PCC Submission to CMS Select Committee inquiry into press standards, privacy and libel

Executive Summary

1. Developments over the last two years have reinforced the Select Committee's 2007 findings about the undesirability of a statutory press regulator and a privacy law (para 1.1).

2. The PCC now helps more people with privacy concerns than ever before – but the profile of the courts' activity in this area has increased, along with media concern about the power of individual judges to decide what can and cannot be published (para 1.2).

3. The PCC works well in practice. In 2008, we dealt with the privacy concerns of nearly 1000 people either formally or informally. These people included high profile people such as members of the Royal Family and television presenters, but were mostly ordinary members of the public caught up in the media spotlight (para 2.1).

4. It is right now – ten years after the passage of the Human Rights Bill – to ask whether all this work might be threatened by developments in the law. The government reassured the PCC and the press in 1998 that press freedom and self-regulation would not be undermined by the HRA. There is an argument that matters have not turned out as the government intended (paras 3.1 and 3.2).

5. It would be potentially highly damaging to self-regulation for judges to make their own interpretations about the press Code of Practice which ignore the PCC's experience in tackling privacy cases (para 3.3). This might undermine the advantages of the self-regulatory system, which is free, fast, non-adversarial and discreet – and which involves the public in its decision-making (para 3.4). Perhaps the remedy may lie in some amendment to Section 12 of the Human Rights Act (para 3.6).

6. The PCC remains opposed to a system of fines for breaches of the press Code because the clear advantages of self-regulation would be lost by such a move to a quasi-legal system of regulation (para 4.1). The Commission already provides a range of meaningful remedies for intrusions into privacy, and, in any case, the public does seem particularly supportive of fines as a remedy (para 5.1).

7. In any case, the law would not make an effective alternative regulator of privacy: the UK is not a ring fence-able jurisdiction in which the flow of information can be controlled by a court; and the formality and riskiness of the law are alienating to the

public (para 6.1). Globalisation and digitalisation of media are powerful forces favouring self-regulation (para 6.2).

8. The PCC took an early interest in the McCanns' situation (para 7.2), and made numerous offers to assist (para 7.3). We helped on a number of specific occasions (para 7.4), for which the McCanns expressed gratitude.

9. But the PCC would not generally launch inquiries into matters without the say-so of the principals involved. Given our previous contact with the McCanns, it would have been impertinent to have unilaterally announced an inquiry, and risked looking like a cynical attempt to exploit the publicity surrounding the case. That said, the Chairman of the PCC did publicly condemn the libels (para 7.6).

10. In short, the PCC is not meant to police the laws that relate to the press as well as the Code of Practice. It was right that a complaint of libel should be remedied by a legal action for libel. Although unusual, tragic, and highly publicised, this was an episode from which it would be difficult to draw general conclusions about the effectiveness of the PCC (para 7.7).

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1.0 Introduction

1.1 The Select Committee's report into self-regulation of the press in 2007, which looked primarily at privacy and newsgathering methods, made a number of important statements of principle. These included the rejection of the case for a statutory regulator of the press and a reference to the near impossibility of drafting an effective privacy law. These findings have since been reinforced by the changing media landscape (particularly the pace at which digital media have developed); the confidence that the public has in the PCC, reflected in even greater activity; and the continued tightening of the Code of Practice, among other things.

1.2 Despite the recent profile of the law in the area of privacy, the respective responsibilities of the PCC and the courts have not dramatically changed over the last two years. The PCC still deals with far more privacy complaints and concerns (indeed, a record number in 2008) and the courts have continued to develop the law of confidence in conjunction with the privacy provisions of the Human Rights Act, as they were doing up to 2007 at the time of the last inquiry. What has changed is the profile of the courts' activity – mainly as a result of the Mosley ruling – and, rightly or wrongly, a serious hardening of media concern about whether in principle single judges should have so much power over what can and cannot be published. There are also serious questions about whether the law can actually be particularly effective going forward, for reasons that this submission will explore in paragraph 6.

1.3 In the context of this latest inquiry, it is clearly important to bear in mind what the PCC is actually meant to do. Before it was set up in 1991, there were already numerous laws that applied to the press – such as libel, contempt of court, copyright and so on, which have since been joined by numerous others. The PCC was not set up as a general regulator of all press behaviour to police these laws as well as take complaints under the Code of Practice. Rather, it was primarily meant to deal with issues, both ethical and practical, that the law cannot capture. It therefore complements the law rather than competes with it.

