Editors' Code of Practice Committee

Appendix B

PRIVACY AND THE CODE

Summary

THIS review of the problems of the press over privacy does not claim to be exhaustive. Advice was sought from, among others, the PCC, media lawyers, specialist QCs, and a former senior judge. Their responses often conflicted. But there was a reasonable consensus on identifying the key issues.

First, judges' interpretations of the Human Rights Act mean the right to privacy regularly trumps freedom of expression. Second, CFAs and after the event insurance grossly inflate litigation costs while loading the risk on defendant newspapers. This makes a legal remedy attractive to a significant number of high-profile privacy complainants, who by-pass the PCC.

The effects are far-reaching. Excessive CFA fees have a chilling effect on freedom of expression. Also, the PCC is sidelined in a major area of its remit, denying the self-regulatory system the chance to set landmark precedents. As well as making privacy law under the HRA, judges also *interpret the Code* - but without any regard for PCC precedents. Having parallel jurisdictions interpreting the same rules is potentially damaging to consistency and certainty – and public trust.

While the Government's current consultation on changing CFAs and ATE insurance could genuinely transform the landscape on costs, there is no matching optimism on legal changes to rebalance the competing rights of privacy and freedom of expression. In reality, the Government has little scope for manoeuvre while the UK remains signed up to the European Convention on Human Rights.

A variety of suggestions for rebalancing the system were explored:

- **Changing the Human Rights Act** – e.g. to restrict celebrities' control of their image rights.
- **Reversing Lord Woolf's direction** to judges to disregard PCC adjudications.
- **Changing the Code** to influence judges to hear defences that claimants compromised their own privacy; or that *editors reasonably believed they were acting in the public interest.*
- **Making the PCC more attractive to complainants** by extending conciliation to include awards and/or considering a form of bolt-on arbitration on damages.

Conclusions: There are no magic bullets. Expected CFA changes could transform the current economics, but legal options on rebalancing the competing rights of privacy and freedom of expression are limited by the HRA and Strasbourg precedents.

Amending the Code is the only real option available for influencing the judges in the short term and possible amendments have been drafted. Effecting legal changes would require a revolution in the current judicial mindset here and in Strasbourg.

Editors' Code of Practice Committee

Introduction

1. Privacy is an issue with porous borders. It is notoriously difficult to define where the lines should be drawn and when they have been crossed. Several attempts to introduce a privacy law have foundered as a result. The one area of consensus is that there is no consensus. Therefore, any analysis of the particular problems of the press and the developing judge-made law of privacy could easily become mired in a wider philosophical debate.

2. To narrow the focus, this review attempts not to find a cure for the disease, but to identify the symptoms – the effect on the press and self-regulation – and concentrate on possible remedies for those, particularly where they might involve the Code.

3. Advice was sought from, among others: the PCC, in-house newspaper lawyers, specialist QCs and a former senior judge, together with published and private statements by political leaders. Their views, sometimes expressed under Chatham House rules, often conflicted and frequently led down blind alleys. Some suggestions that emerged were beyond the remit of the Code Committee. This study has explored these, in case they formed part of a matrix of measures, but makes no claim to be exhaustive.

The problem

4. The issue of privacy in all its forms – including intrusion into grief, protection of children, harassment and the use of clandestine devices – accounts for nearly 20pc of the PCC's complaints. That is a significant proportion, which has resulted in an impressive body of jurisprudence used by the press and complainants alike. It is difficult for critics to represent that as a failure. The Commission's decisions, on a case-by-case basis, have built a set of rules on privacy that has helped shape British journalism.

5. But since the introduction of the Human Rights Act, the landscape has changed. First, judges' interpretations of the Act - often influenced by European Court of Human Rights rulings – have resulted in the right to privacy regularly trumping freedom of expression.

6. Second, an amendment to s12 of the Act that required courts to take into account a relevant privacy code has proved ineffective. It was intended to allow the principles set out in the Editors' Code to be considered by judges. But a direction by Lord Woolf specifically precluded them from looking at PCC jurisprudence, thus effectively asking them to interpret the Code in their own way.

7. Third, the advent of CFAs and after the event insurance has grossly inflated litigation costs while loading the risk on defendant newspapers. This makes a legal remedy attractive to a significant number of high profile privacy complainants, who by-pass the PCC in favour of seeking cash awards at little or no risk.

8. The consequences for freedom of expression, the press and the self-regulatory system are far-reaching:

- The balance of the competing rights of privacy and freedom of expression has swung so far in favour of privacy that it is extremely difficult for the media to succeed in an action.
- Excessive CFA fees themselves have a chilling effect on freedom of expression. Newspapers routinely spike stories or settle claims rather than risk facing extortionate costs by contesting a claim, even where such a defence would have legal merit.
- The self-regulatory system is sidelined in a crucial area: when high profile cases go to the courts the PCC is denied the chance to set its own landmark precedents on privacy.
- Having judges interpret the Code regardless of PCC jurisprudence creates a danger of parallel jurisdictions interpreting the same rules differently, making editorial judgments extremely difficult, undermining reasonable expectations of consistency and certainty, and diminishing public and industry trust in the Code.

