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SUBMISSIONS TO THE LEVESON INQUIRY

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Executive Summary

As solicitors specialising in advising claimants in the area of reputational law, we have first hand experience of the ways in which the current regulatory and policy regime has failed to protect the rights of those who are subject to media interest and intrusion. We of course recognise the importance of free speech, but there must be restrictions when that freedom encroaches on the rights of others. Therefore we act to protect those whose rights are being infringed by their private information being exploited for commercial gain, or those whose reputations are being sullied without justification.

Freedom of speech is a fundamental tenet of a healthy democracy. However, an individual's right to privacy is equally deserving of protection, and in the cases that we have dealt with, the need for such protection is acutely apparent. We draw on our experiences in the following submissions. We do not, however, have a wealth of direct experience of dealings between the press and the police; nor between the press and politicians. We respectfully make our submissions to the Inquiry on this basis.

We are aware that the Inquiry has been seeking recommendations as to what changes could be made to the current system. We have tried to include suggestions wherever possible. The headline points can be summarised as follows:

1. Prior Notice

Notice ought to be given to a person whose privacy is about to be invaded before the publication of an article or photographs.

2. Injunction for Defamation

A court ought to be able to prevent publication of false claims after consideration of all appropriate facts.

3. Regulatory Body with teeth

Any regulatory body ought to be accessible and in which anyone (well known or otherwise) is able to make use and can have confidence that a complaint will be treated fairly and that if upheld an appropriate sanction will be imposed.

4. Damages

If a regulator is to be effective they must have the power to award damages to a complainant where their rights have been infringed and at a level which deters other press from acting in that same way. There should also be a requirement to give the same prominence to apologies as the offending article.

In terms of damages awarded by the Courts, these must be significantly higher than they are at present if they are to act as a deterrent.

5. Practical protection in privacy

Injunctive relief in respect of misuse of private information that provides practical protection, with real consequences for those who breach the Court's Orders.

Privacy

How the statutory and common law on privacy and the use of anonymity injunctions and super-injunctions has operated in practice

Once the press have disclosed an individual's private information to the public, it can never again be made private. The genie cannot be put back in the bottle. As Mr Justice Eady recognised in the case of *Max Mosley v Newsgroup Newspapers Limited* [1], serious invasions of individual privacy by the press have the propensity to "ruin" lives, and what is achieved by a monetary award in the event of a serious invasion of an individual's privacy is limited. Injunctions (granted on an 'interim' basis and before publication of the private information) are the only effective remedy of real value to an individual in respect of misuse of private information.

In the current regime, we do not believe that injunctions are being granted either too frequently or infrequently. Though no hard and fast figures are publicly available, our best guess would be that the number of privacy injunctions granted by the courts over the last decade can be measured in the dozens rather than in the hundreds or more, with the true figure probably being closer to 50 or 60 in total. Therefore, we see no issue with the number of injunctions being granted. The changes implemented by the Report of the Master of the Rolls have so far reduced the number of applications further, though obviously it will take some time to be able to accurately assess the impact of those changes.

We are not aware of injunctions being granted in illegitimate circumstances, i.e. in circumstances where the disclosure of private information would be in the public interest, but that that disclosure has been prevented by a weak or dubious claim to privacy.

It ought to be a concern of any regulatory framework that adequate protection is given to those Claimants who have persuaded the courts that their Article 8 rights outweigh the Article 10 rights of the Defendant(s) or any third party on a set of given facts. Our chief concern is that, at present, Claimants in that position are finding their rights under Article 8 eroded through the actions of both parties and non-parties to the proceedings.

[1] [2008] EWHC 1777 (QB) at [236]

Judicial balance between freedom of expression and the right to privacy

The problem in terms of balancing Article 10 and Article 8 is not in relation to the facts. Those are usually clear and the courts, by and large, strike the correct balance between the two competing interests. That said, there can be a practical difficulty once that exercise has been carried out. This difficulty concerns what a Defendant is allowed to publish, once an interim injunction has been granted, in the interests of free speech.

In some recent cases the amount of information freely available within media organisations has caused the degree of protection intended by the court to be eroded: for example, where details of a privacy injunction have been circulated within a media organisation and an employee of that organisation leaks the private information online. Although the judicial approach has tried to strike a fair balance in protecting the right to a private and family life, the practical position is that the individual and/or their family are not being protected in the way that the court intended.

