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The Culture, Media and Sport Committee

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Contents

Report

Summary

There has been a long process of debate, development and more debate over ways to reconcile freedom of expression by the media, essential in a free and democratic society, with respect for the private lives of individuals.

Various inquiries and different regulatory bodies have grappled with this topic since 1949. Simultaneously there has been a range of relevant major and minor developments in common law, on the statute books and at the European Court of Human Rights.

The current situation is one of uncertainty. The overall legal context is developing with the implications of the two 1998 Acts, on data protection and on human rights, yet fully to emerge.

The regulation of broadcasting has been reformed and the precise responsibilities of the Office of Communications (Ofcom) were being finalised at the same time as this Report was being prepared. Ofcom obviously has an important opportunity to produce an improved code and procedures with which to deal with the relatively few complaints about intrusion into privacy by broadcasters made each year.

Overall, standards of press behaviour, the Code and the performance of the Press Complaints Commission (PCC) have improved over the last decade. However, the question arises of whether the progress made in raising press standards, from the very low baseline conceded by editors themselves, has gone far enough.

In 1993 our predecessor Committee, in the shadow of the "last chance saloon", recommended an integrated package of: enhanced freedom of information provisions; a privacy law; enhancement of press self-regulation, including the award of compensation, and establishment of a statutory Press Ombudsman. Ten years later, with a new Government ostensibly satisfied with progress, we offer recommendations arising out of a different scenario.

Of necessity we reserve our judgement on the arrangements to be established by Ofcom, to which we may well return. We see room—as do the Government and new Chairman of the Press Complaints Authority—for improvements within the current self-regulatory system which the press signs up to, funds and accepts judgement from, against its own Code. The key to this system must be that it commands the full commitment of the industry itself as well as the confidence of Government, Parliament and, crucially, the public. To these ends the measures we recommend are aimed at enhancing: the independence of the PCC and aspects of procedure, practice and openness; the Code of Conduct; the efficacy of available sanctions; and clarity over the protection that individuals can expect from unwarranted intrusion by anyone—not the media alone—into their private lives.

Conclusions and recommendations

1. Ofcom must seize the opportunity presented by its new structure to undertake a thorough review, including wide consultation, of how complaints against the broadcasters should be tackled and on the substance of a new code upon which the system will rest. In the meantime, and under the new arrangements, we recommend the continuation of hearings for complex cases (but we see no good reason why the complainant cannot make a full record of the proceedings). (Paragraph 36)

2. We were not at all convinced that door-stepping, by a film crew, of people who have refused, sometimes in writing, to be interviewed is really done to give the subjects of a programme a final opportunity to put their side of the story. The motivation is surely less judicial and more about entertaining footage. Such intrusion, and broadcasting the result, should only be undertaken in important cases of significant public interest. (Paragraph 37)

3. The BBC should respond to the preference of individuals for their privacy complaints to be dealt with by an external body (previously the Broadcasting Standards Commission) and should either increase the demonstrable independence of its own system or refer complaints to Ofcom if the initial response from the programme-makers does not resolve the situation. The BBC should participate fully in the Ofcom review that we recommend above. (Paragraph 38)

4. Ofcom and all the broadcasters should engage with the PCC and the press industry to develop ways of tackling the media scrums that still seem to gather at the scent of a story. Described by Lord Wakeham as "a form of collective harassment" this is a matter that must be capable of being sorted out—especially when it is the victims of violent events, or their families, that are involved. (Paragraph 39)

5. Of necessity we reserve our judgement on the precise arrangements to be established by Ofcom. This is a matter to which we may well return. (Paragraph 40)

6. Notwithstanding the PCC's avowed intent to secure resolution between parties to a complaint if possible, we recommend that the PCC consider establishing a twin-track procedure. The new provision would be to respond to those complainants who did not want mediation but wanted the Commission to make a judgement in reference to the Code on their case (after the normal exchange of papers) without this insistence prejudicing the result. At the very least the Commission should make an assessment amongst complainants as to the level of demand for such an innovation. (Paragraph 61)

7. There are a number of issues that arise in advance of the publication of a story that do not amount to "prior restraint" or "press censorship". We believe that the PCC should consider establishing a dedicated pre-publication team to handle inquiries about these issues from the public and liaison with the relevant editor on the matters raised. This team should also handle issues related to media harassment, including the production and promotion of guidance to both press and the public, liaison with the broadcasters and the transmission of "desist messages" from those who do not

want to talk to the media. The first job for the pre-publication team should be the collaborative work with Ofcom on "media scrums" that we recommend above. (Paragraph 62)

8. We recommend that the Code Committee, Pressbof and the Commission, consider the following in relation to the Code of Conduct. (Paragraph 63)

9. The Code's ban on intercepting telephone calls should be updated to reflect the communications revolution (in line with the provisions of the Regulation of Investigatory Powers Act 2000) and should include reference to the privacy of people's correspondence by e-mail and between mobile devices other than telephones. (Paragraph 63.i))

10. An additional element of the Code should be that journalists are enabled to refuse an assignment on the grounds that it breaches the Code and, if necessary, refer the matter to the Commission without prejudice. (Paragraph 63.ii))

11. The Code should explicitly ban payments to the police for information and there should also be a ban on the use and payment of intermediaries, such as private detectives, to extract or otherwise obtain private information about individuals from public and private sources, again especially the police. (Paragraph 63.iii))

12. We welcome the assurance of the Chairman of the PCC that the selection of candidates for the role of lay commissioner would be put on a proper, open and transparent footing from now on. We note his undertaking to have a further lay commissioner, appointed under such arrangements, in place before the end of 2003. (Paragraph 65)

13. We believe that the Commission would command more confidence in the independence of its membership if it adopted the following proposals:

14. Lay members should be sought and appointed for fixed terms under open procedures including advertisement and competition. (Paragraph 67.i))

15. Press members should be appointed for fixed terms from across the industry. There should be an explicit presumption that they are not there to represent the interests of their associations but to offer the benefits of their particular experience whilst acting independently as members of a quasi-judicial body. (Paragraph 67.ii))

16. Press members (and here we include members of the Code Committee) who preside over persistently offending publications should be required to stand down and should be ineligible for reappointment for a period—perhaps the length of a term of office. Persistence could be defined as "three strikes and you're out". (Paragraph 67.iii))

17. The lay majority should be increased by at least one; as provided for in the PCC's Articles and accepted by Sir Christopher Meyer, the new PCC Chairman. (Paragraph 67.iv))

18. The Appointments Commission should appoint an independent figure, also under the new procedures, to implement the procedural appeals process to which Sir

Christopher has referred. To this responsibility we would add the task of commissioning a regular external audit of the PCC's processes and practices—a version of accreditation. While the "standard" would probably be unique to the PCC, the methodology has been pretty well-established throughout the corporate world. (Paragraph 67.v))

19. The Code Committee, which at the moment is composed entirely of editors, should be re-established with a significant minority of lay members. (Paragraph 67.vi))

20. We recommend that the PCC, under its new Chairman, considers the case for taking a more consistent approach to foreseeable events that herald intense media activity and people in grief and shock; and for acting as soon as possible after unexpected disasters have occurred. This may be another appropriate responsibility of the pre-publication team. (Paragraph 72)

21. The text of a PCC adjudication should be clearly and consistently set out to ensure its visibility and easy identification as proposed by Sir Christopher Meyer, the new Chairman of the Commission. However, we urge that the design of this 'branding' must avoid duplicating the appearance of an advertisement which may cause it to be skipped automatically by some readers. (Paragraph 79)

22. We therefore recommend that any publication required to publish a formal PCC adjudication must include a prominent reference to that adjudication on its front page—in effect a 'taster' for the judgement. (Paragraph 80)

23. In addition we recommend that the PCC's annual report contains an additional feature–something familiar and popular amongst newspapers—a league table showing how publications have performed against the Code that year. (Paragraph 81)

24. We believe that annotating press archives as to their accuracy and sensitivity should be automatic in all serious cases, and certainly all upheld adjudications, and furthermore that the publication should be responsible for removing the relevant article from publicly available databases. (Paragraph 82)

25. We believe that the PCC, Pressbof and the industry would benefit, in terms of public confidence, if they formed a consensus around two new elements of the system; one gently punitive and one modestly compensatory: (Paragraph 84)

26. Pressbof should introduce a gearing between the calculation of the registration fee and the number of adverse adjudications received by a publication in the previous year; and (Paragraph 84.i))

27. The industry should consider agreeing a fixed scale of compensatory awards to be made in serious cases (which in any case according to the evidence from the industry and the PCC are few and far between). If these were fixed in advance, a matter of consensus and relatively modest, we can see no reason for lawyers to be involved. Consideration could be given to the making the award to a charity of the complainant's choice rather than directly. (Paragraph 84.ii))

28. We strongly urge the PCC and the industry to consider the matter of complainants' costs and agree that, where justified complaints have involved particular financial burdens on the complainant such as the acquisition of a transcript of a trial or inquest (but not legal fees), then those costs must be met by the offending newspaper. We believe anything else to be invidious and a shifting of the burden of proof from the newspaper, which made the original claims, to the complainant who has been found to have been traduced or otherwise injured. In the light of the PCC's battle cry of "fast, free and fair" we believe this to have nothing to do with the debate over punitive or compensatory awards. (Paragraph 85)

29. If the Board and the Code Committee are totally unwilling to accept the introduction of lay members to the latter, then we believe that the industry has a sufficient input into agreeing the Code and that Pressbof should withdraw from the process. (Paragraph 87)

30. We accept the offer to the Committee made by Sir Christopher Meyer to return in a year's time to report on progress. This offer will not, however, substitute for action on our own initiative and we therefore recommend that the PCC make itself available to give evidence to this Committee at regular intervals for discussions on progress with its agenda for change. (Paragraph 88)

31. We cannot see how the matter of illegal payments to policemen can fail to fall within the criteria set out by the PCC for taking the initiative, or how the issue is different to the example of illegal telephone-tapping highlighted by the Commission itself. We believe the PCC must investigate. This may be best accomplished in cooperation with the Information Commissioner and the Police Complaints Authority and, if necessary, result in an addition to the Code (such as occurred on intercepting telephone calls). (Paragraph 95)

32. On the other side of the fence, we recommend that the Home Office and police authorities also take note of the evidence from the editors of The Sun and the News of the World to us regarding payments to police officers for information and take steps to review and overhaul, if necessary, the guidance and measures aimed at preventing such behaviour by the police and media. (Paragraph 96)

33. It is for the Information Commissioner to make sure that all public and commercial entities are aware of their responsibilities under the Data Protection Act and put in place adequate training, guidance and other mechanisms to ensure that those responsibilities are fulfilled. (Paragraph 97)

34. On balance we firmly recommend that the Government reconsider its position and bring forward legislative proposals to clarify the protection that individuals can expect from unwarranted intrusion by anyone—not the press alone—into their private lives. This is necessary fully to satisfy the obligations upon the UK under the European Convention of Human Rights. There should be full and wide consultation but in the end Parliament should be allowed to undertake its proper legislative role. (Paragraph 111)

1 Introduction

The inquiry

1. The Committee announced its inquiry in December 2002, inviting written evidence at that time. Subsequently both the PCC and the PressWise Trust (a charity set up to help victims of the media amongst other things) wrote to former complainants and invited them to get in touch with the Committee. A number did so and went on to submit written evidence and other material that assisted the Committee to understand their experiences and aided the inquiry. We were grateful to all our witnesses for the evidence we have received. However, we are especially mindful of the various burdens involved in the effort made by some former complainants. Where consent has been given we have published, or made available, the submissions we received.[1]

2. During the early part of this year, 2003, we took oral evidence from a wide range of witnesses: legal experts; editors of national, regional and local publications (accompanied by their advisers and others); representatives from some industry trade associations; the PressWise Trust; the National Union of Journalists; the National Council for the Training of Journalists; the Press Complaints Commission (PCC) led by Acting Chairman Professor Robert Pinker; the BBC (as both self-regulator and media organisation); ITN; Mr Clive Soley MP; the Broadcasting Standards Commission (BSC); the Office of Communications (Ofcom); and the Government in the form of Baroness Scotland of Asthal, Parliamentary Secretary, Lord Chancellor's Department; and Rt Hon Tessa Jowell MP, Secretary of State for Culture, Media and Sport. Sir Christopher Meyer, KCMG, who took up his appointment as Chairman of the Press Complaints Commission on 31 March 2003, towards the end of the evidence-gathering process, appeared before us on 21 May. A full list of those who gave oral evidence is set out at the back of this volume.

3. Early in the inquiry we had also invited a small number of people who had submitted written evidence about their experiences with the media and the regulators to give oral evidence in private. This was due to the decision of the Committee that it would not seek to re-try individual cases as well as the request of some, but we stress not all, of the witnesses. This oral evidence, where the consent of the witness has been given, has been published as part of the record.[2]

The dilemma

4. The dilemma we faced was the same as when the National Heritage Committee inquired into the subject in 1993.[3]

1 The majority of the written evidence we received is published in HC 458 Volume III. Where reproduction has not been possible the material have been deposited in the Public Record Office under longstanding arrangements (the details are set out at the back of this volume).

2 The oral and written evidence from witnesses appearing before the Committee is published in HC 458 Volume II.

3 National Heritage Committee, Fourth Report of Session 1992-93, *Privacy and Media Intrusion*, (hereafter the "NHC Report") HC 294-I, paragraphs 1-8.

5. A free and open democratic society is one where there must be a resolute guarantee of freedom of speech, especially for the media. Legal restraint and remedies, if that restraint is broken, must apply in specific and defined areas, for example: national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.[4]

6. Self-restraint should also play a part in that freedom of expression. As the National Heritage Committee said in 1993: "A free society should not be a society which, in order to exhibit its freedom, dispenses with civilised discourse."[5] However, crucially, this freedom must protect the ability to say, write and broadcast things which might be inconvenient to those in public authority whoever they might be.

7. There must also be respect for privacy. Not everything in an individual's life is fair game for speculation, comment and exposure. This applies also to individuals who have public responsibilities or who have courted publicity for their own ends. However, we were mostly concerned with what we termed, for want of better words, people not generally in public life who have nonetheless found themselves the focus of media attention often by virtue of being the victims of crime or by being involved in a personal or national tragedy.