Reviewing the options

9. The immediate priority is to rebalance the system to protect freedom of expression and to prevent self-regulation being sapped. A variety of suggestions were put forward, including:

Changing the law – seeking amendments to the Human Rights Act, and to the rules governing CFAs; reversing Lord Woolf's direction to judges on PCC jurisprudence.

Changing the Code to re-establish freedom of expression and publication in the public interest, in a way that would influence judges.

Changing the way the PCC works to make it more attractive to complainants.

10. Each is set out below. The most obvious route for effecting changes would be to amend the Code of Practice, in a way that might influence judges. Changes to the CFA rules are the subject of a fast-track Ministry of Justice consultation.

Changing the law

11. **The Human Rights Act**: Jack Straw says he is prepared to look at changes to s12, which emphasises the public interest, especially in the light of the current DCMS inquiry. It would be helpful if the Government could be persuaded to introduce measures that restricted people's image rights, where they had compromised them by previously using the media to project a particular - especially different - image.

12. However the Government's room for manoeuvre appears limited while Britain remains signed up to the ECHR. Some senior lawyers are sceptical of any change that might seem to conflict with Strasbourg judgments. Even the Tories, who are pledged to replace the HRA with a Bill of Rights, privately admit their proposal would have only marginal effect because the Convention – and ECtHR rulings on it – would remain binding. *This could make Code changes the most attractive option (see 15 below).*

13. **CFAs**: Straw has been supportive of changes publicly – and even more so in private – and has promised action in October following the MoJ's fast-track consultation. The Associated Newspapers/Oxford University research demonstrating that Britain's legal costs dwarf the rest of Europe's is particularly damning, but there are suggestions that Lord Jackson - who is conducting a review of legal costs generally and who reports in December - may not be so committed to radical change.

14. **Reversing Lord Woolf:** The reasoning behind the directive to judges to ignore PCC adjudications when taking into account the Code's rules on privacy is not clear. One suggestion is that Woolf did not want to load judges with unnecessary paperwork. Another is that he thought PCC adjudications might be lightweight. Senior lawyers believe the direction could be overturned, given that Woolf has retired, but some are unconvinced that the judges will give much weight to the PCC in any event.

Changing the Code of Practice

15. **Influencing judges:** If the Woolf Direction is not reversed and the Human Rights Act is not changed, the simplest and fastest route for influencing the judges would be by changing the Code to stress the importance of freedom of expression. Two proposals have been put forward.

16. Trinity Mirror lawyers have suggested the Code should incorporate PCC jurisprudence that takes into account the extent to which complainants may have compromised their own privacy by talking publicly about similar matters. The PCC actively supports such a change on the grounds that it would help deal with the problem of image control developing on the back of legal privacy suits, which is happening at the expense of freedom of expression and the public's right to know.

17. Meanwhile, Antony White QC, as part of News International's submission to the DCMS Select Committee, suggests current High Court judgments on privacy are flawed, as they do not allow a defence that an Editor *reasonably believed publication was in the public interest* at the time. The defence applies only if the judge rules that it actually *is* in the public interest.

18. White argues that this is inconsistent with public policy as expressed in Data Protection legislation, which has a defence of reasonable belief. He believes that while there is a strong case for introducing legislative changes, or establishing the principle in common law, amending the Editors' Code would be a fast and effective route with an instant application.

19. In reality, both these amendments reflect broadly what the PCC does already under the spirit of the Code, and so they would not be likely to affect future adjudications. However specific amendments to the Code would at least have to be considered by judges deciding privacy cases. Clearly, great care must be taken in drafting.

20. Lawyers are divided on how much notice the judiciary would take. There is a view that the judges' mindset is such that they would not readily be influenced by PCC adjudications. The question is not solely whether the changes would do any good, but also whether they might do any harm.

21. Some concern has been expressed that if the image control amendment conflicted with the thrust of current Strasbourg rulings, it could expose the PCC to a future risk of judicial review, but that is an unknown. The Irish Press Code already includes something on vaguely similar lines. The PCC believes we should not be inhibited by the threat of judicial review and that the introduction of such a change could be a strong card with the DCMS Select Committee.

22. Antony White's amendment would also have limits. Editors would need to demonstrate their reasons for believing they were acting in the public interest, which the courts would probably restrict to 'responsible journalism'. This would not offer great comfort to editors running kiss and tell stories. The Max Mosley case would probably have been on the cusp.

Changing the PCC

23. Two suggestions from within the industry for making the PCC more attractive to complainants were explored as part of the study into CFAs. Both fell outside the Code Committee's remit and, as they involved compensation payments, would need PressBoF and PCC approval. They are included for information. Briefly, the proposals were:

- That the MoJ's plans to rebalance CFAs should include a pre-action protocol which requires that CFAs should not be applicable until reasonable attempts had been made at conciliation via a recognised body, such as (but not exclusively) the PCC.
- That where the PCC upheld that the Code had been breached, there should be a form of bolt-on, fast-track arbitration - where a complainant seeking damages could go to arbitration on the amount. It was suggested that this would be much quicker and cheaper than going through the courts.