There has been much comment concerning the value of an injunction where there is breaching of the order either online or on an extra-jurisdictional basis. On a practical level, the subsistence of an injunction in the face of any media onslaught can still be of value where one purpose of the Order granted is to prevent harassment. We also note that the Buffham Issue, as identified below, if dealt with either by the courts or Parliament, will make it much safer for Claimants to push speedily to a final injunction. The wider use of *contra mundum* orders may also help to solve much of the difficulty outlined above, as would any provision to help lift the anonymity of a person breaching orders online. This might be achieved by the availability of non-party, pre-action disclosure orders.

The Inquiry may also wish to consider recommending revision to the law concerning online harassment, and its enforcement. One would imagine that the widespread publicity regarding the prison sentence given to the 'troll' who posted abusive online messages following the death of a schoolgirl[2] will act as a significant deterrent on such behaviour in future.

Concerns in relation to the effect of privacy injunctions on freedom of expression and open justice could be alleviated by publication of statistical information twice a year regarding how many injunctions had been granted within the preceding six months and the types of private information protected. The public would then be informed about the quantity and type of injunctions being granted/refused without detailed information having to be given about the private subject matter.

Though perhaps an obvious point to make, one must also remember that we refer here only to cases in which the public interest has been found to be weak and the privacy rights found to outweigh those of freedom of expression. Where there is true public interest in publication of information, these arguments are rendered redundant.

[2] See http://www.bbc.co.uk/news/uk-england-berkshire-14907859

We would suggest that one area which exacerbates the prevalence of such leaks is the manner in which service of injunctions is dealt with by media organisations. We understand that at present when a newspaper is served with an injunction, the details of what the injunction concerns are widely circulated within the newspaper organisation. If circulation were to be limited to only those who strictly need to know about it in order to prevent a breach (for example, the editorial and legal teams), the amount of information being leaked in breach of court orders might be immediately reduced without having any impact on freedom of speech. A list kept by each media organisation of who had been served with the injunction internally would also greatly assist with making any breach of a court order easier to identify and for the culprit to be held accountable.

Issues relating to the enforcement of privacy injunctions and "new media"

We believe it is still possible to provide people with practical protection despite the new digital and social media technologies which has made communication of the important, the innocuous, public and private alike, instantaneous and global in its reach.

The flouting of court orders has increased as the number of injunctions granted in an anonymised form has increased. It is foreseeable that once any information regarding a specific injunction is published, (as it is when there is an anonymised injunction and basic details such as "a Premier league footballer", "an award winning Hollywood actress" appear widely) it then follows that leaks become more likely to occur. This is especially the case when there is a perception (in the media or otherwise) that the leaking of such information will not lead to any legal sanction.

Any legitimate public interest in injunctions might instead be easily dealt with by way of the annual or biannual publication of statistical information. Allowing the publication of specific details about a particular injunction, whilst at the same time ignoring the fact that anonymity is quite clearly at risk through leaks, does not provide practical protection to those who have persuaded the courts that their Article 8 rights outweigh the Article 10 rights of any third party. We believe it to be worthy of further consideration whether it was only a coincidence that injunctions began to be breached once the Rules were relaxed and information about specifics were allowed to be published.

Practicalities of restraining print media when other forms of 'new media' publish private information

Any form of media intrusion into someone's private life is very damaging. However, traditional forms of media are read and watched by many more people and viewed with more credibility than online sites such as Twitter (despite the fact that Twitter's credibility as a trustworthy source of news is increasing in some quarters – and in turn is often relied upon by the media when looking for sources for, or to confirm, stories). Therefore, we believe that it is better for the traditional forms of media to be bound by the law even if the matter has been significantly published online amongst a raft of false information. One must not forget that much information online is mere speculation and often false – many members of

the public will not consider information online as trustworthy as they might information from traditional media outlets. Also, repealing or revoking a law because it is frequently breached is not the way forward. We must find ways of dealing with the issue lest we find ourselves in a situation where there is no effective remedy to protect privacy pre-publication, or where the authority of the court is in question.

'Jigsaw' identification by the press and 'new media'

'Jigsaw' identification poses a significant problem in practice. See, for example, Mr Justice King's provisional view in *NEJ v. Wood*[3] that information published in the Daily Mail breached the order of Mr Justice Blake; and the consideration by Mr Justice Tugendhat in *TSE and ELP v. News Group Newspapers*[4] as to whether details about TSE published by The Sun breached the order of Mrs Justice Sharp.