8. The balancing of these rights, or their due reconciliation, is what this Report is about. In 1993, with regard to the press, the balance being struck was not found to be appropriate by the *Review of Press Self-Regulation* carried out by Sir David Calcutt QC, nor, subsequently, by our predecessor Committee.[6]

Defining terms

9. Privacy is an aspect of human dignity and autonomy and almost everyone regards privacy as essential.[7] There was no dispute that everyone should be entitled to a zone of privacy and is likely to need such space to maintain their psychological well-being and personal development and to allow the fostering of relationships especially intimate ones. Article 8 of the European Convention on Human Rights states that everyone has the right to respect for his or her private and family life, home and correspondence.

10. But privacy cannot be an absolute right. There are limited situations when it can and should be breached, where crime, corruption or hypocrisy are being hidden under a cloak of privacy and where it is overwhelmingly in the public interest that the truth be brought to light. Even here, though, it is important that both the authorities and the media only infringe privacy in relation, and in proportion, to the iniquity thought to be in question.

4 *Pace,* Article 10 of the European Convention on Human Rights

5 *Op. cit.,* paragraph 2.

6 Cm 2135; NHC Report, paragraph 8.

7 Professor Eric Barendt, *Rules by Recluses,* IPPR, 2002, pp14 and 15

11. PCC jurisprudence, more developed than that of any other regulator, revealed the following features of privacy:

i) People could intrude upon, or compromise, their own privacy but private facts subsequently exposed by the media should be proportionate to the information revealed by the individual.

ii) One person's privacy could be compromised by the right to freedom of expression of another individual involved in the story.

iii) If the relevant information was, or was about to be, available to the public then its privacy was diminished.[8]

iv) Publication of photographs taken without knowledge or consent was intrusive if such photographs were taken in places where there was an expectation of privacy. The PCC has ruled public places such as quiet tearooms and cathedrals to be in this category, but not a public beach.

v) Many privacy-related clauses in the Code had a public interest exemption but the hurdle for over-riding the clauses relating to children was "exceptionally" high; on health matters the public interest case must be "incredibly strong"; and there was no such exemption at all for provisions relating to victims of sexual assault or to intrusion into grief and shock.[9]

12. The "public interest" is a concept of crucial importance. However, it was a confusing term. The public interest had not traditionally been regarded as the same as "that which interests the public" and indeed this was the firmly stated position of the PCC.[10] The Court of Appeal recently seemed to suggest differently: "Even trivial facts relating to a public figure can be of great interest to readers and other observers of the media ... The public figure may be a role model whose conduct could well be emulated by others ... The courts must not ignore the fact that if newspapers do not publish information the public are interested in, there will be fewer newspapers published, which will not be in the public interest. The same is true in relation to other parts of the media."[11] This view was described as an "aberration" by one of our witnesses[12] which was corrected in a further Court of Appeal judgment.

13. It might be better to regard the public interest as covering those matters that citizens *ought* to be interested in: information necessary or helpful to participating in the democratic process, information about crimes and misdemeanours, information important to the ability of society and individuals to safeguard health, wealth and safety and generally to the effort of navigating through the complexities of modern life. This appears at first to be a very solemn definition. However, it is certainly not intended to

8 However, justification by a newspaper that a private fact had been broadcast simultaneously has been dismissed by the PCC on the grounds that the broadcast was subject to separate procedures and judgements made by press editors must be based on the press editors' Code.

9 Ev 186ff Vol II

10 Ev 154 and 200 Vol II

11 *A v. B and C*, quoted in *Ruled by recluses, privacy journalism and the media after the Human Rights Act*, IPPR, 2002 (hereafter "*Ruled by Recluses*, IPPR, 2002"), p98. See also Ev 200 Vol II

12 Ev 13 Q 55

exclude anything other than private material, the lack of knowledge of which could have little significant impact on anyone else's life. The Press Code of Conduct describes the public interest as including, but not limited to: detecting or exposing crime or a serious misdemeanour; protecting public health and safety; and preventing the public from being misled by some statement or action of an individual or organisation. The Code also states that there is a public interest in freedom of expression itself and the Commission would therefore have regard to the extent to which material has, or is about to, become available to the public.

14. Lord Wakeham established a number of questions to test a public interest defence to a charge of breaching the Code. These involve assessment of whether:

i) there was a current and genuine public interest and any way to minimise the necessary intrusion;

ii) any intrusive photographs are necessary to the story or simply illustrate it;

iii) impacts on innocent or vulnerable relatives (especially children) of the individual at the centre of any necessary intrusion can be minimised;

iv) in any story about someone connected with a public figure, there is a genuine public interest in the connection; and

v) in any story about the past actions or statements of an individual (at odds with current behaviour), the original statement or action was recent enough.[13]

15. There have been many attempts to define what constitutes the public interest. The gravity and ambiguity attached to the term have also motivated efforts to find an alternative phrase perhaps the latest of which concluded that "social importance" was a superior concept being more amenable to subtle gradations from high to low—a key advantage in a regulator's toolbox.[14]

16. Media intrusion can take two principal forms. There was first the intrusion of unethical newsgathering methods. Such activities included: the use of long lens cameras, or concealed cameras, to peer in or around private domains; the bugging of telephones; interception of e-mails; trawling through dustbins; and persistent door-stepping which can amount to a "media scrum". Other matters to which we heard reference concerned the eliciting of private data from public and commercial entities (the police, BT and other organisations) perhaps through the employment of private detective agencies or other intermediaries.[15] Of course, although reprehensible and in some cases illegal, not all these behaviours will cause distress in themselves being, by their nature, clandestine.

17. The second form of intrusion, highlighted by Sir Louis Blom-Cooper, Chairman of the PressWise Trust, as the more serious, is the decision actually to publish or broadcast the fruits of this harvesting, whether licit or not, in a media story.[16] The information, which

13 Ev 200 Vol II

14 David Morrison and Michael Svennevig, *Ruled by Recluses*, IPPR, 2002, p65ff

15 Ev 128 Vol II and see Section 4 below

16 Q 214

was then in the public domain, can receive local, regional, national or even international attention and can reappear in other stories, however tangentially related, almost indefinitely.

18. Intrusion felt by people was not always strictly a matter of privacy. The editors of local and regional papers, and a national paper in Scotland, said that many complaints to them concerned their reporting of court proceedings, which are of course the open and public arbitration of private upsets and tragedies.[17] However, a number of individual cases about which we received evidence of particular distress related to one-sided, or distorted, reporting of such matters. This seemed to be a particular problem in adversarial proceedings because, by their very nature, lines of argument were presented in a very partial way.

19. In one case, an officer-in-charge of a case where the prosecution failed was named prominently in a newspaper even though his culpability for the errors was a matter of dispute and his own side of the story was not sought prior to publication. His identification led to victims in other cases losing confidence in him. From the way he presented his experience to us, we believe his eventual resignation to have been a significant loss to the police force.[18] In another case, from 1991, a young schoolgirl was murdered by a fellow pupil who was subsequently sentenced to Unlimited Time under Scottish law. Subsequent references to this case in some articles (within discussions of sentencing policy) focused solely on arguments put forward by the defence which presented the victim as provocative in a number of ways and, in one instance, played down the extent of the attack. In 1992 the victim's younger brother committed suicide as a direct and demonstrable response to this coverage which has been proved unbalanced with reference to a transcript of proceedings obtained by the family with difficulty and expense.[19] Finally, there was the case of an inquest that heard expert evidence that drug-use was not the cause of a young man's suicide but one newspaper reported quite the reverse in a very declamatory style. Eventually, again after the effort and expense on the part of the relatives of securing a transcript of proceedings, the newspaper accepted their point.[20]

20. These, we hope, are isolated occurrences, with perhaps the most tragic having taken place more than a decade ago (although this is of no solace to those involved). However, taken with our other evidence, links between privacy on the one hand, and accuracy and distortion on the other, can be clearly shown. If publication can be an act of intrusion, and the Press Code says it is, then publication of inaccurate, distorted or one-sided public material can be just as intrusive and damaging as the revelation of private facts.

The different media

21. The broadcasters and the press operated in two quite different environments. The broadcasters, being near-monopoly providers delivering output straight into people's homes, were licensed, regulated by statute—including a requirement for impartial news

17 Q 840
18 Ev 370 Vol II and Q 1004
19 Ev 177 Vol III
20 Ev 410ff Vol II

provision—and subject, ultimately, to the removal of their licence to operate if they continually transgressed. The BBC was of course in a slightly different position constitutionally, but the implications of the Royal Charter and Agreement with the Secretary of State were effectively the same.

22. The press was in a different position. As Mr Paul Dacre, editor of *The Daily Mail*, told us: "anyone can start a newspaper".[21] In the absence of a wholly new statutory system, there was ultimately no big stick, or Damoclean sword, under which change could be imposed. Therefore, the current regulation of the press is a matter of consensus and voluntary submission for a variety of reasons which we examine further below. Mr James Strachan, barrister, pointed to the anomaly of proposals to give the PCC "teeth" because this, he argued, misunderstands the basic position that "any coercive means the regulator wishes to impose have to be by the consent of those...being regulated".[22]

23. For whatever reason, surveys of public attitudes have consistently revealed that the people place significantly more trust and confidence in the broadcasters than in the press. It was pointed out several times that press journalists vie with politicians for the lowest position in many such surveys.[23] It is certainly the case that the weight of our evidence, supportive *and* critical, was heavily focused on the PCC and the press, rather than the broadcasters, and that is reflected in the balance of this Report. As in 1993, the Committee has found that the main concerns of witnesses and public debate—Communications Bill notwithstanding—related to the conduct and regulation of the press.

The Government's position

24. Government policy on the regulation of the broadcasters is set out in the Communications Bill and is an area upon which we have reported three times since 1998. Ofcom will replace the Independent Television Commission and the Broadcasting Standards Committee and a discrete Ofcom "Content Board" will deal with complaints under revised arrangements. With respect to the press, the Government's position could not be clearer. The DCMS wrote that: "the Government's starting point is a fundamental belief that a free press is best served by unfettered self-regulation. The Government has no plans whatsover to legislate in this area, or to interfere with the way the PCC operates."[24] The Secretary of State submitted a list of areas where she thought the Commission could usefully ask itself whether it could improve performance, and these were described as "questions" that have emerged from our inquiry.[25] We deal with these in detail later in this Report.

21 Q 158
22 Q 39
23 Q 156
24 Ev 347 Vol II, paragraph 2
25 Ev 347 Vol II

2 The broadcasters

Regulation

The BSC

25. All UK broadcasters were subject to the jurisdiction of the Broadcasting Standards Commission ("BSC"). In accordance with Sections 107 and 108 of the Broadcasting Act 1996 the BSC issues two Codes of Guidance, one dealing with privacy and fairness and the other with standards in programmes. The BBC regulated itself under its Producer Guidelines while all commercial licensees including the ITV licensees, Channel 4, Five and BSkyB, were regulated additionally by the Independent Television Commission (ITC). The ITC's Programme Code contained very similar provisions to the BBC's Producer Guidelines. The ITC was obliged by the same two sections of the Broadcasting Act 1996 "to reflect the general effect" of the BSC's Codes in its Programme Code. In preparation for amalgamation under Ofcom the ITC has been referring privacy complainants where possible to the BSC.[26]

26. The key features of the BSC regime were:

- While complaints can relate to either the programme-making or the broadcast itself, the window for making a complaint was after the programme has been broadcast and within a reasonable time (usually three months for TV and six weeks for radio, reflecting obligations on broadcasters to keep recordings of their output for these periods). However, extensions were allowed in exceptional circumstances.

- The BSC only accepted complaints from individuals or organisations whose privacy had actually been infringed (although we understand that some third party complaints on intrusive material could be dealt with as relating to "standards" rather than "fairness and privacy").

- A complaint could not be entertained, or proceeded with, if it was the subject of legal proceedings. The Commission may also refuse to consider a complaint if "there is a legal remedy available"; however the BSC's submission said that this right was rarely exercised in view of the fact that the Commission was "designed to offer a remedy that is affordable and normally speedier than court proceedings".

- In some instances where matters of fact were disputed the BSC would hold a hearing with all parties present, as well as their witnesses if necessary and Commissioners (who may themselves ask questions).

- The Commission's only sanction was the power to direct a broadcaster to broadcast its findings and pay for publication somewhere of the complainant's choosing. The Chairman of the BSC told us that if people wanted money then they went to the courts. He said that broadcasters hated having to publish adverse findings.[27] The sanctions

26 Ev 304 Vol II

27 Q 697

available to the ITC with respect to the commercial broadcasters were considerably more draconian and included large fines or even loss of licence. The joint evidence from ITV, Channel 4 and Channel Five stated that the ITC had never fined a broadcaster for a breach of its code relating to privacy.

- The BSC told us that it expected that Ofcom would continue to offer complainants an informal but informed, independent and free means of redress. Ofcom would however have increased authority and powers flowing from its position as the integrated economic regulator.

- There were no formal means by which complaints could be resolved. The Commission's approach, set by law, was limited to adversarial proceedings and adjudication. However, it was open to complainants to withdraw complaints in the face of adequate action by the broadcaster and the BBC's evidence recorded that happening on two occasions in 2000-02 (out of 9 privacy complaints).[28]

27. In 2001-02 the average performance targets agreed with the DCMS were: (a) 33 weeks with a hearing (25 achieved); and (b) 24 weeks without a hearing (19 achieved).[29] Lord Dubs said that one weakness of the system was its lack of speed. This was often because production teams tended to disperse after filming making reassembly for a hearing difficult.[30]

The BBC

28. The BBC was covered by the BSC but also regulated itself. The BBC had a Programme Complaints Unit (PCU) for, *inter alia*, complaints of unwarranted infringement of personal privacy. The Unit was in the Public Policy Division and so was separated from programme-making or other output. The BBC described the Unit's activity as "rigorous and impartial investigation of complaints which suggest a serious and specific breach of the BBC's editorial standards."[31] The standards were set out in the Producers' Guidelines as required by the Charter and Agreement.

29. Where a complaint was upheld by the PCU it was up to divisional management to determine and implement remedial and/or disciplinary action. It was for the Head of PCU to recommend on-air correction. The BBC had an appeal mechanism in the form of the Governors' Programme Complaints Committee separately supported by an Editorial Adviser. The Committee would consider the matter and may require an on-air apology or correction.