1.4 It was for good reason that it was left to the press to create its own independent body to balance the public's right to know with respect for individuals' privacy. There was an understandable reluctance on the part of politicians to empower a state agency to decide what sort of information should be published or discussed in a democracy. Despite widespread discussion in the 90s of the merits of a privacy law, similar objections of principle applied, as well as those relating to the practical

difficulty of drafting legislation. Additionally, it was noted that bodies like the PCC were able to take account of evolving culture, wider context, public expectations and industry practices.

2.0 Effectiveness of the PCC

2.1. These arguments retain their force today. But has the PCC worked in practice? Our last submission to the Select Committee in 2007 detailed the range of activity we undertake to protect the privacy of individuals, including pro-active and pre-publication work aimed at preventing problems before the need for any complaint arises. Inevitably, a lot of this work is conducted away from the public gaze – which is the PCC's central appeal to people genuinely trying to protect their privacy. Privacy trials in court will by definition attract far more attention, in the process giving further publicity to the very information which in the plaintiff's view should never have been published in the first place. But high profile cases of this kind, of which Max Mosley's was the most striking in 2008, are relatively few and far between: they should not be allowed to obscure the rapidly growing recourse of the public to the PCC in this area. In 2008, we dealt with the privacy concerns of nearly a thousand people, either informally or formally. This broke all records for the PCC. We made 329 formal privacy rulings, resolved (that is, successfully mediated) 131 cases, issued 55 private advisory notes to the UK press on behalf of individuals, and helped hundreds of people with pre-publication advice – so removing the need for a formal complaint.

2.2 To give a flavour of our work, the people we helped ranged from an 82 year old lady, whose grandson was involved in a financial scandal, but who herself wished to be left alone by reporters; to families of people who had killed themselves in the Bridgend area; to high profile individuals s[redacted] and members of the Royal Family [redacted] Following our intervention on behalf of a lady from Bridgend, whose son had killed himself, a national newspaper apologised for its actions and removed material from its website. She said:

> "Thank you very much it means so much to my family and I. I will accept their apology now that I have it in black and white... I just can't thank you enough and hope now perhaps my family can start to move forward".

[redacted]

> "When I had my baby last year, I didn't want to be followed around by photographers every time I left the house, as happened when I was pregnant. We asked the PCC to issue a private request to photographers to stop following us, and to newspapers and magazines not to use pictures of me taken when I was with my family in private time. The degree of compliance was very

impressive, and I would recommend this service to anyone in a similar position".

There are of course numerous other similar examples of our work. Members of the Committee are always welcome to come to the Commission to talk to us in more detail about how we deal with privacy complaints.

2.3 The graphs below, showing how our work has mushroomed in recent years, reflect both the volume of our work on privacy and also the extent to which the public generally continues to have confidence in us:

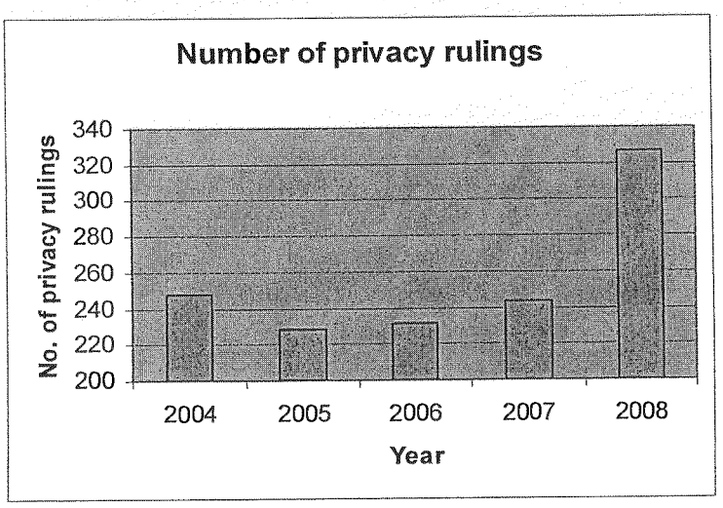

Figure 1: Number of privacy rulings 2004-2008

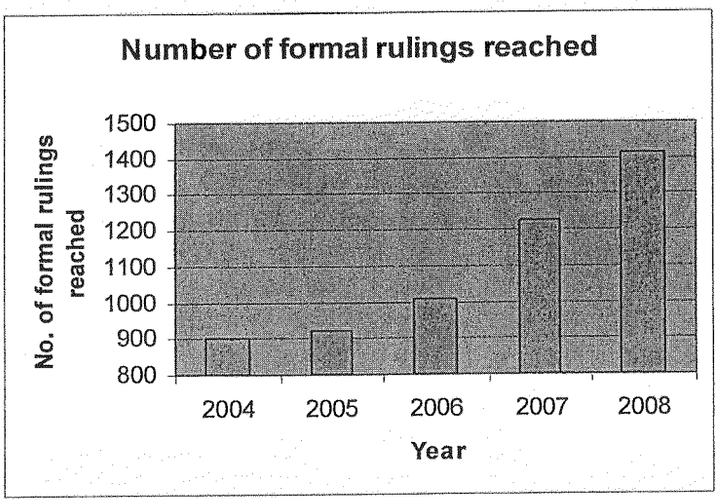

Figure 2: Total number of rulings under the Code 2004-2008

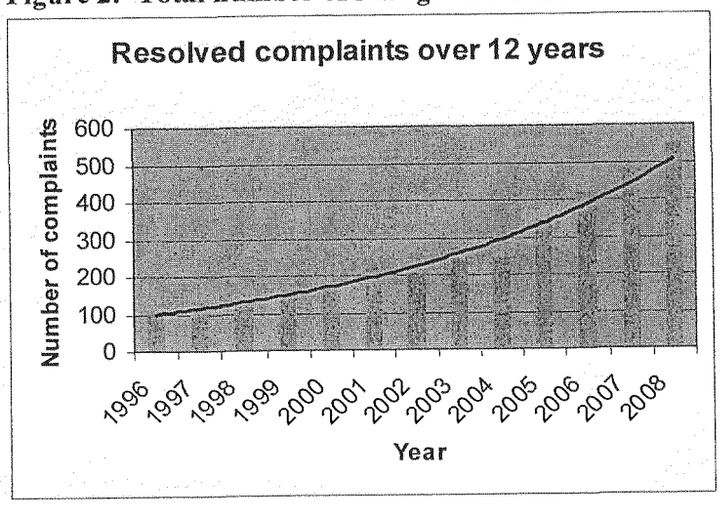

Figure 3: number of all resolved complaints, 1996-2008

3.0 Impact of the HRA and role of judges

3.1 But could this service – which is for "ordinary" members of the public as well as public figures – be threatened by the developments in the law? It is right for the Select Committee to consider the matter. It is now ten years since the passage of the Human Rights Bill, when numerous warnings were made about the possible impact on the PCC's work and freedom of expression. Responding to these, Jack Straw – then Home Secretary – said:

> "There was a concern in some sections of the press that the Bill might undermine press freedom and result in a privacy law by the back door. That was not the Government's view. On the contrary, we have always believed that the Bill would strengthen rather than weaken the freedom of the press... I am glad that we have been able to frame an amendment that reflects the Government's stated commitment to the maintenance of a free, responsible press, and the consequent need for self-regulation... if for any reason, it does not work as we envisage, and press freedom appears at risk, we shall certainly want to look again at the issue"[1].

3.2 Ten years on, there is a case for arguing that on matters of privacy things have not turned out as the government intended. In their implementation of the Human Rights Act the courts have shown their willingness to restrict the flow of

[1] Hansard, 2 July 1998, cols 535 and 541.

information or punish the media, where judges believe that Article 10 of the Act (freedom of expression) is trumped by Article 8 (protection of privacy). Many of these cases, especially where they have gone all the way to the House of Lords, have demonstrated how difficult and controversial it can be to make a judgement on where the line falls between the public and private spaces.

3.3 It is now a fact of life that two parallel jurisdictions are issuing rulings on privacy cases: the courts and the PCC. Self-evidently, the PCC must operate within the framework of the law. But the requirement of Section 12 of the HRA that the courts take account of the PCC's Code of Practice - the amendment to which Mr. Straw referred in the quotation above, intended to buttress self-regulation and the freedom of the press – has become progressively hollowed out as judges make their own interpretations of the Code without reference to the PCC's case law. Not only is this potentially highly damaging to self-regulation, it ignores the vastly greater experience of the PCC in tackling privacy cases – an experience which long pre-dates the passage of the Human Rights Bill. To take one example: the PCC has developed 'jurisprudence', which, on privacy matters involving celebrities, takes proper account of the extent to which a celebrity complainant has sought publicity in the past; and whose complaint has more to do with image control than genuine privacy. This is not (yet) spelled out explicitly in the Code of Practice. As a result, judges are under no obligation to take account of PCC decisions which might well inform their own judgements.