In practice, we have tried to prevent jigsaw identification by asking the court to dictate what can be said about a case, with some success, but with the risk remaining that the publication of <u>any</u> information about a case (in respect of which the court has already ruled there is no public interest) is likely to lead to speculation about the identity of the Claimant.

One might look at the issue of super injunctions to see what can be learned about possible future practical protection, which would not be intended to stifle matters of legitimate public interest. Another important factor to look at is who media organisations can and should inform once they have been served with an injunction. Restricting wide circulation of the information, coupled with the retention of a list of all those to whom the information has been sent, available to the court upon request, will have an immediate deterrent effect on leaks. If there is a possibility of being held accountable, we believe a great deal of the current deliberate flouting of court orders will largely disappear.

We believe that what is needed to ensure compliance with an order of the court is for the injunction to be circulated amongst the relevant people in the Editorial and Legal Departments, who should monitor whether any item is likely to fall foul of the injunction. There are surely systems that can be put in place that will alert the editorial and legal teams if a set of words, such as someone's name, is intended to be published.

Refusal to give undertakings, wasted time and costs and press speculation as to the identity of Claimants

There is a recent trend for media organisations faced with a potential pre-publication privacy injunction to refuse to give an undertaking not to publish private information, but then make no attempt to defend a subsequent injunction application in respect of that information, thereby wasting the court's time.

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[3] [2011] EWHC 1972 (QB) at [20]
[4] [2011] EWHC 1308 (QB) at [33]-[34]

This has become increasingly prevalent over the last 12 months. It is felt in some quarters that certain newspapers actually prefer to publish this type of story (in the usual form of *"star wins gagging order"*) rather than the private information in question. They may also publish minor details of the identity of the Claimant pushing at the spirit, if not the letter, of the order. They may also refer to the anonymised name of the Claimant in an action which in turn fuels internet speculation about the identity of the Claimant.

In most cases this behaviour vastly, and damagingly, erodes the protection available to the Claimant. This is because the publication of sketchy details in the press tends to play to human nature's propensity to be curious, creating an environment in which members of the public wish to find out the identity of the Claimant, and in which some of those who actually know the details wish to assist with identification. As the courts have recently recognised, protection from identification is not the only purpose of an injunction (the details protected by the injunction is the overriding purpose), however in many cases, preventing identification is of particular significance to the individuals concerned because damage is done simply by being named. If anonymity cannot be guaranteed by the Court the combination of details in a pre injunction article or a judgment, together with speculation about the identity online, often, in practical terms, results in all but the salacious details being published.

Without sufficient safeguards there is, in our view, too much licence for the press to misbehave. It seems obvious that journalists are behind identity leaks, both in the online press and on social media sites, even if proof will be hard to find. The primary motivation to undermine any perceived restrictions on the media's ability to publish is profit. Where it is not possible to obtain content by legal or ethical means, it can be done in an underhand or illegal way. Where there is no story, the press will concoct one to fit into a 'narrative' about a celebrity, or to create a fantasy to fit a set of photos that could be described as representing a number of possible situations that they appear to depict. The games played, whilst entertaining for the tabloids and perhaps a section of their readership, have a material effect on the wellbeing of the Claimant and often their family.

This is not just spin: in one recent case an individual sought an injunction to prevent the publication of private information concerning an extra marital affair of which their spouse was already aware. The injunction was not to protect the reputation of the individual; it was to protect the spouse, who wanted to try to rebuild the marriage but felt this would be more difficult if the details were made public; and to protect their children, who were schoolchildren in their formative years. Publication of such information would clearly make the children vulnerable amongst their peers and jeopardise their wellbeing and academic performance. As it was, an anonymised injunction was granted to the individual (at great cost). This prevented the publication of the information in the tabloids although the possible identity of the individuals had been leaked online. Therefore, although the Court took the right course, the practical position as it currently stands is that the individual and his family have not been protected in the way that the Court intended.

Whilst a lot of online information is incorrect there have nevertheless been leaks of some correct information. This can be damaging not just to the Claimant, of course, but also to his or her family. Whilst penalising newspapers who take such steps may result in eliminating a certain amount of this behaviour, our view (which we hope is shared by the Inquiry) is that the more important issue is to prevent and discourage the widespread flouting of court orders in this type of case.