24. The PCC has huge advantages over the judicial system. It is fast, cheap and offers an apology or retraction - not usually part of a court settlement - which research suggests is usually the complainants' prime aim. Also, in its role as conciliator, the PCC already helps broker settlements that include *ex gratia* payments agreed by the parties.

25. However, extending this in any manner that led to damages or fines would breach the PCC's current constitution and would almost certainly change the nature of self-regulation in a way that would be unacceptable to the industry and to the Commission. The danger is that it would become slower, more legalistic and expensive and less accessible to ordinary complainants, thus replicating many of the faults of the legal system.

26. The suggestion of bolt-on arbitration on damages, while attempting to preserve the PCC's role as the adjudicator on the Code, is already an option to the parties, if they want it. One risk in institutionalising such a system is that it would raise expectations of cash awards among the majority of complainants who currently settle for an apology or correction.

Conclusions

27. No magic bullets emerged from the review. There was one common feature among all the substantive options explored: ultimately they would need to be aimed at lawyers, either to implement or interpret. But, predictably, there was no great consensus among the lawyers consulted on the desirability or probable effectiveness of any of them. However, it would be a mistake to be overly influenced by that: the dangers of paralysis by analysis are obvious.

28. Perhaps the more appropriate tests should be:

- Which schemes had the widest support, and the least resistance?
- Which would be within the immediate competence of the Code Committee and the PCC?

29. By those tests, the proposals to change the Code in order to restore a proper balance between the competing rights of privacy and freedom of expression, and to allow for an editor's genuine and reasonable belief that publication was in the public interest, become clear favourites.

30. First, they both are forms of protecting freedom of expression, which is in the public interest, rather than a self-serving device on behalf of the press. They reflect existing PCC policy and thus conform to the original spirit of the amendment to s12 of the Human Rights Act. The Commission wants them and sees the theoretical risk of inviting judicial review as worth taking to restore freedom of information as an issue considered by judges. Any other doubts centre not on the harm they do, but on the limits to the benefit they might yield.

31. Second, they offer speed of execution. Draft changes are offered below. If the Code Committee agreed, they could go out for consultation and be ratified by the PCC in August.

32. However, while these must be the strong options for immediate short-term action, they should not preclude consideration of a longer-term approach by the industry. Whatever changes are intended by amendments to the Code can still be frustrated by legal, judicial and cultural mindsets both in the UK and Strasbourg.

33. It is worth recalling that the Lord Woolf who once suggested that there was a public interest in newspapers publishing stories that interested the public is the same Lord Woolf who was a principal architect of CFAs, and who instructed judges not to take account of PCC jurisprudence. Judges studiously ignored Woolf's more liberal notion of press freedom, but followed his PCC direction to the letter. The legal system devoured CFAs. Undoubtedly, much of that owes a lot to the law of unintended consequences, but it is may also offer a useful insight into judicial and legal values in the UK.

34. Meanwhile, there is the Strasbourg mindset. When Princess Caroline won her victory at the European Court of Human Rights, her lawyer Mattias Prinz, said: "This is very good for my client and for all people in Europe because the court is raising the standard of protection of private life to a level higher than in Germany – to the level of France".

35. The Oxford University study of comparable costs shows a mammoth disparity in legal expenses in the UK and the rest of Europe, including France. So Britain is effectively importing French legal values, but not French legal costs. It is a dystopian combination with potentially dire consequences for freedom of expression. Yet the issue remains largely unaddressed.

36. And it is a reminder that changes made by the Code Committee would necessarily be working only in the margins - treating the symptoms. Changing the legal fundamentals would require a revolution in that wider mindset. That must remain the long-term challenge if we are to cure the disease.

IMB/April 2009

Editors' Code of Practice Committee

Draft amendments:

3 *Privacy

i) Everyone is entitled to respect for his or her private and family life, home, health and correspondence, including digital communications. **When determining whether there has been an intrusion into an individual's private life, consideration will be given to whether a complainant has compromised his/her privacy by disclosing publicly any similar matters.** Editors will be expected to justify intrusions into any individual's private life without consent, **and, where appropriate, to demonstrate that they had reasonable grounds for believing that an intrusion was justified in the public interest.**

ii) It is unacceptable to photograph individuals in private places without their consent.

Note - Private places are public or private property where there is a reasonable expectation of privacy.

THE PUBLIC INTEREST

1. The public interest includes, but is not confined to:

i) Detecting or exposing crime or serious impropriety.

ii) Protecting public health and safety.

iii) Preventing the public from being misled by an action or statement of an individual or organisation, **including misleading information about an individual's private life.**

2. There is a public interest in freedom of expression itself.

3. Whenever the public interest is invoked, the PCC will require editors to demonstrate fully how the public interest was served.

4. The PCC will consider the extent to which material is already in the public domain, or will become so.

5. In cases involving children under 16, editors must demonstrate an exceptional public interest to over-ride the normally paramount interest of the child