3.4 It is worth setting out once again the advantages of our self-regulatory system; and what is at stake. We are free; we are fast; and there is none of the adversarial, and sometimes intimidating, argument of public hearings in court. Our flexible, non-statutory basis guarantees common sense decisions that take account of external developments. We involve the public in our work, for instance by having ten lay members on the board of the PCC (and the staff have never been employed by the press); by commissioning research into public opinion; and by regularly meeting members of the public all round the UK who are affected by our work. This is something that commands public support. When asked who should consider complaints about editorial standards, 45% of the public said that such matters should be considered by a committee including both members of the public and senior journalists, while just 12% said it should be for judges.[2]

3.5 While operationally independent of the industry, we have to be aware of the realities of journalism, so that our rulings are relevant and respected in the press. The realities have been transformed over the last few years. Deadlines are constant because of digital publishing, and journalists are overwhelmed with information in an unprecedented way. Just five years ago the picture editor on *The Sun* received up to 2500 new images every day for consideration for publication. Now the figure

[2] A further 11% thought members of the public only should decide; 8% chose lawyers and 8% government appointees; while just 4% thought senior journalists alone should be responsible. 12% did not know. Ipsos MORI September 2006.

is between 10000-15000 each day. This is one reason why a small number of serving editors sit on the PCC.

3.6 There must be a danger that the good, but lower key, work that the PCC does in the interests of the public at large will be undermined if the parallel system of privacy jurisprudence does not take account of the PCC's own adjudications. This will result in confusion among the industry about what standard is required; 'double jeopardy' for editors; and the development of a two-tier system. It was clearly never the intention for such a state of affairs to develop. The remedy may lie in some amendment to Section 12 of the HRA.

4.0 Fines and compensation

4.1 The PCC naturally wishes to prevent self-regulation from being undermined. But the answer is not for the PCC to be more like the law. Our 2007 submission set out why a system of fines and compensation would be undesirable. It would actually amount to the death knell for self-regulation. We are opposed because:

- It would be impossible to fine newspapers and magazines without legal apparatus compelling them to pay. Such a legal basis alone would completely change the nature of the system, which is based on industry buy-in and collaboration between the parties where possible. It would alienate the industry – which is encouraged to work with rather than against the self-regulatory system in the interests of delivering results for complainants;
- It would inevitably import the worst features of the compensation culture: delayed justice, antagonism and legal wrangles through lawyers;
- The PCC's popular (with complainants) conciliation service would be destroyed as editors would refuse to offer corrections or apologies for fear of admitting liability and exposing themselves to a fine later on;
- There would be little incentive for editors to work with any such statutory press council (which is what it would be) to minimise problems before publication;
- The industry has already made a substantial financial investment in the system in order to ensure that it costs nothing and is risk-free for complainants. Faced with further financial penalties, many groups may simply choose to leave the system.

4.2 We therefore urge the Select Committee not to be seduced by the superficially enticing argument in favour of giving the PCC the power to fine – i.e. that it would look 'tougher' – and bear in mind the significant downsides attached to any such proposal. In short, we believe that it is not possible to combine the virtues of press self-regulation with a system of fines.

5.0 Meaningful remedies

5.1 It is also the case that – while it may seem counter-intuitive – fines are not particularly popular as a remedy either with the public or with PCC complainants.[3] Hardly any complainants ask the PCC for money, or for the publication to be fined. Rather, people seem to want problems dealt with quickly, sometimes privately, and in a meaningful way. The PCC offers a whole range of remedies to complaints about privacy intrusion, which would be lost if we moved to a formal, fines-based system of regulation. In addition to all the work aimed at preventing intrusion in the first place, the PCC can:

- Quickly negotiate the removal of intrusive material from websites so that it does not get picked up elsewhere;
- Organise legal warnings to be tagged to publications' archives to ensure private information is not accidentally repeated;
- Encourage the destruction or removal of intrusive information from databases or libraries;
- Obtain personal apologies from editors, and undertakings about future conduct;
- Secure prominent public apologies;
- Help negotiate agreed, positive follow up articles;
- Use the power of negative publicity by 'naming and shaming' a publication's conduct in a critical ruling (which must be published in full and with due prominence by the editor);
- Organise a combination of the above, or, depending on the circumstances, the purchase of specific items in order to make amends (a wheelchair, for example), *ex gratia* payments, or donations to charity.