Public Interest

We do not believe that current privacy laws impinge upon high-quality investigative journalism and the reporting of matters which are genuinely in the public interest. It should be remembered that injunctions are only granted by a Court when the public interest has been found to be weak or non-existent and the privacy rights in question found to outweigh any competing rights of freedom of expression. When considering the impact of privacy injunctions it is important to disregard the false claims regarding the stifling of free speech.

Despite the stance the media have taken, which is a highly distorted misrepresentation of the true position, there are rarely any injunction applications that involve issues of real public interest (most involve celebrities and relate to sexual and/or medical information, or stolen property).

Privacy Claimants: sexual conduct and criminality

When it comes to consensual sex between adults in private, the Courts of England and Wales and the European Court of Human Rights have for decades fairly consistently ruled that it falls within the law of confidence, even where those tastes extend beyond "normal" behaviour.

The rationale for this is that sexual conduct is "an essentially private manifestation of the human personality"[5] – reasoning which would no doubt register little disagreement today. Therefore, we believe that a person's conduct in private must constitute a significant breach of the criminal law before there is any justification for public disclosure by the media. There are, however, other considerations, as even when there is a significant breach of the criminal law, the impact of publication on the person's family should also be considered. When the media publishes details of someone's sexual conduct, as they frequently do, the individual's entire family may be subjected to harassment and intrusion. It also appears that many situations which trigger a sexual scandal being published in the press start by an implicit attempt at blackmail. This is also a factor to be taken into account as it is settled principle of law that victims of blackmail are afforded lifetime anonymity.

Save for marking "ironic" as an understatement, we cannot improve upon the observations of Geoffrey Robertson QC and Andrew Nicol QC in *Media Law*[6] in relation to this:

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[5] Dudgeon v United Kingdom (1981) 4 EHRR 149 at [60]
[6] p.790, 5th edition

"It is ironic that the people who would be prosecuted for the serious crime of blackmail if they threatened their victim with public exposure unless they were paid a sum of money can now obtain that sum quite legally by taking their story direct to a newspaper."

In terms of the pressures on those deciding whether to seek help from the court, sometimes this will be an outright request for money failing which an individual will 'sell their story'. In other cases the threat is much more subtle – perhaps not high enough for a public prosecution, or even a complaint to the Police, but nevertheless enough to cause serious concern. Even if there is a sufficiently high level of threat for a complaint to be made to the Police, individuals are often reluctant to do this because there has been a tradition of the tabloid press learning of such complaints and seeking to publish the details. Therefore, any such element of pressure should also feature very prominently when carrying out the balancing exercise between privacy and freedom of expression.

Furthermore, we commend the suggestion of Geoffrey Robertson QC and Andrew Nicol QC *"that newspapers that purchase sensational stories of this sort should be required to disclose the amount of the payment on publication"* since, *"this would serve to alert their readers to the possibility that the sensation in the story may be related to the sensation of receiving a large amount of money for telling it."*[7]

The Role Model Argument

It is sometimes said by the press that certain people in the public eye deserve less protection because they are public 'role models.'

Few individuals in the public eye, who achieve prominence by virtue of their talent in a particular arena, or media interest in them, choose to be 'role models'. This is usually a title foisted upon them by the media often in an attempt to justify intrusion into their private lives. Most of them never put themselves forward as any such thing, nor want the role when they are branded as such.

It is our view that if someone has come to prominence as a result of their skills in a particular area, that does not mean that their entire life should then be perceived to be, or placed by the media, in the public domain.

We believe it is unfair to allow the dissemination of private information or photographs about people's private lives outside of their profession, absent other countervailing factors.

The recent High Court decision in *Ferdinand v MGN Ltd*[8] marks a disconcerting return to the approach taken in cases such as *Woodward v Hutchins*[9] and *Flitcroft*[10].

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[7] *Ibid.*
[8] (Rev 2) [2011] EWHC 2454 (QB)
[9] [1977] 1 WLR 760
[10] [2003] QB 195

The case was a claim for breach of confidence and misuse of private information in relation to an article published in the *Sunday Mirror* in April 2010. The article alleged that the Claimant had been having an affair with a Ms Storey, whom he met in 1996-1997, until the beginning of 2010, when he terminated the relationship after being made England Captain in February that year. The article alleged that he had ended the relationship out of fear of being exposed.