Numbers of complaints

30. Between 1998-99 and 2001-02 the BSC received about 50 complaints per year involving privacy (compared to up to 6,000 per year on standards). Of the 50, about 10 per year were not entertained on various grounds. Over the whole period 40 were upheld (in whole or in

28 Ev 304ff Vol II
29 Ev 306 Vol II
30 Q 688
31 Q 139

part) and 85 were rejected. Ms Judith Barnes told us that customer satisfaction research in 1999 revealed that complainants liked the idea of face-to-face hearings with the broadcasters but they would have liked more assistance with the procedures.[32]

31. In 2000-2002 privacy complaints formed less than 1% of all complaints to the BBC's PCU with none going on appeal to the GPCC. It was unclear whether this figure included those privacy complaints accepted by BBC Information. The BBC recognised that people with personal grievances have often preferred to go to the BSC and this may be because the Commission was seen as more independent—an external judge. Conversely, complainants about standards seemed to want to address their concerns directly to the broadcaster responsible.[33]

32. With regard to ITV, Channel 4 and Channel Five in the last ten years, the regulators have entertained 178 complaints on privacy grounds about programmes on all three channels; and of these 52 have been upheld in whole and 43 have been upheld in part. In other words, on three channels, each broadcasting all day (ITV, with regional variations, broadcasting up to 30 hours a day), the average number of privacy complaints has been fewer than 18 each year, of which slightly over half were upheld in whole or in part.[34]

33. There has been a statutory framework governing the ways in which TV programmes have been made over the last ten years. Broadcasters seem to have been given a reasonably clear understanding of their responsibilities, and the regulators have recognised the need both to protect freedom of expression and safeguard the privacy of individuals. The evidence suggested that there are few occasions when broadcasters have seriously invaded the privacy of individuals without some justification. The current regulations, and the manner in which they are applied, seem to have worked within the boundaries of their own aspirations. However, one cannot ignore the judgment of the ECHR in *Peck* which (applying to circumstances prior to the introduction of the Human Rights Act 1998) found arrangements in the UK to be deficient—one point noted was that the media regulators had no powers of prior restraint nor any means of awarding compensation.[35]

Doorstepping

34. The subject of doorstepping, both by individual presenters and camera crews and by the so-called "media scrum", was an issue that concerned us greatly, applying equally to TV and print journalists. This was emphasised by the late submission of evidence from one witness which indicated that not all intrusive media behaviour ceased 10 or 20 years ago and, as far as one can tell, not all journalists desist when requested. The events described took place in 2001.[36] The broadcasters and the press tended to blame each other for this problem, with both sides claiming to withdraw as soon as requested.[37] We make a recommendation below for some collaboration between Ofcom and the PCC to sort this problem out.

32 Q 707
33 Q 140
34 Ev 91 Vol III
35 Ev 93 Vol III
36 Ev 202 Vol III
37 QQ 457, 927, 929 and 930

35. With regard to targeted doorstepping of individuals we heard from the broadcasters that the reason for this was often to offer the last chance to the subject of an investigative programme to give his or her side of the story.[38] We found this to be rather disingenuous, especially when the broadcaster said that these attempts sometimes took place after exchanges where interviews had been ruled out, sometimes in writing. We set out our recommendations on broadcasting below.

36. **Ofcom must seize the opportunity presented by its new structure to undertake a thorough review, including wide consultation, of how complaints against the broadcasters should be tackled and on the substance of a new code upon which the system will rest. In the meantime, and under the new arrangements, we recommend the continuation of hearings for complex cases (but we see no good reason why the complainant cannot make a full record of the proceedings).**

37. **We were not at all convinced that door-stepping, by a film crew, of people who have refused, sometimes in writing, to be interviewed is really done to give the subjects of a programme a final opportunity to put their side of the story. The motivation is surely less judicial and more about entertaining footage. Such intrusion, and broadcasting the result, should only be undertaken in important cases of significant public interest.**

38. **The BBC should respond to the preference of individuals for their privacy complaints to be dealt with by an external body (previously the Broadcasting Standards Commission) and should either increase the demonstrable independence of its own system or refer complaints to Ofcom if the initial response from the programme-makers does not resolve the situation. The BBC should participate fully in the Ofcom review that we recommend above.**

39. **Ofcom and all the broadcasters should engage with the PCC and the press industry to develop ways of tackling the media scrums that still seem to gather at the scent of a story. Described by Lord Wakeham as "a form of collective harassment" this is a matter that must be capable of being sorted out—especially when it is the victims of violent events, or their families, that are involved.**

40. **Of necessity we reserve our judgement on the precise arrangements to be established by Ofcom. This is a matter to which we may well return.**

38 Q 928 (Mr Battle)

3 The press

Background

41. The Press Complaints Commission (PCC) was established by the industry in 1991 in response to the conclusions of the then Mr David Calcutt's inquiry into press self-regulation. The PCC took over from the Press Council which had lost the confidence of nearly all interested parties.

Table 1 - Regulation and the press

Date	Event
1695-1953	Newspapers and periodicals regulated indirectly by the generally applicable laws of libel, defamation, contempt, obscenity, sedition *etc.* following abolition of the Licensing Act
1931	Rt Hon Stanley Baldwin MP accused the press of exercising "power without responsibility"
1938	The think-tank, Political and Economic Planning, proposed a body to protect the press from the government and the public from the press
1949	Report of the Royal Commission on the Press under Sir William Ross recommended a general council of the press to safeguard liberties and rebuke excesses
1952	Defamation Act
1953	Establishment of the Press Council
1962	Report of the Royal Commission on the Press under Lord Shawcross recommended the appointment of lay members to the Press Council and improvement of its complaint procedures
1972	Report of the Departmental Committee on Privacy under Rt Hon Kenneth Younger
1977	Report of the Royal Commission on the Press under Lord McGregor of Durris concluded that the Press Council was failing to regulate the press industry
1984	Data Protection Act
1987-1989	Introduction of several Private Members' Bills relating to privacy and right of reply and, in 1989, comment by Mr David Mellor MP, then a Minister in the Department for National Heritage, that the press were drinking in the "last chance saloon"
June 1990	Report of the Privacy Committee, under Mr David Calcutt, to the Home Office (Calcutt I) recommended replacement of the Press Council with a statutory tribunal but that the industry should be given a last opportunity to make self-regulation work
January 1991	Establishment of the PCC in place of the Press Council and introduction of the Press Code of Conduct
1992	Code amended to ban listening devices or tapping telephones* and to make clear that editors were required to publish PCC adjudications in full with due prominence
January 1993	Review of Press Self-Regulation by Sir David Calcutt (Calcutt II) concluded that the PCC was failing and that his original proposals be implemented

Date	Event
1993	Mr Clive Soley MP introduced a Bill on *Press Freedom and Responsibility*
March 1993	Report on Privacy and Media Intrusion from the National Heritage Committee recommended *inter alia* a statutory press ombudsman and a privacy law
May 1993	Pressbof announced: a majority of independent commissioners for the Commission, additional independent members for the Appointments Commission, the Code to be ratified by the Commission and improvements to the Code
June 1993	PCC helpline launched for members of the public concerned about press investigations relating to them which might breach the Code
October 1993 – May 1995	Code amended to define private property more widely* in response to Calcutt II and PCC censure of intrusion relating to Countess Spencer
November 1993	PCC announced press industry commitment to incorporation of Code into contracts of employment of editors and journalists
1994	PCC announced the establishment of a Privacy Commissioner with responsibility for investigating *prime facie* gross or calculated breaches of the Code
September 1995	All relevant media codes amended to reduce the possibility of the "jigsaw" identification of vulnerable children
1995	The chairman and the director of the PCC made *ex-officio* non-voting members of the Code Committee
Dec 1996	Code amended to strengthen provisions on payments to witnesses in criminal trials*
1997	PCC and the Code made applicable to on-line versions of publications
Sept 1997	Death of Diana, Princess of Wales and subsequent calls for the Code to be revised.
January 1998	Revised Code: new privacy clause (reflecting ECHR) covering public places where there was an *expectation of privacy**; a ban on material obtained by *persistent pursuit* whether by staff or freelancers; children's protection extended*; intrusion into grief and shock extended to cover publication*; "should not" became "must not" throughout.
1998	Partly to underline the seriousness with which the PCC viewed the issue of intrusion the Commission upheld a substantial number of relevant complaints during the year
1998	Human Rights and second Data Protection Acts (containing references to the Code)
December 1999	Code amended in respect of children who are witnesses to, or victims of, crime.* In the light of the Human Rights Act the section on the public interest was amended to include reference to the "public interest in freedom of expression itself"
March 2003	Code strengthened in respect of payments to witnesses in criminal proceedings and the section banning payments to criminals* was hived off to form its own clause
*Subject to a public interest exemption or "not restricting the right to report judicial proceedings"	

Data source: Memoranda from the PCC (Volume II), The Editors' Code of Practice Committee (Appendix 2) and Professor Richard Shannon (Appendix 3, Volume III)

Structure

42. The key elements of press self-regulation were:

- *Press Code of Conduct* which sets out the standards to which all newspapers, magazines and periodicals in the UK must conform.
- *Editors' Code of Practice Committee*, made up of 16 editors and a senior industry figure as chairman, is responsible for drafting the Code. The chairman and director of the PCC are *ex-officio* members of the Committee. The Committee has a secretary shared with Pressbof.
- *PCC*, with 16 members (of whom 7 are editors and the remainder, including the chairman, are independent of industry),[39] is responsible for ratifying the Code and dealing with complaints. The chairman of the Code Committee is an additional *ex-officio* member. The PCC has a director and 11 staff.
- *Appointments Commission* of 5 members including its chairman who is always the chairman of the PCC, the chairman of the Pressbof, and 3 independent members. The PCC director acts as secretary.
- *Press Standards Board of Finance (Pressbof)*, made up of senior figures from the trade associations of the UK newspaper and magazine publishing industry, with responsibility for co-ordinating the industry's actions on self-regulation: appointment of the PCC Chairman; agreeing changes in the Code; and raising the funds for the PCC (£1.7 million in 2003 and £17 million overall since 1990) through a system of registration fees. Sir Harry Roche, Chairman of Pressbof, described the percentage of the turnover of the funding bodies that goes into the annual £1.7 million as "very, very small".[40] The Board has a secretary shared with the Code Committee.

43. The memorandum submitted by the PCC set out in impressive detail a wide range of activities undertaken by the Commission which, in addition to core business, principally includes: work overseas with comparable organisations, efforts to raise awareness of the PCC itself throughout the country, work with vulnerable groups and, perhaps most importantly, assisting in the training of journalists throughout the UK. These elements of the Commission's work were supported by a large number of submissions from its overseas counterparts and training colleges.[41] The latter evidence described the high profile of the Code within journalists' training and the supportive role of the Commission in maintaining this. However, our principal focus is on the Commission's role as a body to settle complaints.

Performance

44. The key performance indicators set out for us by the Commission showed that it resolved the vast bulk of the valid complaints presented to it without having to resort to

39 The new PCC Chairman has confirmed the appointment of a further lay commissioner by the end of the year.

40 Q 646

41 Ev 34-58, 63 and 65 Vol III

formal adjudication and that it did so with great speed, achieving, over the last two years, an average of 32 days for conclusion of all complaints against its target of 40 days. This average rose to 62 days when resolved complaints alone were considered; in other words when the real core business of the PCC was assessed.[42] We have estimated the complete situation for 2002 to be as follows:

All complaints received:	- 32 days
Rejected complaints and complaints where no breach was found (or not pursued by the Commission)	- 11 days
Resolved complaints (or not pursued by the complainant):	- 62 days
Adjudicated complaints:	- 70 days
Upheld:	- 77 days
Not upheld	- 64 days

45. The Commission was confident that its speed was not the result of simply bulldozing people. The first full customer-satisfaction survey in 2002 showed that 59% of all respondents thought that their complaint had been handled satisfactorily and this figure rose to 92% amongst those whose complaints had been resolved.[43] The Commission sees itself as "at heart an alternative dispute resolution mechanism" and not a free version of the legal service. This was in fact a recommendation in the first Calcutt report; that there should be an emphasis on achieving conciliation where at all possible.[44]

46. In 2002 the PCC received 2,630 complaints (91% of which were from ordinary members of the public). Of these only 36 went to formal adjudication with 17 being upheld. 1052 complaints were classified as "resolved" or "not pursued" by the complainant; 534 were rejected as raising no possible breach of the Code and 177 were not pursued by the PCC after it deemed an appropriate offer had been made to remedy any possible breach of the Code by the editor concerned.

47. Overall between 1991 and 2002 the PCC has received nearly 23,000 complaints. Mr Chris Frost, NUJ Ethics Committee, provided the following data.

42 Ev 166 Vol II

43 Ev 167 and 171 Vol II

44 Ev 158 Vol II

Table 2 – complaints to the PCC 1991-2000

Year	1991	1992	1993	1994	1995	1996	1997	1998	1999	2000	Total
Total	1520	1963	1782	2091	2508	3023	2944	2505	2427	2225	22988
Third party	0	107	114	87	77	146	335	205	–	–	1071
Undue delay	46	64	97	85	91	110	93	112	–	–	698
No remit	137	232	447	427	800	1125	593	689	–	–	4450
Concluded	*662*	*1249*	*1690*	*1957*	*2470*	*2752*	*2531*	*2601*	*1641*	*1458*	*19011*
No breach	347	584	704	914	1026	897	914	954	942	857	8139
Resolved	72	182	231	356	413	393	514	555	650	544	3910
Adjudicated:											
upheld	32	31	40	34	28	27	34	45	26	24	321
rejected	28	49	57	54	35	54	48	41	23	33	422

Data source: Mr Chris Frost, NUJ, from a study to be published in Journalism Studies *later this year, 2003.*

48. The distribution of adjudications across publications has been as follows:

Table 3 (1991-2000)

Publication (7 or more adjudications)	Number of adjudications	Upheld or upheld in part	Rejected or not pursued	Upheld as % of adjudicated
The Sun	47	19 (1st)	28	38.3
News of the World	39	17 (2nd)	22	30.8
Mail on Sunday	39	16 (3rd)	24	33.3
The Mirror	29	14 (4th)	15	31.0
Daily Mail	28	6 (10th =)	22	21.4
Daily Star	25	10 (6th)	15	36.0
Sunday Times	23	6 (10th =)	17	26.1
Evening Standard	22	6 (10th =)	16	22.7
Sunday People	19	9 (7th)	10	42.1
Daily Express	19	7 (9th)	12	26.3
Today	16	11 (5th =)	5	68.7
Sunday Mail	16	6 (10th =)	10	25.0
Sunday Mirror	15	11 (5th =)	4	66.7
Daily Telegraph	11	4 (11th)	7	27.3
The Times	11	2 (13th =)	9	18.2
Daily Record	10	3 (12th)	5	30.0
The Guardian	9	1 (14th =)	7	11.1

Publication (7 or more adjudications)	Number of adjudications	Upheld or upheld in part	Rejected or not pursued	Upheld as % of adjudicated
Daily Sport	8	8 (8th)	0	100.0
Sunday Telegraph	8	2 (13th =)	6	25.0
The Independent	7	1 (14th =)	6	14.3
Independent on Sunday	7	2 (13th =)	5	28.6

Data source: Mr Chris Frost, NUJ, from a study to be published in Journalism Studies *later this year, 2003.*

49. Within these global figures, privacy complaints—which the PCC defined in its 2002 annual report as those relating to clauses 3-7 (privacy, photographs in private places, harassment, grief and shock and children), 9, 10 and 12 (hospitals, innocent relatives and victims of sexual assault)—have been rising, as a proportion of all complaints (to 24.1 per cent in 2002), as well as in absolute terms. According to the Commission, in 2002, 95% per cent of such complaints were made by ordinary members of the public and, of the total number of privacy complaints, half related to regional, local and Scottish and Northern Irish publications.[45] It was pointed out that, of all subjects, genuine intrusions into privacy were the least likely to give rise to a complaint in every instance because of the possibility of the process making matters worse.