6.0 The future of privacy regulation

6.1 In section 3 above we have rehearsed some of the potential problems that may arise for self-regulation. But there is a fundamental question about whether the law could ever on its own become an effective general mechanism for dealing with privacy. Numerous structural flaws present themselves:

- The effectiveness of the law depends on the UK being a ring fence-able jurisdiction within which the flow of information can be controlled. This is not the case. Information from anywhere in the world is available in an instant. Ordering a UK newspaper not to publish something will be meaningless if a widely-read English-language website, based abroad, publishes it anyway;
- Similarly, the focus on the traditional media in relation to privacy overlooks the reality of commercial media existing in a new landscape alongside many successful non-commercial publishers online;

[3] As we have told the Committee previously, research into public opinion shows that the most popular form of resolution for a possible breach of the Code would be a published apology, followed by a private apology. Less than a third supported a fine in the September 2006 Ipsos MORI survey.

- The process of using the law is formal, slow, alienating, risky, and potentially extremely costly.

6.2 Clearly the globalisation and digitalisation of the media have presented new challenges to regulation. But these are surely powerful forces favouring deregulation of formal structures and a greater reliance on self-regulation, which is particularly appropriate with its emphasis on self-restraint, swift remedies, and collaboration.

6.3 The PCC has evolved constantly over its 18 year history, and is now actively thinking about how it can further adapt and use its expertise, in light of the legal developments and the rapidly changing structure of the media. We hope the Select Committee will recognise that there has never been a more suitable time for self-regulation of the media. Indeed, there are indications from UK and European politicians that there should be a wider reliance on self-regulation going forward, providing that the media can be persuaded to buy in to such systems.

7.0 McCanns

7.1. We would not normally comment on contact we have with private individuals, but note that the Committee has called for evidence on the McCanns and the media. In particular, it has asked why the McCanns did not complain to the PCC over the libellous stories in the Express titles, and why we did not invoke our own inquiry after the matter was settled.

7.2 The Committee should be aware that the Commission took a very early interest in the McCanns' situation, contacting the British Embassy on 5 May 2007 (two days after Madeleine's disappearance, and way before the story assumed its subsequent prominence). We have attached in an appendix the exchange of correspondence with the embassy, in which it is clear that the PCC pro-actively offered its services.

7.3. Subsequently, on 13 July 2007, the Chairman of the PCC, Sir Christopher Meyer, met Mr McCann and his then press adviser, Justine McGuinness, in London. He told them how the PCC could help – if necessary – and gave them some of our literature. There was a further, briefer, meeting with Mr and Mrs McCann on 29 February 2008 during which Sir Christopher repeated that the PCC stood ready to help, if need be.

7.4 Additionally, the PCC had a more formal role in advising the McCanns' representatives over how to ensure that their twins' birthday party could take place away from the media glare, something that was successfully achieved. We also spoke to the local council in Charnwood about how the McCanns' neighbours could be assisted (vans and cars from TV, radio and press journalists were allegedly blocking the entrance to their road, preventing some of them from getting to work). In a radio interview, the McCanns' spokesman Clarence Mitchell – while explaining why the McCanns took the legal action – said about this work:

> "the PCC have been very helpful towards Kate and Gerry – they've been very pleased with their advice on the more practical aspects of dealing with the press, such as having the constant presence of photographers outside their home and the harassment...". [4]

7.5 This will demonstrate that there was a clear line of communication between the Commission and the McCanns, and illustrate that the PCC was actively seeking to help them if possible.

7.6 But the PCC does not generally launch inquiries into matters without the say-so of the principals involved. To have done so in this case would not only have been an impertinence to the McCanns in light of our previous contact, it would have risked looking like a cynical attempt to exploit the publicity surrounding the case. Without the involvement and instructions of the McCanns, it would also have been highly unlikely to have achieved very much. That said, Sir Christopher Meyer did give a number of interviews at the time of the settlement in which he condemned the libels, and took the opportunity to draw the distinction between the role of the PCC and the role of the law in considering matters of libel.

7.7 To reiterate the point made in paragraph 2 of this submission, the PCC is not supposed to investigate every example of alleged malpractice by the press. Breaches of the laws of libel, copyright, data protection, contempt of court and so on in relation to published material should be considered by the courts. The PCC applies different tests and, in any case, has different sanctions. Where there is any conceivable overlap between the jurisdiction of the PCC and the courts, it must be for the complainants to decide which forum to use. While this was a highly unusual, tragic case that attracted enormous publicity, the use of the libel laws to remedy a complaint of libel was hardly unprecedented. It would therefore be difficult, in our submission, to draw any broader conclusions about the general effectiveness and record of the Press Complaints Commission from this highly regrettable episode.

ENDS

[4] Clarence Mitchell interviewed on the *PM* programme, 19 March 2008.