While the court found that the relationship was in principle protected by Article 8, in relation to the 'balancing exercise', the Defendant's right to freedom of expression outweighed the Claimant's right to privacy. The publication of the article was justified in the public interest and the information contributed to a debate of general interest in a democratic society on the following grounds:

- The Claimant had given an interview to the News of the World in January 2006 in which he had portrayed himself as a reformed family man who had given up the ways of his past, including 'cheating' on his long-term partner, Ms Ellison. The same themes were echoed in the Claimant's autobiography and subsequent media interviews.

- There was a further public interest due to the Claimant's appointment as England Captain. Many members of the public expect high standards from someone in the Claimant's position and for many, the Captain is expected to be a role model who maintains those standards off, as well as on, the football pitch. The Defendant's article, therefore, reasonably contributed to a debate of general interest in a democratic society as to his suitability for that role.

The decision appears to countenance the view that because certain members of society expect high standards of, and consider an England football captain to be, a "role model" then anyone who accepts the post must also accept a greater degree of intrusion into his private life. A very weak "public interest" was identified in the case. This is a case where what is in the public interest, as opposed to what is merely of interest to the public, are hardly distinguishable: here the "public interest" is closer to what Baroness Hale once called "vapid tittle tattle." This is a retrograde and worrying development of privacy law.

The effectiveness of section 12 Human Rights Act 1998

We believe the courts' interpretation of the balance regarding section 12 HRA 1998 is about right. The approach taken by the court safeguards freedom of expression by putting it at the forefront of the judge's mind at the relevant time. Nevertheless, this issue should be looked at in detail. Whilst freedom of expression is the cornerstone, indeed the lifeblood, of a democratic society, it has increasingly been used as a justification by the media, especially the tabloid media, to invade the privacy of individuals where there is no strong, indeed often no, public interest in doing so.

Damages: an adequate remedy in privacy cases?

Generally, the purpose of awarding a Claimant damages in respect of a civil tort is to compensate them for the harm caused by the tortuous actions of the Defendant. The role of damages in privacy cases is important, but is very much a secondary factor for Claimants. This is because, once private information has been made public, no level of damages can ever draw a veil over information that was formally private. Furthermore, with the proliferation of private information on the internet the harm caused by dissemination is usually persistent.

By far, the most important remedy for a Claimant is injunctive relief – at the interim and final stages. However, it has to be practical protection.

Whilst damages will never be adequate compensation in privacy cases due to the nature of the wrong committed, this should be reflected in the relief available to Claimants. The threat of large damages or a fine may assist by operating as a check on the worst invasions of privacy. If someone sues after the event it is generally a matter of principle rather than the pursuit of money which is the motivating factor - one is highly unlikely to make a profit following the trial of any privacy action given that the costs are likely to far outweigh any award of damages.

Punitive financial penalties

Damages are not a sufficient remedy for breaches of privacy, as stated above. Once private information is published no amount of money can take that information out of the public domain. At the moment privacy awards are widely considered to have a damages threshold of £60,000 or thereabouts. This is hardly an effective deterrent for a deep-pocketed media group weighing up the potential consequences of publishing private information. Punitive damages would likely go a considerable way towards deterring some of the more flagrant breaches of privacy we see in the press but would still not adequately compensate an individual for having their right to privacy breached.

We suggest that effective interim relief (to protect individuals) combined with introducing accountability for any leaks, together with high awards of damages (if a story is improperly published), may go some way to creating a deterrent effect on those who trade in the privacy of others.

Prior notification

Currently, advance notice is not required to be given to the subject of any story by the media. However, there is some irony in the fact that the individual seeking an injunction must give advance notice that they are applying for an injunction to the media that they intend to serve the injunction on, if granted.

We believe that serious consideration ought to be given to a law favouring prior notification. Once publication has occurred nothing can make that information private again. It is grossly unfair on the individual. The practical considerations about advance notification, together with the provision of practical privacy

protection for individuals, the cost of which must not prohibit access to justice, should all be examined by parliament.

Aggravated damages where there is no prior notification

Unfortunately, damages do not adequately compensate a Claimant who wishes to protect his or her privacy. However, there ought to be some safeguard against publishers wilfully breaching a person's privacy without first giving them the opportunity to take action in respect of a threat of publication. Therefore, significant aggravated damages should be payable in cases where privacy has been breached and no advance notification is given. This will hopefully, over time, have a deterrent effect. However, this is only likely to be a deterrent when combined with other factors, given that most individuals will not wish to amplify the intrusion into their lives by taking action after the event, as such action will likely lead to further publicity.