50. It is difficult to draw firm conclusions over precisely what the figures tell us. The PCC, and others, argue that increasing numbers of complaints, and static or reducing numbers of adjudications, indicate that the PCC's role as a mediator, in whom the public has trust, is a great success.[46] On those terms, 321 adverse adjudications out of nearly 23,000 complaints (and 4,653 instances where a breach of the code was, or might have been, involved) is a very good result over 10 years. The converse of this is that the PCC's focus on reconciliation, in suppressing the number of adjudicated cases (*i.e.* reducing censure and limiting jurisprudence), has acted to reduce the full impact of the Code on the industry and its standards. The most extreme view offered was that the PCC was a positive liability in that it held up only a pretence of redress and, without it, at least people would know that their recourse was to the law.[47]

51. Sir Christopher Meyer, the new PCC Chairman, in evidence to the Committee, conceded that ever increasing numbers of complaints must eventually cease to indicate greater awareness of, and confidence in, the PCC amongst the public and start to suggest problems in the press especially if complaints continued to relate to one or two particular areas. While Sir Christopher believed that the PCC was nowhere near this point,[48] he made a commitment to new research by the Commission, saying:

> "What the Press Board of Finance, that finances the PCC, does not know – because I have not actually mentioned this to them yet—is I think I need a bit more money from them actually to survey more precisely what is going on out there."[49]

45 Ev 185 Vol II
46 Ev 153 Vol II
47 Q 1009
48 Q 999
49 Q 1000

52. The rationale argued for the PCC is that to maintain the freedom of the press—vital in an open and democratic society—the industry has to regulate itself; otherwise the door is open to Government influence, censorship, even control; and this spectre was raised by the PCC and editors in strong terms.[50] Even if these fears are more negotiating gambits than genuine concerns,[51] the logic behind the argument is persuasive. For self-regulation to work, however, it has to command the confidence of a split constituency. This has been a significant challenge for the PCC. As it has no authority, nor indeed resources, other than what is ceded voluntarily to it by the press industry, the PCC must command the confidence of that industry. In view of past threats to replace self-regulation with a statutory system, a proposal described as "repugnant" by the PCC and the press industry, the Commission must also command the confidence of Government and Parliament. Crucially, to meet its objectives and to be effective, the PCC must command the confidence of the public.

53. The Commission does seem to have the confidence of the industry. The PCC argues that its authority is now well established and disputes over complaints occur within the boundaries defined by the Code with no example of an editor trying to justify a decision on any other basis. The evidence we received from editors and journalists of national, regional and local newspapers and magazines was, to a great extent, extremely positive and complimentary about the impact that the Code and the PCC were having on press standards.[52] Editors, especially of regional and local papers, claimed that contact with the PCC, either as a member of the Commission or just in consultation, was extremely welcome. Mr Robert Thomson, editor of *The Times*, wrote that "the Press Complaints Commission is doing a valuable job and does have a clear and recognisable restraining influence on the Press", he added that editors were "conscious of its role, importance and the significance of its sanctions."[53] Several witnesses pointed to the "lawless" days of over ten years ago and some went on to say that behaviour prevalent then would be inconceivable now; attributing this, largely, to widespread acceptance of the boundaries set by the Code of Conduct.[54] Mr Piers Morgan, editor of *The Daily Mirror*, even managed to be affronted by the recent portrayal of tabloid journalists as "sleazy" on Coronation Street.[55]

54. There was not complete unanimity within the industry. The editors of *The Independent* and *The Guardian* were more sceptical for instance and the representatives from the PressWise Trust, the NUJ and the National College for Training Journalists suggested that standards had not risen so markedly as the press representatives were suggesting. There was also a suggestion that support for the PCC from the industry was not necessarily a positive indicator.[56] Mr Simon Kelner, editor of *The Independent*, drew a distinction between the PCC Code, which he described as a sound basis for an ethical newspaper industry, and its administration, which he thought was "weak".[57] This echoes an editorial

50 For example Q 378 and Ev 13 Vol II
51 Ev 21, 34 and 51 Vol III and QQ 237, 260 and 274
52 Ev 11, 31, 352 and Q 869 and Q 425
53 Ev 79
54 QQ 323, 345 and Q 427 and Ev 15ff and Ev 69ff
55 Q 379
56 Ev 21, 34 and 51 and QQ 257, 260 and 274
57 Q 285

from Mr Charles Moore, editor of *The Telegraph*, in 1997 which said that the "Code itself is not bad at all, but the same was true of Stalin's constitution of the Soviet Union: the problem was that it was not worth the paper it was written on." Mr Moore, then a new member of the Code Committee, went on to express optimism that matters could improve.[58] Mr Kelner also had worries over the level of public trust in the PCC which he said was not transparent nor open to any kind of appeal. He suggested that the Commission needed a completely independent back-stop to act as a court of appeal and a scrutineer of PCC judgements. He put forward Ofcom for the role saying that if the industry observed the Code it would have nothing to fear despite this statutory element in arrangements.[59] The Chairman of Ofcom was not obviously keen on this extra responsibility.[60] Mr Alan Rusbridger, editor of *The Guardian*, was critical over what he saw as some curious judgements by the Commission and a surprising lack of curiosity within the PCC in the evidence of reprehensible conduct by newspapers which had not been translated into complaints.[61]

55. As we have discussed above, the PCC does seem to have the confidence of the Government and the question therefore remains as to whether it has the public's trust. The PCC argues that recent rises in complaints coming to the Commission represent a 40% increase on the first 4 years of the Commission's existence; a sign of increased awareness and confidence on the part of the public. Certainly in terms of bare name recognition alone the PCC, at 80%, appeared to have made an impression.[62]

56. The evidence we have received from those with experience of the PCC was mixed. We were very cautious about drawing any hard and fast conclusions from the limited number of cases upon which we received evidence. Rather we felt that the submissions contributed an important qualitative element to our understanding of the procedures of the PCC and the approach of the press to complaints. We set out below some key elements of what we heard.

57. There was a great deal of praise for the staff of the Commission in assisting complainants through the process[63] but there was also a backdrop of frustration that nothing was going to change and nothing was going to happen to an offending newspaper. In one case, the witness encapsulated the feelings of many in saying that, even though she had, eventually, won the argument and got an apology, she was left with the feeling that the newspaper had "got away with it" (and no sense that someone else would not get the same treatment).[64] The PCC summary of the matter, under the heading "resolved complaints" read: "The newspaper published a full correction and apology". The complainant told us: "I never had the sense ... that at any time anybody actually sat down and made any decisions about it." She described the to and fro of letters and added "I kept saying "I press you to adjudicate" ... but, in fact I was pressed to accept the final offer of *The Daily Mail*, which

58 *The Daily Telegraph*, 18 September 1997
59 Q 288
60 Q 816
61 Q 510
62 Ev 278
63 Ev 131, 132, 135, 136, 400 and Q 1008 (Mr Idun)
64 Q 1050 and Ev 411

was to publish an apology on page 31."[65] This experience seems at odds with the PCC's stated policy that "complainants can of course at any stage ask the Commission itself to take a formal view on their complaint".[66] Another witness described the complaints process as like climbing a staircase with "the Commission" as the "big thing in the sky". However, he told us "You get to the top of the steps, you are looking around, and "it" is not there."[67]

58. The PressWise Trust, and others, argued that the unwillingness of the PCC to hold hearings on cases laid a burden on complainants in requiring them to express themselves on paper, on some quite complicated matters, demanding skills which not everyone possessed (the Trust made the point, however, that editors can be assumed to possess these skills in abundance).[68] The PCC have pointed to the delays which hearings caused the BSC process. We believe that there are certain complicated complaints, perhaps involving conflicts over matters of fact, which might in fact be dealt with more speedily by a hearing. We note below that the Secretary of State has raised this issue with the PCC and we assume that it is under consideration.

59. The Secretary of State submitted to us, after her oral evidence, the full list of suggestions that she had put to Sir Christopher Meyer to assist his consideration of possible improvements to the PCC. Sir Christopher himself announced to the Newspaper Society a number of initial ideas as well as four "heresies" to be avoided at all costs. The table below compares these ideas in summary outline.

Table 4 - Scope for reform of the PCC

PCC Chairman	Secretary of State	Comment
(i) No fines or compensation (ii) No co-regulation (iii) No random own-volition action (iv) No general press control	More proactive and pre-emptive action with greater collaboration with other media regulators	PCC rests on its existing approach to initiating action which we believe to be capable of development.
(i) A Charter Commissioner for review and appeals on procedural matters; (ii) annual health check of the Code by the PCC; (iii) annual independent customer service audit.	(i) An appeals mechanism independent of both Government and industry (ii) More formalised and regular independent scrutiny of the PCC's procedures.	The proposals of the PCC are on the whole more limited, procedural and internal exercises than what we understand the Secretary of State to be suggesting.
A more transparent and open appointment process for lay commissioners	A more transparent and open appointment process for lay commissioners	--
An increased majority of lay membership by one	A greater majority of lay members with fixed term appointments	PCC does not refer to term of appointment.
(i) Newspapers to carry PCC contact details; links to PCC website on newspaper websites (ii) Open meetings around the UK	More effort to raise the PCC's profile and accessibility to the public	--

65 Q 1049
66 Ev 159, paragraph 12
67 QQ 1034 and 1035
68 Ev 52 and 58

PCC Chairman	Secretary of State	Comment
--	Hearings held in certain cases	PCC does not refer to hearings
Code users' handbook for newsrooms on the background and case law related to the Code alongside notes circulated to Editors.	--	The users' handbook will no doubt augment the wallet-sized copy of the Code produced by the Society of Editors for journalists
More visible censure of editors: adjudications to have a clear and common branding	--	The Secretary of State does not refer to due prominence

Data source: Supplementary memorandum from the DCMS and speech by the PCC Chairman to the Newspaper Society, 6 May 2003

60. We see the Secretary of State's suggestions as very reasonable points for consideration by the PCC—a body that asserts it is constantly seeking to improve and increase awareness and confidence amongst the public—and not liable overly to dismay the press industry. Evidence for this is the considerable contiguity between the suggestions of the Secretary of State and the proposals of the new PCC Chairman. Where there are differences, for instance on the scope or degree of independence required for appeals or audit mechanisms, we tend to favour the Secretary of State's emphasis. We also welcome the proposals of the PCC Chairman that are additional to those of the Minister. Our own detailed recommendations are set out below. Some reflect the proposals of Sir Christopher and Tessa Jowell; some do not. All of them are aimed at what we perceive to be the twin necessities of increasing public confidence in improved arrangements whilst keeping the press industry on board and paddling in the same direction.

Conciliation versus adjudication

61. We believe that the PCC is slightly too "softly, softly". We realise the importance of preserving the confidence of the industry but the whole-hearted support for the PCC expressed to us by editors persuades us that the Commission has now got the capability, capacity and political capital to flex its muscles a bit. **Notwithstanding the PCC's avowed intent to secure resolution between parties to a complaint if possible, we recommend that the PCC consider establishing a twin-track procedure. The new provision would be to respond to those complainants who did not want mediation but wanted the Commission to make a judgement in reference to the Code on their case (after the normal exchange of papers) without this insistence prejudicing the result. At the very least the Commission should make an assessment amongst complainants as to the level of demand for such an innovation.**

Pre-publication

62. **There are a number of issues that arise in advance of the publication of a story that do not amount to "prior restraint" or "press censorship". We believe that the PCC should consider establishing a dedicated pre-publication team to handle inquiries about these issues from the public and liaison with the relevant editor on the matters raised. This team should also handle issues related to media harassment, including the production and promotion of guidance to both press and the public, liaison with the**

broadcasters and the transmission of "desist messages" from those who do not want to talk to the media. The first job for the pre-publication team should be the collaborative work with Ofcom on "media scrums" that we recommend above.

The Code

63. We heard persuasive arguments from PressWise and the NUJ that the writing of the Code into journalists' contracts of employment should be backed up by either representation on the Code Committee or a conscience clause in the Code or both.[69] A number of other matters were also raised with us. **We recommend that the Code Committee, Pressbof and the Commission, consider the following in relation to the Code of Conduct.**

i) **The Code's ban on intercepting telephone calls should be updated to reflect the communications revolution (in line with the provisions of the Regulation of Investigatory Powers Act 2000) and should include reference to the privacy of people's correspondence by e-mail and between mobile devices other than telephones.**

ii) **An additional element of the Code should be that journalists are enabled to refuse an assignment on the grounds that it breaches the Code and, if necessary, refer the matter to the Commission without prejudice.**

iii) **The Code should explicitly ban payments to the police for information and there should also be a ban on the use and payment of intermediaries, such as private detectives, to extract or otherwise obtain private information about individuals from public and private sources, again especially the police.** We discuss this issue in more detail later in Section 4.

