr Straw: These are interlocutory proceedings designed to hold the line before there is an action. What you are saying would be different if it was the end of the proceedings and there was some completely egregious case that the court had ignored, but this is just to hold the line. I went to the courts a few days before the publication of the Lawrence inquiry to get an order, on which I was successful, to prevent *The Sunday Telegraph* from disclosing contents of the Lawrence inquiry in advance of its publication to Parliament. I was in the lavatory of a train trying to organise this; my private secretary, who happened to be Clare Sumner, whom you just saw in a different guise, was standing in a shop doorway in Essex Road, Islington, on the way to a dinner, which got completely aborted; and I have no idea where the judge was—but those are the circumstances in which these things arise. I had just been to a game at Blackburn Rovers; I was phoned on the train coming back and got this information saying, "We need to have an injunction because ..." This was not a breach of confidence, and other matters; it was directly about privacy. That is what you have to do. Yes, you could send it all up, but there was a public purpose in what we were doing.

Professor Phillipson: That is what Section 12(3) does. It makes sure the judge does what it says: you must consider the public interest. It precisely corrects the previous tendency in which judges perhaps did err on the side of preserving the confidentiality or the information on the basis that once it was revealed it would then be lost forever. Section 12(3) precisely shifted the balance, so that now there is balance between the two. Whoever is most likely to win at trial will win at the interlocutory injunction stage. That is what Section 12 does.

Q32 Mr Bradshaw: Just a quick one for Professor Phillipson and Sir Stephen, if I may? Jack Straw said earlier that he thought on balance he was against an absolute requirement of prior notification, and that should be dealt with by damages. Do you agree?

Professor Phillipson: Yes.

Sir Stephen Sedley: Yes, I think I do. Perhaps I could also say that in relation to the PCC—I know this does not relate to your question, forgive me—the freedom to tell the truth is of course very important. Where the press is also free to tell untruths, as it is, there needs to be some sort of corrective mechanism. One of the problems about the PCC that has not been mentioned is that a number of the newspapers—one in particular I have had more than one run-in with—are adept at tripping up the PCC's procedures for months and months and

months. First of all they feign innocence about what they have done wrong, and ultimately, on the eve of an adjudication, when you are finally going to lose your patience, they say, "All right, we will correct it." By then every reader has forgotten what it was all about in the first place. The correction, even if it was on page 1, would have no effect at all. That is another of the problems that I think you might want to bear in mind.

Lord Wakeham: Can I say that I agree with that? I did everything I could when I was chairman of PCC to prevent such things from happening. However, I also remember many years ago when I was a magistrate I saw some of these sort of things happening in court cases as well.

Sir Stephen Sedley: I bet you did.

Chair: We are going to have to draw to a close. I thank our four witnesses very much for giving up so much of your time. Colleagues, we are reconvening half an hour later, at 2.30, next Monday in the Boothroyd Room, over in Portcullis House, because there are competing demands for the rooms at this end. Thank you.