Time limitations to injunctions and injunctions contra mundum

We feel that, by and large, the courts are handling issues of time limitation well. In terms of *contra mundum* injunctions, it is still unclear as to the circumstances in which such orders can be obtained. Recent case law suggests that to obtain a *contra mundum* injunction a Claimant may be required to demonstrate a threat to life or something of similar gravity. If correct, this means that *contra mundum* orders will be made in only a very small class of cases.

Where we see a wider issue with timing is the risk that, in practice, (as identified by Mr Justice Tugendhat in *LNS v Persons Unknown*[11]), an interim order is likely to become a permanent injunction (without any trial), binding upon any person to whom the Claimant chooses to provide notice that the order exists.

We acknowledge concerns that interim injunctions are, in effect, transforming into *de facto* permanent injunctions, and would certainly favour any sensible procedural changes to speed up the process by which the final status of such injunctions is determined.

We would particularly welcome any changes to the rules or procedure which might enable a Claimant to make an interim junction permanent more rapidly and cost effectively. However, there is an anomaly in the current jurisprudence that we respectfully submit could be addressed at the same time, indeed which would encourage, rather than deter, a Claimant from seeking to make final his or her interim injunction. This is what we might term the "*Buffham*[12] Issue". That case confirmed that the "*Spycatcher*" principle (pursuant to which a third party who knows of an interim order made to protect confidential and/or private information from being published and publishes the information destroying its confidentiality will commit a contempt of court) only applies to interim orders.

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[11] [2010] EWHC 119 (QB)

[12] *The Jockey Club v Roger Buffham and Others* [2002] EWHC 1866 (QB)

As a result of the *Spycatcher* principle not applying to final injunctions, in Article 8 cases where a Claimant obtains an interim order and then goes on to win their case, third parties (who may have been served with the interim injunction and are then in effect bound by it pending trial) will not be restrained by court order from publishing the information which a Defendant has been prohibited from publishing.

To compound matters, those third parties may not have known the information in question before the Claimant's application for an interim injunction and moreover, following service of the interim order on them, those third parties will (subject to any variations ordered by the court) be entitled to receive evidence put forward in support of the application which could include detailed information relating to the facts sought to be protected and evidence as to whether or not the information is true or partially true.

It might be said that following a final order being made, the fact that third parties will know that the Claimant and the court deem the information to be protected under Article 8 would deter them from publishing it for fear of a privacy/confidence claim being brought against them. Yet this will not provide any real protection to a Claimant, as there is no order against them disclosing the information and the relatively low damages awarded in such cases would not act as a commercial deterrent.

The result of final orders being granted in cases involving interim injunctions, therefore, is likely to be that third party media organisations are provided with private information about a Claimant of which they were previously unaware with no sanction against publishing or effective remedy if they do. We would therefore suggest that the effect of the *Buffham* Issue is to deny Claimants proper access to preventative remedies in cases concerning media publication of private and/or confidential information and deter them from seeking a final order. As stated in cases like *Armonas v Lithuania*[13]:

> "*Article 8, like any other provision of the Convention … must be interpreted in such a way as to guarantee not rights that are theoretical or illusory but rights that are practical and effective.*"

Costs of obtaining a privacy injunction

The cost of obtaining an injunction is a significant issue. It is now more expensive than ever to obtain privacy protection. We would welcome measures to make the process of seeking an injunction simpler. The argument as to whether a Claimant's right to privacy outweighs another party's freedom of expression is in most cases quite a straightforward argument, and self-evident.

Statutory reform of privacy law

We believe that the existing common law and legislation on privacy is already sufficient, and clear. It is not apparent what would be achieved by codifying the

[13] 36919/02 (25 Nov 2008) [38]

existing law, given that even with a statutory privacy law the end result will be a similar position to the one that we are in now, namely that a judge will carry out the balancing exercise between the competing interests (the individual's right to privacy against the freedom of expression of the other party).

We have no objection to the existing law being codified: we only query whether it is a worthy use of Parliamentary time, given it is unlikely to accomplish what it is being aimed at.