Constitution of the PCC

64. The PCC seems to have been quite relaxed in its pre-appointment procedures, that is before names go to the independent Appointments Commission. Ms Vivien Hepworth, lay commissioner and former chairman of an NHS trust, gave the impression in oral evidence that she was asked to be a candidate for the Commission because she was a friend of the PCC director. Sir Harry Roche, Chairman of Pressbof, took pains to try and clarify this point[70] but, on reflection, Ms Hepworth's evidence does not seem at all unclear:

> "I can tell you how I was appointed to the Press Complaints Commission. I was asked by Mr Guy Black, whom I have known for many years, whether I had an interest in the PCC, and I said yes, I did."[71]

65. Ms Hepworth emphasised that she had been told she was one of a number of candidates and had been interviewed by Lord Wakeham prior to the Appointments

69 Ev 53 and QQ 254 and 257
70 QQ 655-657
71 Q 601

Commission taking a view. Her experience of the NHS had been a factor in her selection.[72] We note the view of Professor Richard Shannon that press self-regulation "cannot be other than an intimately internal debate" and "it is most unlikely that any lay person would be appointed to the PCC by the Appointments Commission who is not committed in principle to the essence of its purpose, the application of the to the press of...the Code".[73] However, Sir Christopher Meyer, the new PCC Chairman, told us that he was reforming the appointments system and would have no objection to anyone, even a former complainant, applying to become a lay commissioner.[74] **We welcome the assurance of the Chairman of the PCC that the selection of candidates for the role of lay commissioner would be put on a proper, open and transparent footing from now on. We note his undertaking to have a further lay commissioner, appointed under such arrangements, in place before the end of 2003.**

66. With regard to the press members of the Commission we were interested to hear from Mr Locks of the Periodical Publishers Association who accompanied Ms Jane Ennis, newly appointed Commissioner and editor of *NOW* magazine. He said that Ms Ennis had been selected by the PPA "to represent their interests in terms of providing a balanced view as a commissioner."[75] Mr Locks was keen on transparency and the suggestion, originating within this Committee, of an independent audit of the PCC's procedures and practices.[76] A first effort at increased transparency might be a statement clarifying to what extent, if at all, press members of the Commission were there to represent the interests of their trade associations; and how many saw themselves as independent figures in a quasi-judicial capacity.

67. **We believe that the Commission would command more confidence in the independence of its membership if it adopted the following proposals:**

i) **Lay members should be sought and appointed for fixed terms under open procedures including advertisement and competition.**

ii) **Press members should be appointed for fixed terms from across the industry. There should be an explicit presumption that they are not there to represent the interests of their associations but to offer the benefits of their particular experience whilst acting independently as members of a quasi-judicial body.**

iii) **Press members (and here we include members of the Code Committee) who preside over persistently offending publications should be required to stand down and should be ineligible for reappointment for a period—perhaps the length of a term of office. Persistence could be defined as "three strikes and you're out".**

iv) **The lay majority should be increased by at least one; as provided for in the PCC's Articles and accepted by Sir Christopher Meyer, the new PCC Chairman.**

72 Q 601
73 Ev 21
74 Q989
75 Q 902
76 Q 886

v) **The Appointments Commission should appoint an independent figure, also under the new procedures, to implement the procedural appeals process to which Sir Christopher has referred. To this responsibility we would add the task of commissioning a regular external audit of the PCC's processes and practices—a version of accreditation. While the "standard" would probably be unique to the PCC, the methodology has been pretty well-established throughout the corporate world.**

vi) **The Code Committee, which at the moment is composed entirely of editors, should be re-established with a significant minority of lay members.**

Proactivity and third party complaints

68. The PCC argue that one of the serious defects of the former Press Council was its approach to "own volition" and "third party" complaints (between which the PCC saw little distinction). The Commission said that the old Council was simply not able to deal with the amount of work it took on, became very slow and lost the confidence of the industry.[77] In principle the PCC eschews such procedures arguing it would: create a two-tier system (with high-profile figures 'expecting' action without complaining); politicise the Commission (action involving Government ministers would have to be followed by action on behalf of the opposition); risk intruding on people's right *not* to complain (possibly in contravention of the Human Rights Act) and run up against their right *not* to cooperate; and involve a system of making choices (over matters to pursue) that would be tantamount to controlling the press. The PCC add that to be fair and effective it would have to monitor over 1,200 newspapers and 8,300 magazines (and their websites).[78]

69. However, taken together these arguments appear to be a monumental Aunt Sally in the light of the Commission's own evidence. The PCC stated that it can, and does, accept third party complaints in certain circumstances (and we understand that one such complaint has been accepted effectively from a select committee—not this one). In addition certain events and issues have caused it to undertake discussions and investigations of its own volition and it has given those examples, and set out the relevant criteria, in evidence to this Committee. And finally the Commission described the limited, private and informal media monitoring exercises that it had undertaken for its own purposes (recognising that part of the PCC's role is to do what it can consistently to raise standards of newspaper reporting).[79] We regard all this as very welcome, but believe that it sits very uncomfortably alongside the deafening volume of the PCC's arguments against being asked to do what it has been doing anyway. In any case, where a third-party complaint is regarded by the PCC as raising a matter of public interest, the Commission could ask the person on behalf of whom the complaint is made whether he or she consents.

70. We believe that the Commission could tackle the perceived inconsistency between its arguments and its activity (whilst answering many critics and without emulating the Press Council) by taking a more open and consistent approach to proactivity. During our

77 PCC submission, *passim*

78 Ev 227ff

79 Ev 167, 173, 208, 227 and 231

inquiry Linda Gilroy MP raised in the House concern over rumours that news agency staff were pursuing relatives of members of HM armed forces serving in Iraq. She subsequently reported to the Committee that most media behaviour had been good. *The Plymouth Evening Herald* had adopted a policy of only seeking information from the MoD but had suggested to Ms Gilroy that the slow speed of response to questions may have prompted other agencies to "over-step the mark". Discussions with the local community about the media suggested a case for proactive cooperation between the PCC and the Ministry of Defence in the future and we suggest that cooperation may assist both sides.[80]

71. When we put Ms Gilroy's initial concerns to the PCC it was clear that the Commission would act on a specific complaint but had hitherto not considered the issue.[81] We believe that the conflict in Iraq was a foreseeable event that was, tragically, almost certain to involve serious injury and death to a number of members of the services. We feel that it would not have been beyond reason, outrage any principle, or have been too onerous to distribute a helpful reminder concerning the relevant rules and procedures of the Code and the PCC to the home bases of the relevant units and to the local and national media (acting in concert with the BSC). We were surprised that the new Chairman himself decided specifically to take no action.[82] We can see no harm in the measures for which we were pressing and a great deal of merit in establishing them as standard practice. The PCC, as seen very recently, finds no difficulty in intervening, justifiably, to protect the privacy of Prince William; surely there are other deserving recipients of its concern. To this end we note Sir Christopher's statement that he was open to "that sort of thing in the future".[83]

72. **We recommend that the PCC, under its new Chairman, considers the case for taking a more consistent approach to foreseeable events that herald intense media activity and people in grief and shock; and for acting as soon as possible after unexpected disasters have occurred. This may be another appropriate responsibility of the pre-publication team.**

73. We consider proactive action on issues, rather than events, later in this report in assessing the relationship of the Code to the law (and payments by the press to the police).

74. A further beneficial reform, along the same lines, would be consideration by the PCC of a new and more explicit approach to the acceptance of certain third party complaints, perhaps after a consultation exercise. As we have said, the Commission does accept such complaints in certain circumstances. We believe that this is as important in issues of prejudicial and pejorative references to minority groups as it is on privacy matters.

75. The PCC set out evidence to us of their assistance to vulnerable groups to enable them to complain; and this included reference to the travelling community.[84] We note that Friends, Families and Travellers, a national voluntary organisation serving the travelling community, reported that it had submitted over 600 complaints to the PCC over the years regarding discriminatory references to gypsies and travellers in the press. The majority of

80 Letter to the Chairman of the Committee
81 QQ 560-564
82 Q 970
83 *Ibid*
84 Ev 210 Vol II

these had not been accepted and none had been upheld.[85] Perhaps the PCC would concede that this is evidence, despite its efforts, of a problem that just will not produce a technically valid complainant, *i.e.* one related to a named individual—with regard to discrimination and racism this is often the whole point. We would highlight, in this regard, the PCC's emphasis on upholding the spirit, as well as the letter, of the Code.

76. The Commission should also consider revising its criteria for deciding who can complain on behalf of patients, the mentally-ill and children in certain circumstances.[86]

Sanctions

77. We have noted and discussed the fact that the PCC seeks wherever possible to "resolve", rather than to adjudicate upon, complaints. We are concerned that this may mean that the apologies offered to, and accepted by, complainants—where there is no formal judgement by the Commission—may fall short of the required "due prominence" either in where it is placed or how, if a complainant's letter or other invited contribution, it is edited.[87] We welcome the robust attitude of the new PCC Chairman on this issue in insisting that the profile of redress must be commensurate with the prominence of the offending story. Sir Christopher told us:

> "If...there had been some hideous transgression on the front page, then I would expect the adjudication to be published, or at least to start, on the front page; depending on how long the adjudication was going to be. I think that would be entirely reasonable."[88]

78. We accept that having to publish an adverse adjudication, decided by a jury of one's peers amongst others, is not something that any editor wants to do. However, we believe that public confidence in the PCC and the press in general would be boosted by the following modest enhancements.

79. **The text of a PCC adjudication should be clearly and consistently set out to ensure its visibility and easy identification as proposed by Sir Christopher Meyer, the new Chairman of the Commission. However, we urge that the design of this 'branding' must avoid duplicating the appearance of an advertisement which may cause it to be skipped automatically by some readers.**

80. We accept that due prominence is not straightforward given the different layouts and readers' habits across different papers and magazines. **We therefore recommend that any publication required to publish a formal PCC adjudication must include a prominent reference to that adjudication on its front page—in effect a 'taster' for the judgement.**

81. **In addition we recommend that the PCC's annual report contains an additional feature-something familiar and popular amongst newspapers—a league table showing how publications have performed against the Code that year.** We have set out an

85 Ev 144 Vol III
86 Q 1003 and Ev 400ff Vol III
87 For example see Q 1003
88 Q987

example above.[89] We also urge the PCC to look at the depth and breadth of the data set out in its report and especially the way it categorises complaints when setting out the figures. For example, we are concerned that eliding "resolved" complaints with those "not pursued" may mask a degree of frustration with the process, on the part of complainants, which has not so far been recognised. The PCC should engage in a consultation exercise to ensure that users are getting what they need out of its annual report and other published information.

82. We note that "tagging" the cuttings (to signal that a story, part thereof, or related photograph should not be recycled into a further article without checking the complaint) is "sometimes offered" by a publication as part of its effort to achieve resolution.[90] **We believe that annotating press archives as to their accuracy and sensitivity should be automatic in all serious cases, and certainly all upheld adjudications, and furthermore that the publication should be responsible for removing the relevant article from publicly available databases.** We note that in one case described to us the offending article was indeed not available on the press database provided through the House of Commons Library. However, the particular inaccuracy had been repeated in an article in the same newspaper on the following day and that reference was returned by a search on the general topic.

83. We accept that financial sanctions large enough to be of a genuinely deterrent and/or punitive nature cannot simply be grafted on to a system of voluntary self-regulation based essentially on professionalism, good faith and peer pressure. However, we note the view of Mr Michael Tugendhat, and others, that:

> "if you have people self-regulating they are not going to do things they do not have to do. One of the things the PCC has set its face against, for example, is any form of compensation and I am afraid that is quite simply due to the fact that it represents newspaper interests and that is inevitable. So if you want compensation you have to go to the courts."[91]

84. **We believe that the PCC, Pressbof and the industry would benefit, in terms of public confidence, if they formed a consensus around two new elements of the system; one gently punitive and one modestly compensatory:**

i) **Pressbof should introduce a gearing between the calculation of the registration fee and the number of adverse adjudications received by a publication in the previous year; and**

ii) **The industry should consider agreeing a fixed scale of compensatory awards to be made in serious cases (which in any case according to the evidence from the industry and the PCC are few and far between). If these were fixed in advance, a matter of consensus and relatively modest, we can see no reason for lawyers to be involved. Consideration could be given to the making the award to a charity of the complainant's choice rather than directly.**

89 The best indicators of performance need careful consideration.

90 Ev 210 Vol II

91 Q 21

85. One other matter arose about which we feel very strongly. The Commission is loud and clear that complaining is free. The situation was presented differently by the PressWise Trust[92] and, indirectly, by some of the other evidence we received; especially where complaints are proved or upheld by reference to the transcript of a legal proceeding.[93] **We strongly urge the PCC and the industry to consider the matter of complainants' costs and agree that, where justified complaints have involved particular financial burdens on the complainant such as the acquisition of a transcript of a trial or inquest (but not legal fees), then those costs must be met by the offending newspaper. We believe anything else to be invidious and a shifting of the burden of proof from the newspaper, which made the original claims, to the complainant who has been found to have been traduced or otherwise injured. In the light of the PCC's battle cry of "fast, free and fair" we believe this to have nothing to do with the debate over punitive or compensatory awards.**

Pressbof

86. We trust that Pressbof will treat the request for further resources from Sir Christopher for research, first aired in front of us, with sympathy. We further urge the Board of Finance to treat any further request from the PCC for such assistance, arising out of the recommendations of this Report or from its own proposals for reform, both sympathetically and generously.

87. We were impressed by the oral evidence given by Sir Harry Roche, who told us quite frankly that Pressbof played a role in ratifying or agreeing changes to the Code of Practice. In excess of 500 pages of evidence were provided to us by the PCC, Pressbof, the lay members and the Code Committee. While the ratification of Code amendments by the PCC, with its lay majority, was stressed, nowhere was mention made of this on-going role for Pressbof.[94] **If the Board and the Code Committee are totally unwilling to accept the introduction of lay members to the latter, then we believe that the industry has a sufficient input into agreeing the Code and that Pressbof should withdraw from the process.** If our previous recommendation is accepted then Pressbof will be more justified in continuing its existing practice; so long as it is made clear exactly what its role is, and should, be.

88. **We accept the offer to the Committee made by Sir Christopher Meyer to return in a year's time to report on progress. This offer will not, however, substitute for action on our own initiative and we therefore recommend that the PCC make itself available to give evidence to this Committee at regular intervals for discussions on progress with its agenda for change.**

92 Ev 52 Vol II and Q 217

93 Ev 177 Vol III and Q 1057

94 Q 661

The PCC and the law

Introduction

89. The relationship between the PCC and the law is a complex one and has three facets of interest to us:

a) conduct banned by the Code, with or without public interest defences, that is also the subject of either criminal or civil law;

b) references to the Code in statute which require the courts to have regard to it in certain cases; and

c) the Human Rights Act 1998 and the case for, and against, a privacy law.

Criminal and civil offences and the Code

90. Part of the rationale argued for the PCC is to provide an alternative to the courts for people with grievances against newspapers. The Code sets out what the press industry has decided is a practical and fair standard of conduct and against which it must accept the judgement of the Commission. It would be surprising if there was no coincidence at all between what the industry has ruled unacceptable and what could be a cause of action under civil law or even an offence under criminal law. However, the PCC told us that the "Code of Practice does not cover matters which are appropriately dealt with by the law".[95] We believe some obvious examples to be: serious cases of inaccuracy and the libel laws; persistent doorstepping and the Protection from Harassment Act; the interception of telephone calls and the Regulation of Investigatory Powers Act 2000; the removal of documents and photographs without consent and laws on theft; and, explicitly, the clause on identifying the victims of sexual assault.[96]

91. The old Press Council required complainants to sign a legal waiver in view of the increased liability of newspapers in a subsequent court action should the complaint be upheld. The PCC does not require a waiver but it does not actively pursue a complaint while it is the subject of legal proceedings and has a rule that matters cannot be dealt with "for which there was a legal remedy available through the Courts to the complainant, such as defamation, unless there is a good reason to do so".[97] The BSC also has the right to refuse a case with an available legal remedy but told us "as the BSC is designed to offer a remedy that is affordable and normally speedier that court proceedings, it rarely exercises this right."[98] The PCC director also said occurrences were rare—a dozen a year usually relating to copyright, contractual matters or defamation—and, whether the complainant could afford a lawyer or not, the Commission could not deal with the matter.[99] It appears to us that under Clause 1 on Accuracy the more serious breaches of the Code are likely to run up

95 Q 585
96 See Annex A
97 Ev 397 Vol II
98 Ev 305 Vol II and See Q 571
99 Q 582

against this rule. We believe that in the light of the PCC's role as an alternative to the courts the Commission should re-examine the effect of this rule on complaints; especially those made under Clause 1.

92. We raised with the PCC the issue of the evidence given by the editor of *The Sun*, Ms Rebekah Wade and the editor of *The News of the World*, Mr Andrew Coulson, regarding payments for information to the police. Ms Wade told us: "We have paid the police for information in the past."[100] When asked whether the practice would continue in the future, Ms Wade said "It depends" and Mr Coulson intervened saying, "We operate within the Code and within the law and if there is a clear public interest then we will. The same holds for private detectives, subterfuge, a video bag, whatever you want to talk about."[101] Despite Mr Coulson's reference to the law, it appears clear that, when they feel it is demanded by the "public interest", the editors of *The Sun* and *The News of the World* remain ready to make payments to the police in exchange for information. As far as we are aware this practice is illegal for both parties and there is no public interest defence that a jury could legitimately take into account.

93. Mr Les Hinton, Chairman of News International and of the PCC Code Committee, appearing subsequently, reported to us that Ms Wade had since told him that she had "not authorised payments to policemen" and Mr Hinton suggested that her evidence was that "there have been payments in the past".[102] In addition to many press witnesses referring to the "lawless" days of 10 or 20 years ago (statements that echo evidence given to our predecessor Committee in 1993), references to the improper and intrusive gathering of data have appeared from time to time in the press itself (and a few more appeared the day after the evidence from Ms Wade and Mr Coulson).[103] Examples have been:

i) In October 1997 *The Observer* reported that a private detective had pleaded guilty to12 offences under the Data Protection Act whereby she had extracted ex-directory phone numbers and telephone bills out of BT. The article reported her clients as *The News of the World, The People, The Sunday Express* and *The Mail on Sunday.*

ii) In January 2002 *The Daily Telegraph* reported that a solicitor's employee had stolen sensitive documents relating to a murder case from work and sold them to *The Sun, The Daily Mirror and The Express* (and was only prevented by arrest from keeping an appointment with *The Daily Mail*). *The Guardian* reported that *The Sun* was accused of prompting the man to steal the documents.

iii) In September 2002 *The Guardian* reported that there was a data "black market" and referred to a private detective agency called "Southern Investigations" which had been found to be selling information from police sources to *The News of the World, The Daily Mirror and The Sunday Mirror.*

100 Q 467
101 Q 468
102 Q 590-592
103 12 March 2003

iv) In December 2002 *The Sunday Telegraph* reported that private detective agencies routinely tapped private telephone calls for the tabloid press, with some agencies deriving the bulk of their income from such work and such clients.

v) In January 2003 *The Times* reported the Human Resources directorate at the Inland Revenue admitting that there was evidence that some employees had sold confidential information from tax returns to outside agencies (but without identifying which agencies).

In addition:

vi) The *2002 Case Digest* from the Police Complaints Authority stated that "Every year sees complaints alleging the unauthorised disclosure of information from the Police National Computer. Forces have reviewed their methods of preventing unlawful entry but there will always be a few officers willing to risk their careers by obtaining data improperly."

vii) Finally, Baroness Scotland told us that she understood from the Criminal Prosecution Service that there had been an increase in the wrongful disclosure of police information (although neither the Minister nor the Police Complaints Authority gave an indication about to whom disclosures were being made).

We regard this as a depressing catalogue of deplorable practices.

94. Mr Alan Rusbridger, editor of *The Guardian*, suggested that the PCC had a "lack of curiosity" about these practices which was not how other regulators behaved.[104] We asked the PCC whether the Commission felt the need to investigate the matter. The PCC told us that this was a matter for the law and outside the Commission's remit which was defined by the Code of Practice. Oddly, this does not appear to chime with the Commission's written evidence on previous action. The PCC memorandum states that it does have the power to raise its own complaints and had done so in a number of cases. It went on to say that:

> "...[The PCC] was happy to act of its own volition on the back of third party complaints - but only once it had satisfied itself that (a) there were broad matters of public interest at stake and (b) nobody directly involved could complain. (In case of payments to criminals and witnesses, and of financial journalism, this will always remain the case—as those directly involved are likely to be people who have actually benefited from any breach of the Code.)"[105]

95. **We cannot see how the matter of illegal payments to policemen can fail to fall within the criteria set out by the PCC for taking the initiative, or how the issue is different to the example of illegal telephone-tapping highlighted by the Commission itself. We believe the PCC must investigate. This may be best accomplished in cooperation with the Information Commissioner and the Police Complaints Authority**

104 Q 510

105 Ev 227 Vol II. The issues given by the PCC were: identification of the winner of the first rollover jackpot of the National Lottery; payments to criminals and to witnesses; and inappropriate share-dealing by financial journalists. Also see B(2), paragraph 2 on illegal telephone-tapping, Ev 173 and 179 Vol II

and, if necessary, result in an addition to the Code (such as occurred on intercepting telephone calls).

96. **On the other side of the fence, we recommend that the Home Office and police authorities also take note of the evidence from the editors of The Sun and the News of the World to us regarding payments to police officers for information and take steps to review and overhaul, if necessary, the guidance and measures aimed at preventing such behaviour by the police and media.**

97. **It is for the Information Commissioner to make sure that all public and commercial entities are aware of their responsibilities under the Data Protection Act and put in place adequate training, guidance and other mechanisms to ensure that those responsibilities are fulfilled.**

References to the Code in statute and in Court

98. The PCC illustrated the growing authority of the Code and the Commission by reference to its relationship to statute and the Courts.

i) The media exemption within the Data Protection Act 1998 (Section 32) provides a defence for newspapers against action by the Information Commissioner and others if the publication was in compliance with the Code. It is not a matter of the PCC certifying compliance but rather the Court itself having to take account of the Code in coming to a judgement.[106]

ii) The media exemption within the Human Rights Act 1998 (Section 12) also requires the Courts to take account of a newspaper's compliance with the Code in assessing any defence based on the right to freedom of expression.[107] The most recent example of this was in the Approved Judgment in *Douglas v. Hello!* where Mr Justice Lindsay explained:

> "Where the Court is considering whether to grant any relief which, if granted, might affect the exercise of the Convention right to freedom of expression, then the Court, where the proceedings relate to material which is claimed, or appears, to be journalistic, must have particular regard, *inter alia*, to any relevant privacy code."[108]

iii) In addition there are the occasions when amendments to the Code, or other PCC guidance, have been made effectively as substitutes for legislative change (for example, to protect children who are victims or witnesses in a criminal trial and to prevent payments to witnesses in criminal trials). Baroness Scotland, Parliamentary Secretary, Lord Chancellor's Department, described the debate with the PCC over payments to witnesses as "trenchant" but told us that the Commission's eventual amendment to the Code was as "fulsome" as the Department had wanted (new Clause 16). She said that if the PCC had not been minded to change the Code to

106 Ev 182
107 Ev 182
108 *op. cit.*, 11 April 2003

"stamp out" the "vice" of witness payments there would have been legislation. She added "there has to be judicious use of the sort of encouragement we are giving [the PCC] over witnesses".[109]

iv) One further area is the matter of payments to criminals and/or their families for the stories of their crimes. This is banned by the PCC Code, subject to a public interest exemption, but the matter has been under consideration within the Home Office for some time now as to whether there are other steps that can be taken within the terms of Article 10 of the Human Rights Convention.[110] We received indications of cases where criminals had made extremely unwelcome contact with their victims with a view to gaining information to assist the production of accounts of their crimes.[111] We regard this as abhorrent and urge the Home Office to bring forward its long awaited proposals; seeking the cooperation of the PCC if necessary.

v) The PCC point out that on two occasions applications for Judicial Review of PCC decisions have been rejected.[112]

A privacy law

99. The debate over whether there should be a privacy law has never been simultaneously colder and hotter. The Government has stated clearly that it has no intention of bringing forward proposals for a privacy law and the PCC, the press industry and others argue strongly against the proposal.[113] At the same time the European Court of Human Rights (ECHR) has been critical of the UK in this respect and the subsequent introduction of the Human Rights Act has led to a number of judgments in the English Courts indicative of pressure towards a privacy law.[114]

100. Mr Paul Dacre, editor of *The Daily Mail* and Editor-in-Chief of Associated News, wrote that: "The press in this country works under some of the most stringent and powerful laws of any western democracy. The libel laws, contempt of court, the provisions of the Youth Justice and Criminal Evidence Act, the Children Acts, the Law of Confidence, the body of law restricting the reporting of certain cases in court, the Protection from Harassment Act, the Copyright laws, the Data Protection Act, the Human Rights Act, the Sexual Offences Act, the Representation of the People Act, the Access to Justice Act, and other numerous restrictive laws already add up to a huge body of legal controls. To add more would add to the burden, not only on a free press, but on the courts and force ordinary people into the onerous and expensive process of going to law to exercise their rights."[115] Mr Alan Rusbridger, editor of *The Guardian,* told us that, while his newspaper had sponsored the Privacy and Defamation Bill in 1998, he had since changed his mind. He

109 Q 767
110 Ev 190
111 Ev 178
112 Ev 233
113 See for example Ev 32, 337 and 251ff
114 Annex – Informal meeting with the Information Commissioner
115 Ev 29

said he was against any privacy law but, on balance, would prefer a statute going through Parliament to case law being developed *ad hoc* in the courts.[116]

101. The PCC cited Lord Wakeham, speaking during the passage of the Human Rights Bill, who argued that privacy law would be a law for the rich and could make the press industry withdraw effective cooperation with the PCC, thus depriving ordinary people of an avenue for redress without giving them anything useful in its place.[117] The PCC said that the redress available under the law would be: slow (measured in years not days); expensive (even taking into account new provision of conditional fee arrangements); and exposing (with cross-examination and the reporting of proceedings combining to repeat and extend the original cause for complaint).[118] The PressWise Trust said that a privacy law aimed specifically at the media would be "inimical to press freedom" but a law of general application might actually be helpful to the press if it clarified more precisely what protection individuals could expect.[119] The Commission cited Mr Justice Silber (ruling in Anna Ford's application for Judicial Review of a PCC decision) who said that the "Commission is a body whose membership and expertise makes it much better equipped than the courts to resolve the difficult exercise of balancing the conflicting rights ... [of] privacy and of the newspapers to publish."[120]

102. This view was however firmly rejected by Mr Rabinder Singh QC, and Mr James Strachan, who pointed out that the courts are in fact required to carry out this very exercise in the application of the Human Rights Act, including with reference to the PCC Code.[121] However, Mr Michael Tugendhat QC told us that at present the situation was not "bust" and therefore should not be "fixed". There was massive protection for many aspects of privacy in English law, principally flowing from law on breach of confidence and data protection (an issue at stake in *Campbell v. MGN Ltd*), as well as the Human Rights Act (although the latter also created uncertainty). Existing law had to be interpreted by the courts, but so would any new legislation which could not be anything other than in reasonably broad terms.[122] This was echoed by Baroness Scotland who told us that under any new privacy law

> "...the courts...would have to interpret any new privacy law and make that balance between...Article 8 and Article 10...the ballast [for] which is given by Section 12 of Human Rights Act, which says that you have to consider freedom of expression as being a very important issue."[123]

103. The case for a specific act was also put by a number of witnesses. Professor Eric Barendt said that it was "anomalous" that privacy was not protected in England and Wales, it being artificial to rely on breach of confidence (as Catherine Zeta-Jones has done) and other remedies. He said while case law was bound to develop on the subject there would be

116 Q 493
117 Ev 204
118 Ev 204ff and 251ff
119 Ev 47
120 Ev 204
121 Ev 12ff and Q42
122 Ev 4, Q 8 and Q 30
123 Q 746

an extended period of uncertainty which itself could chill investigative journalism.[124] A number of witnesses said that they saw no reason why the law and the PCC could not co-exist and the new PCC Chairman has made the same point in another context.[125] Sir Louis Blom-Cooper. Chairman of the PressWise Trust, told us that a "law which said "unwarranted invasion of privacy" [will make] every editor who makes a decision about publication...stop in his tracks before he actually published." Sir Louis added that this was the best remedy that a free society can provide".

104. Professor Barendt said that the reason that the courts often gave for not acting was the boldness of the departure which was something for Parliament to decide although "this is an interest that cries out for protection". He made a further point that legislation had a declaratory quality and, despite the prospects for few actions, there was value in society declaring that privacy was a fundamental human right.[126] Mr Mike Jempson, from the PressWise Trust, wrote that the real weakness of human rights legislation in the UK was the absence of a Human Rights Commission to offer assistance and resources in particular cases where important principles are at stake. Mr Chris Frost, NUJ Ethics Committee, agreed that this was a lack but said that the NUJ was not in favour of a privacy law.[127]

105. The findings of the European Court of Human Rights in the case of *Peck* have been much discussed in evidence to us. The case's effect is confusing because the introduction of the Human Rights Act intervened between the original events and the final judgment of the ECHR (and the fact that the Government attempted to argue an old case on new law does not help). In *Peck* the ECHR found the UK to have deficient arrangements to provide remedy or relief to the complainant. The deficiency was highlighted by the fact that Mr Peck's cause of action did not engage the breach of confidence law that has long stood as proxy for a privacy law. That being so, there was no recourse, as the law then stood, nor to the media regulators who could provide no remedies; either of restraint or of damages.[128]

106. The question is whether the Human Rights Act 1998 rectifies this deficiency. The PCC, Mr Tugendhat, and presumably the Government, amongst others, appear to think it does. Professor Barendt, Mr Singh and Mr Strachan, amongst others, believe that relying on the courts and cases to develop the law sufficiently in reasonable time is not enough.

107. We regard the pragmatic arguments against introducing a privacy law to be quite seductive, especially with regard to the question of limited access to the law for people of ordinary means. However, it seems that the right to respect for private life, introduced into English law by the Human Rights Act 1998, has indeed sown the seed of privacy law. If so, the really pragmatic question is whether its growth should be under the care of the courts, on a case-by-case basis, or of the Government and Parliament subject to the extensive consultative processes now available for legislative proposals: Green Paper, White Paper, draft Bill, Bill and passage through the two Houses. Evidence from the PressWise Trust stated that

124 Ev 1ff and *Ruled by Recluses*, IPPR, 2003 pp 15ff

125 Speech to the Newspaper Society, 6 May 2003

126 Q 10

127 Ev 71

128 See Ev 175

> "By demanding that the elected legislature should not define the electorate's rights and the courts should not adjudicate on whether the law has been breached, the [press] industry lays itself open to the charge of arrogance and the sort of abuse of power against which the Human Rights Act is designed to protect the public."[129]

108. The PCC were clear that the Human Rights Act should not, and would not, become a "privacy law by the back door" and rather scorned Mr Justice Sedley's sole finding, in the first *Douglas v. Hello!* case that English law did now recognise a discrete privacy right.[130] In contrast, in *Peck*, the fact that only one judge out of three made this observation, contributed to the ECHR's rejection of the Government's argument that the UK now had an adequate remedy in "development" by the courts; *i.e.* the law of confidence. Mr Singh and Mr Strachan suggest that the PCC and the press were in a bind because the alternative to a privacy law (whether by the back or the front door) fully to satisfy our Convention obligations was a tough new statutory media regulators with powers to impose prior restraint and award damages.[131]

109. In the most recent relevant judgment brought to our attention (*Douglas v. Hello!*) Mr Justice Lindsay articulated the issue with great clarity:

> "So broad is the subject of privacy and such are the ramifications of any free-standing law in the area that the subject is better left to Parliament which can, of course, consult interests far more widely than can be taken into account in the course of ordinary *inter partes* litigation. A judge should therefore be chary of doing that which is better done by Parliament. That Parliament has failed so far to grasp the nettle does not prove that it will not have to be grasped in the future. The recent judgment in *Peck v. United Kingdom* in the ECHR, given on the 28th January 2003, shows that in circumstances where the law of confidence did not operate our domestic law has already been held to be inadequate. That inadequacy will have to be made good and if Parliament does not step in then the Courts will be obliged to. Further development by the Courts may merely be awaiting the first post-Human Rights Act case where neither the law of confidence nor any other domestic law protects an individual who deserves protection. A glance at a crystal ball of, so to speak, only a low wattage suggests that if Parliament does not act soon the less satisfactory course, of the Courts creating the law bit by bit at the expense of litigants and with inevitable delays and uncertainty, will be thrust upon the judiciary. But that will only happen when a case arises in which the existing law of confidence gives no or inadequate protection; this case now before me is not such a case and there is therefore no need for me to attempt to construct a law of privacy and, that being so, it would be wrong of me to attempt to do so."[132]

110. This supports the opinion of the Information Commissioner who felt that the courts were cautiously moving towards a common law concept of privacy similar to the law of confidence. He told us that the Court of Appeal was very close to recognising that "in an

129 Ev 56

130 Ev 204, paragraph 4

131 QQ 36 and 39

132 Approved judgment, *Douglas v. Hello!*, 11 April 2003

appropriate case, and on particular facts, a "breach of privacy" would be found; as opposed to a "breach of confidence".[133]

Conclusion

111. **On balance we firmly recommend that the Government reconsider its position and bring forward legislative proposals to clarify the protection that individuals can expect from unwarranted intrusion by anyone—not the press alone—into their private lives. This is necessary fully to satisfy the obligations upon the UK under the European Convention of Human Rights. There should be full and wide consultation but in the end Parliament should be allowed to undertake its proper legislative role.**

133 See Annex D

Annex A: The Code of Press Conduct

The PCC Code of Practice – March 2003	The Press Industry's Code of Practice - 1993
1 *Accuracy* i) Newspapers and periodicals must take care not to publish inaccurate, misleading or distorted material including pictures.	1 *Accuracy* i) Newspapers and periodicals should take care not to publish inaccurate, misleading or distorted material including pictures.
ii) Whenever it is recognised that a significant inaccuracy, misleading statement or distorted report has been published, it must be corrected promptly and with due prominence.	ii) Whenever it is recognised that a significant inaccuracy, misleading statement or distorted report has been published, it should be corrected promptly and with due prominence.
iii) An apology must be published whenever appropriate.	iii) An apology should be published whenever appropriate.
iv) Newspapers, whilst free to be partisan, must distinguish clearly between comment, conjecture and fact	*See below, Clause 3*
v) A newspaper or periodical must report fairly and accurately the outcome of an action for defamation to which it has been a party.	iv) A newspaper or periodical should always report fairly and accurately the outcome of an action for defamation to which it has been a party.
2 *Opportunity to reply* A fair opportunity for reply to inaccuracies must be given to individuals or organisations when reasonably called for.	2 *Opportunity to reply* A fair opportunity for reply to inaccuracies should be given to individuals or organisations when reasonably called for.
See above, Clause 1(iv)	3. *Comment, conjecture and fact* Newspapers, while free to be partisan, should distinguish clearly between comment, conjecture and fact.
3 **Privacy* i) Everyone is entitled to respect for his or her private and family life, home, health and correspondence. A publication will be expected to justify intrusions into any individual's private life without consent ii) The use of long lens photography to take pictures of people in private places without their consent is unacceptable. *Note—Private places are public or private property where there is a reasonable expectation of privacy.*	4 **Privacy* Intrusions and enquiries into an individual's private life without his or her consent are not generally acceptable and publication can only be justified when in the public interest.
4 **Harassment* i) Journalists and photographers must neither obtain nor seek to obtain information or pictures through intimidation, harassment or persistent pursuit	7 **Harassment* i) Journalists should neither obtain information through intimidation or harassment.
ii) They must not photograph individuals in private places (as defined by the note to clause 3) without their consent; must not persist in telephoning, questioning, pursuing or photographing individuals after having been asked to desist; must not remain on their property after having been asked to leave and must not follow them.	ii) Unless their enquiries are in the public interest, journalists should not photograph individuals on private property without their consent; should not persist in telephoning or questioning individuals after having been asked to desist; should not remain on their property after having been asked to leave and should not follow them.
iii) Editors must ensure that those working for them comply with these requirements and must not publish material from other sources which does not meet these requirements.	

The PCC Code of Practice – March 2003	The Press Industry's Code of Practice - 1993
5 *Intrusion into grief or shock* In cases involving personal grief or shock, enquiries must be carried out and approaches made with sympathy and discretion. Publication must be handled sensitively at such times but this should not be interpreted as restricting the right to report judicial proceedings.	9 *Intrusion into grief or shock* In cases involving personal grief or shock, enquiries should be carried out and approaches made with sympathy and discretion.
See below, Clause 10(i)	10 *Innocent friends and relatives* Unless it is contrary to the public's right to know, the press should generally avoid identifying relatives or friends of persons convicted or accused of crime.
6 **Children* i) Young people should be free to complete their time at school without unnecessary intrusion. ii) Journalists must not interview or photograph a child under the age of 16 on subjects involving the welfare of the child or any other child in the absence of or without the consent of a parent or other adult who is responsible for the children; iii) Pupils must not be approached or photographed while at school without the permission of the school authorities; iv) There must be no payment to minors for material involving the welfare of children nor payments to parents or guardians for material about their children or wards unless it is demonstrably in the child's interest; v) Where material about the private life of a child is published, there must be justification for publication other than the fame, notoriety or position of his or her parents or guardian.	11 *Interviewing or photographing children* i) Journalists should not normally interview or photograph a child under the age of 16 on subjects involving the personal welfare of the child, in the absence of or without the consent of a parent or other adult who is responsible for the children. ii) Children should not be approached or photographed while at school without the permission of the school authorities.
7 **Children in sex cases* 1. The press must not, even where the law does not prohibit it, identify children under the age of 16 who are involved in cases concerning sexual offences, whether as victims or as witnesses. 2. In any press report of a case involving a sexual offence against a child—i) The child must not be identified; ii) The adult may be identified; iii) The word "incest" must not be used where a child victim might be identified; iv) Care must be taken that nothing in the report implies the relationship between the accused and the child.	12 **Children in sex cases* 1. The press should not, even where the law does not prohibit it, identify children under the age of 16 who are involved in cases concerning sexual offences, whether as victims or as witnesses or defendants.
**Listening Devices* Journalists must not obtain or publish material obtained by using clandestine listening devices or by intercepting private telephone conversations.	
9 **Hospitals* i) Journalists or photographers making enquiries at hospitals or similar institutions must identify themselves to a responsible executive and obtain permission before entering non-public areas. ii) The restrictions on intruding into privacy are particularly relevant to enquiries about individuals in hospitals or similar institutions.	5 Hospitals i) Journalists or photographers making enquiries at hospitals or similar institutions should identify themselves to a responsible official and obtain permission before entering non-public areas. ii) The restrictions on intruding into privacy are particularly relevant to enquiries about individuals in hospitals or similar institutions.

The PCC Code of Practice – March 2003	The Press Industry's Code of Practice - 1993
10 **Reporting of crime* (i) The press must avoid identifying relatives or friends of persons convicted or accused of crime without their consent. (ii) Particular regard should be paid to the potentially vulnerable position of children who are witnesses to, or victims of, crime. This should not be interpreted as restricting the right to report judicial proceedings.	
11 **Misrepresentation* i) Journalists must not generally obtain or seek to obtain information or pictures through misrepresentation or subterfuge. ii) Documents or photographs should be removed only with the consent of the owner. iii) Subterfuge can be justified only in the public interest and only when material cannot be obtained by any other means.	6 *Misrepresentation i) Journalists should not generally obtain or seek to obtain information or pictures through misrepresentation or subterfuge. ii) Unless in the public interest, documents or photographs should be removed only with the express consent of the owner. iii) Subterfuge can be justified only in the public interest and only when material cannot be obtained by any other means.
12 *Victims of sexual assault* The press must not identify victims of sexual assault or publish material likely to contribute to such identification unless there is adequate justification and, by law, they are free to do so.	13. Victims of Crime The press should not identify victims of sexual assault or publish material likely to contribute to such identification, unless by law, they are free to do so.
13 *Discrimination* i) The press must avoid prejudicial or pejorative reference to a person's race, colour, religion, sex or sexual orientation or to any physical or mental illness or disability. ii) It must avoid publishing details of a person's race, colour, religion, sexual orientation, physical or mental illness or disability unless these are directly relevant to the story.	14 *Discrimination* i) The press should avoid prejudicial or pejorative reference to a person's race, colour, religion, sex or sexual orientation or to any physical or mental illness or handicap. ii) It should avoid publishing details of a person's race, colour, religion, sex or sexual orientation, unless these are directly relevant to the story.
14 *Financial journalism* i) Even where the law does not prohibit it, journalists must not use for their own profit financial information they receive in advance of its general publication, nor should they pass such information to others. ii) They must not write about shares or securities in whose performance they know that they or their close families have a significant financial interest without disclosing the interest to the editor or financial editor. iii) They must not buy or sell, either directly or through nominees or agents, shares or securities about which they have written recently or about which they intend to write in the near future.	15 *Financial journalism* i) Even where the law does not prohibit it, journalists should not use for their own profit financial information they receive in advance of its general publication, nor should they pass such information to others. ii) They should not write about shares or securities in whose performance they know that they or their close families have a significant financial interest without disclosing the interest to the editor or financial editor. iii) They should not buy or sell, either directly or through nominees or agents, shares or securities about which they have written recently or about which they intend to write in the near future.
15 *Confidential sources* Journalists have a moral obligation to protect confidential sources of information.	16 *Confidential sources* Journalists have a moral obligation to protect confidential sources of information.
16 *Witness payments in criminal trials* i) No payment or offer of payment to a witness—or any person who may reasonably be expected to be called as a witness—should be made in any case once proceedings are	8. **Payment for Articles* Payments or offers of payment for stories, pictures or information should not be made to witnesses or potential witnesses in current criminal proceedings or to people

The PCC Code of Practice – March 2003	The Press Industry's Code of Practice - 1993
active as defined by the Contempt of Court Act 1981. This prohibition lasts until the suspect has been freed unconditionally by police without charge or bail or the proceedings are otherwise discontinued; or has entered a guilty plea to the court; or, in the event of a not guilty plea, the court has announced its verdict. *ii) Where proceedings are not yet active but are likely and foreseeable, editors must not make or offer payment to any person who may reasonably be expected to be called as a witness, unless the information concerned ought demonstrably to be published in the public interest and there is an over-riding need to make or promise payment for this to be done; and all reasonable steps have been taken to ensure no financial dealings influence the evidence those witnesses give. In no circumstances should such payment be conditional on the outcome of a trial. *iii) Any payment or offer of payment made to a person later cited to give evidence in proceedings must be disclosed to the prosecution and defence. The witness must be advised of this requirement.	engaged in crime or to their associates except where the material concerned ought to be published in the public interest and the payment is necessary for this to be done.
17 *Payment to criminals* *Payment or offers of payment for stories, pictures or information, must not be made directly or through agents to convicted or confessed criminals or to their associates—who may include family, friends and colleagues—except where the material concerned ought to be published in the public interest and payment is necessary for this to be done.	*See above, Clause 8.*
The public interest There may be exceptions to the clauses marked * where they can be demonstrated to be in the public interest. 1. The public interest includes: i) Detecting or exposing crime or a serious misdemeanour; ii) Protecting public health and safety; iii) Preventing the public from being misled by some statement or action of an individual or organisation. 2. In any case where the public interest is invoked, the PCC will require a full explanation by the editor demonstrating how the public interest was served. 3. There is a public interest in freedom of expression itself. The Commission will therefore have regard to the extent to which material has, or is about to, become available to the public. 4. In cases involving children editors must demonstrate an exceptional public interest to over-ride the normally paramount interest of the child	*The public interest* The public interest would include: i) Detecting or exposing crime or serious misdemeanour. ii) Detecting or exposing anti-social conduct. iii) Protecting public health and safety. iv) Preventing the public from being misled by some statement or action of that individual or organisation.

Annex B: Examples of co-regulation

A. Advertising Standards Authority

Forty years ago the Advertising Association established the Committee of Advertising Practice (CAP), an industry body to draw up a Code of Practice for advertisers, agencies and media. In 1962 the industry established the Advertising Standards Authority (ASA) under an independent Chairman, to adjudicate on complaints about breaches of the Code. The stated aim was to ensure that advertisements are 'legal, decent, honest and truthful'. The majority of complaints are about misleading advertising. Under the self-regulatory system advertisers have to be able to prove the claims they make if challenged. In 2001 the ASA considered complaints about 10,527 advertisements, and formally investigated and upheld complaints about 652 of them. The Code bans any confusion of advertising with editorial material and with private correspondence.

The vast majority of advertising in the UK was said now to comply with the Code. Self-regulation means that advertisements that break the Codes can be withdrawn without resort to legal bans. Advertisers who flout the rules can be denied access to newspapers, magazines, poster sites, direct mail or the Internet. CAP interprets ASA rulings to the industry and helps advertisers to comply with the Codes through Copy Advice and Help Notes. Self-regulation in this area is argued to be flexible in the light of new situations or products. The Government has indicated that it considers the self-regulatory system to be effective: "the success of self-regulation is due to the hard work of many, including the ASA. But self-regulation could not work without the active participation and commitment of the advertising and publishing industries. The system also has a high level of recognition from the public and is important to consumer confidence in advertising" (Parliamentary Under-Secretary of State, Department of Trade and Industry, 2003).

Since 1988, self-regulation have been backed up by the Control of Misleading Advertisements Regulations. The ASA can refer advertisers who refuse to co-operate with the self-regulatory system to the Office of Fair Trading (OFT) for legal action (see also Annex D). The OFT's role was mainly to support and reinforce the controls exercised by other bodies where these have been unable to take effective action. The OFT has stated that there are rare instances where it would act unilaterally. Most complaints about misleading advertisements are handled by the ASA and the trading standards service (although the ITC, Radio Authority also have a role as do some other agencies such as the Financial Services Authority and the Medicines Control Agency, handling more specialized advertising complaints). The Regulations also impose a statutory duty on the Director General of Fair Trading to have regard to the benefits of self-regulation in exercising functions defined by them.

B. ICSTIS—Independent Committee for the Supervision of Standards of Telephone Information Services

ICSTIS was an independent industry-funded regulator responsible for the supervision of Premium Rate Services which now operated across all forms of communications devices ranging from fixed telephone services, mobile text services, certain Internet services and more recently some of the interactive elements of TV services such as some found on the Sky platform. The co-regulatory model for supervising this sector appeared to be unique. ICSTIS was supported by all UK telecoms operators and a Condition in DTI network licenses underpinned this. The Communications Bill would alter arrangements slightly with ICSTIS appearing on the face of the Bill in Clauses 116-120. There was clear input from all stakeholders when determining the Code after wide consultation. The Code was then approved by the Director General of Oftel (soon to be Ofcom). ICSTIS members were independent of the sector with no direct interests as a condition of appointment. ICSTIS had "teeth" in terms of its ability to apply sanctions to providers of services who breached the Code. This ranged from warnings to unlimited fines (the highest so far having been £100,000) to a complete bar of the services in question. Like statutory bodies, ICSTIS is a public body subject to Judicial Review and has in place independent appeals mechanisms to ensure complete compliance with the Human Rights Act, specifically the ECHR Article Six provisions in relation to the right to a fair and impartial tribunal hearing.

Annex C: Privacy law in other countries

COUNTRY	PRIVACY PROVISIONS
Australia	Privacy Act (1988)
Austria	Civil Code (1811), Data Protection Act (1978), Data Protection Act (2000)
Belgium	Act concerning the Protection of Personal Privacy in Relation to the Processing of Personal Data (1992)
Canada	Privacy Act (1982)
Denmark	Personal Data Act (2000)
Finland	Constitution (1919), Personal Data Act (1999)
France	Law Regarding Data Processing, Files and Individual Liberties (1978)
Germany	Federal Data Protection Act (1977, 2000) amended 2001
Hong Kong	Personal Data (Privacy) Ordinance (1995)
Hungary	Constitution (1949), Act on the Protection of Personal Data and on the Publicity of Data of Public Interest (1992)
Iceland	Act on the Protection of Individuals with Regard to Processing of Personal Data (2000)
Ireland	Data Protection Act (1988)
Israel	Protection of Privacy Law (1981)
Italy	Law on Protection of Individuals and Other Subjects with Regard to Processing of Personal Information (1996)
Luxembourg	Act Regulating the Use of Nominative Data in Computer Processing (1979)
Netherlands	Act Providing Rules for the Protection of Privacy in Connection with Personal Data Files (1988)
New Zealand	Privacy Act (1993)
Norway	Personal Data Act (2000)
Portugal	Act on the Protection of Personal Data (1998)
Slovak Republic	Constitution (1992)
Spain	Constitution (1978), Law on Personal Data Protection (1998)
Sweden	Personal Data Act (1998)
Switzerland	Civil Code (1907), Federal Law on the Protection of Data (1992)
United States	Privacy Act (1974), Freedom of Information Act (1967), privacy statutes in many states (see HC 294-I (1992-93), Annex 1)

Annex D: Informal meeting with the Information Commissioner

Background

The Information Commissioner submitted a memorandum to the inquiry which set out in summary the extent to which his role touched on matters covered by the Committee's inquiry. The Committee also heard reference to his role from witnesses. Mr Michael Tugendhat QC told the Committee on 25 February 2003: "You do have a privacy commissioner. He is not called that, he is called an information commissioner, but under section 53 of the Data Protection Act 1998 he can support people who do not have legal advice and representation." The Committee held an informal meeting with the Commissioner in the course of the inquiry.

Meeting

The Commissioner said that the Data Protection Act 1998 was a complex piece of legislation that replaced the previous 1984 Act to implement the provisions of the EU Data Protection Directive (95/46/EC). The Act did not contain the term "privacy" but the Directive did – not least in Article 1 setting out its aims—and many of the Commissioner's European colleagues had privacy in their titles or job descriptions. The concept is embraced by the Act in many of its provisions.

The Commissioner was not there to regulate the media. However, his duties covered their performance as controllers and processors of data, and their activity in respect of other data controllers, just as much as anyone else except insofar as Section 32 of the Act applied. Section 32 exempted personal data processed for the "special purposes" (journalistic, literary or artistic) from certain provisions of the Act if the processing was undertaken with a view to publication provided that the data controller reasonably believed that, having regard to the importance of the public interest in freedom of expression, publication would be in the public interest. In considering this "reasonable belief" Section 32 required account to be taken of the compliance of the data controller with any relevant or designated code of practice – *e.g.* the Press Code of Conduct.

The Court of Appeal adopted a wide approach to this exemption, making it clear that it applied after, as well as before, publication, even though it was equally clear that the principal rationale was in order to ensure that the Act does not create an oppressive means of prior restraint. During the passage of the Bill quite the reverse impression had been given and the exemption's application to processing "prior to publication" stressed by Lord Williams. It was for the Law Lords to finally settle this matter should a relevant case ever get to come before it – and Naomi Campbell had been given leave to appeal to the House of Lords in her case against the *Daily Mirror* (*Campbell v MGN Ltd 2002*) which involved the Data Protection Act..

Section 32 was certainly not, therefore, a huge get-out clause for the media; it applied to certain provisions of the Act to the extent that there was a reasonable belief, in conjunction with compliance with the PCC Code as interpreted by the courts, that compliance with any of those provisions was incompatible with journalistic purposes.

Section 55 of the 1998 Act created a criminal offence in relation to the unlawful obtaining or disclosuere of personal data. The section 32 exemption had no relevance here and the section applied to everyone. The offence would arise where someone knowingly or recklessly obtained or disclosed (or procured the disclosure of) personal information without the consent of the data controller. This might arise, for example, where a journalist – or an intermediary – impersonated someone to obtain personal information from a bank or from a government department such as the Inland Revenue. The sale of personal information obtained in this way is also an offence, as is offering to sell such information. There are various defences available but these are narrowly drawn. Under the analogous provisions of the previous Act (Section 5(6)-(8) of the Data Protection Act 1984) there was at least one prosecution in 1997 of a private detective who was convicted of extracting personal data from BT on behalf of various newspapers. A "Blaggers' video" had recently been made by the Commissioner to warn people with

access to personal data of the common ruses used to extract personal and private information from data controllers.

Section 53 of the Act empowered the Commissioner to provide assistance to individuals to take forward actions under specified parts of the Act relating to the 'special purposes' and in a case involving, in his view, a matter of substantial public importance (*i.e.* where important clarification of the law was likely to result). The Commissioner had yet to use these powers.

The Commissioner raised the issue of co-regulation; effectively the system recommended by the National Heritage Committee in 1993 in respect of the press and raised in evidence to this Committee. He pointed to the example of the Advertising Standards Authority where Regulations in 1987 had created a back-stop role for the Office of Fair Trading. The Commissioner's impression was that, while this had been initially resisted as a threat to self-regulation, in the event the ASA had found the capacity to refer very difficult or complex cases to the OFT quite useful. The Commissioner said he had no wish to be given further responsibilities in addition to the two very considerably complex pieces of legislation under which he already had duties. However, he felt duty-bound to point out the significant contiguity of some of his responsibilities with some of the matters under consideration by the Committee and to offer the observation that a wholly new regulator, with an over-lapping remit, could add further confusion to an already uncertain legal environment.

The issue of the definition of a "public authority" under the Human Rights Act (HRA) was discussed. Clearly the Information Commissioner was such an authority as were the statutory regulators. With regard to the PCC it was at least arguable that it was such an authority (and it was believed that the PCC itself accepted this – not least by expressly adopting procedures as if it were subject to the jurisdiction of the Administrative Court). Government policy, however, since the days of the "last chance saloon" made applying the usual rule of thumb – would the state perform the function if the self-regulatory body did not exist? – less than straightforward. In the final analysis it was the role of the courts to decide the issue in the light of the HRA.

The Commissioner pointed to some legal developments related to privacy. He felt that the courts were cautiously moving towards a common law concept of privacy in the same neighbourhood at least as the law of confidence. In his opinion the Court of Appeal had come very close to recognising that, in an appropriate case and on particular facts, a "breach of privacy" would be found as opposed to a "breach of confidence".

Formal minutes

Wednesday 21 May 2003

Members present:

Mr Gerald Kaufman, in the Chair

Mr Chris Bryant	Mr Adrian Flook
Mr Frank Doran	Rosemary McKenna
Michael Fabricant	Derek Wyatt

* * *

Draft Report (Privacy and media intrusion), proposed by the Chairman, brought up and read.

Ordered, That the Chairman's draft Report be read a second time, paragraph by paragraph.

Paragraph 1 read and agreed to.

Paragraphs 2 to 28 read, amended and agreed to.

Paragraphs 29 to 50 read and agreed to.

Paragraphs 51 to 65 read, amended and agreed to.

Paragraph 66 read and agreed to.

Paragraphs 67 to 88 read, amended and agreed to.

Paragraphs 89 to 97 read and agreed to.

Paragraph 98 read, amended and agreed to.

Paragraphs 99 and 100 read and agreed to.

Paragraphs 101 to 111 read, amended and agreed to.

Summary read, amended and agreed to.

Annexes A-D read and agreed to.

Resolved, That the Report, as amended, be the Fifth Report of the Committee to the House.

Ordered, That the Chairman do make the Report to the House.

Several papers were ordered to be appended to the Minutes of Evidence.

Ordered, That the Appendices to the Minutes of Evidence taken before the Committee be reported to the House.

[Adjourned till Tuesday 10 June at 2.30pm

Witnesses

List of written evidence in Volume II

List of written evidence in Volume III

List of unprinted written evidence

Papers have also been received from the following and have been reported to the House. To save printing costs they have not been printed and copies have been placed in the House of Commons library where they may be inspected by Members. Other copies are available to the public for inspection and requests should be addressed to the Parliamentary Archives, Record Office, House of Lords, London SW1A 0PW. (Tel 020 7219 3074). Hours of inspection are from 9.30am to 5.00pm on Mondays to Fridays.

Mrs Iris Baker

HC Bentley

Mr Peter Bradley MP

Friends, Family and Travellers Advice and Information Unit

Mr Robert Henderson

Mr Ian Lucas MP

Mr Bob Powell

Press Complaints Commission

Mr Ivor Rowlands

Society of Editors

Margaret and James Watson

Mrs Anne Webster

Reports from the Culture, Media and Sport Committee since 2001

The following reports have been produced by the Committee during the last two sessions

Session 2002–03

First Report	National Museums and Galleries: Funding and Free Admission	HC 85
Second Report	The Work of the Committee in 2002	HC 148
Third Report	A London Olympic Bid for 2012	HC 268
Fourth Report	The Structure and Strategy for Supporting Tourism	HC 65

Session 2001–02

First Report	Unpicking the Lock: the World Athletics Championships in the UK	HC 264
Second Report	Testing the Waters: the Sport of Swimming	HC 418
Third Report	Arts Development	HC 489
Fourth Report	Communications	HC 539
Fifth Report	Revisiting the Manchester 2002 Commonwealth Games	HC 842
Sixth Report	The Government's Proposals for Gambling: Nothing to Lose?	HC 827