We believe that for the most part, the courts are striking a correct balance between Article 8 and Article 10. There is very little weight at all in the value of freedom of expression in a case concerning gossip about sex between consenting adults which forms the subject of a great deal of privacy injunctions. This is recognised by much of the press. However, and as noted above, in many of the recent applications for an injunction no attempt has been made to defend a proposed article, and neither has an undertaking not to publish the story been provided when requested.

This would appear to be because it is the current preference of some parts of the press in relation to certain types of article (most often - if not exclusively - a kiss and tell style story) is for an injunction to be obtained in an anonymised format so that they can report on the granting of an injunction and invite speculation upon the identity of the person in question.

We note that this type of injunction is very rarely challenged in the courts, even though any party bound by the injunction could make such a challenge (by way of an application to the court) if they believed there was any public interest in the information in question.

Enforcement of privacy injunctions across jurisdictional borders within the UK?

There is certainly an issue with injunctions where orders are obtained in England and Wales which are then subsequently frustrated by publications in Scotland or Ireland. Preventing the publication of information about an injunction will likely alleviate this problem given that it narrows the number of people who know about the injunction. This is evidenced by the widespread compliance with privacy injunctions before 2011. Keeping a list of who has been told about the injunction will also limit disobedience. The reality is that if an individual is required to also obtain injunctions in these other jurisdictions in addition to one in England and Wales, the costs will increase dramatically. The points we make above in relation to making it more difficult for people to breach orders online also apply here.

Parliamentary Privilege

In relation to Parliamentary privilege, we respectfully submit that it is a matter for Parliament to decide what restrictions to put in place. We would, however, submit that the issue of Parliamentarians disobeying court orders is of major concern, given the reality that those Members who have done so have, do so on very limited information - usually gleaned from only one side of the proceedings. They

are not in a legitimate position to decide whether something should or should not be private in the absence of statute. If parliament wishes to codify the law it should do so formally, and not by usurping a decision of the Court by using parliamentary privilege to do so. This has wider implications for the constitutionality of such a course of action. A judge, after hearing all of the evidence, is not only in the legitimate position, but the more experienced position to make such a decision. Whilst debate on the general issues is to be welcomed, MPs should not, on limited evidence, be establishing themselves as a one-man Court of Appeal and 'overturning' validly obtained court orders. We would welcome the Speaker of the House providing new guidelines to MPs, and similar guidelines for their Lordships.

Judges interpret and apply law that has been introduced through Parliament. Parliament chose to introduce the Human Rights Act. It was understood at the time that it would bring about greater rights to privacy, an uncontroversial fact at the time of the passing of the bill.

Penalties for 'abuse' of Parliamentary Privilege

Whilst this is a matter for Parliament, we believe that penalties should be considered: firstly to help protect the rights of Claimants in these cases and secondly to maintain the credibility of Parliament, and the separation of powers. As mentioned, this has wider constitutional implications and we feel that this is an issue that should be addressed by parliament as a matter of urgency.

Issues relating to media regulation in this context, including the role of the Press Complaints Commission

The Human Rights Act and the PCC Code are virtually identical in their wording in respect of privacy. There is therefore no basis for the press to object to the Human Rights Act's provisions, as the media voluntarily signed up to the same.

Regulation of the press by a body without statutory powers (such as to prevent publication of stories in advance, or to impose financial sanctions) simply does not work. The Inquiry has heard a deluge of evidence which speaks to this. For the PCC, or any kind of self-regulation, to be effective, it would need to be given teeth.

Baroness Buscombe's claim that the PCC could have stopped the reporting of private information the subject of an injunction bordered on the disingenuous (BBC2's Newsnight, 23 May 2011). While the PCC can sometimes deal with, for example, urgent issues of harassment of individuals by the media, and has some success in obtaining corrections in relation to inaccurate articles, for the majority it is a weak and ineffectual body, in part caused by its narrow remit as a supervisory body. Without any statutory "teeth", this means that its function is not, except in the remotest sense of the word, investigative; nor does it have effective sanctions to deter the kinds of serious wrongdoing which has prompted this Inquiry. In addition, there is an element of "publish and be damned (by the PCC)" which seems to be the principle by which many of the media organisations within the self-regulatory system operate.

As evidence of how the PCC does not provide effective regulation, it is imperative to compare the way the PCC investigated the beginnings of the phone hacking in 2009, with the way the former independent television regulator, the ITC, reacted in 1998 when untrue allegations about a programme on drug-running were made on a TV channel. The ITC imposed a £2m fine after a thorough investigation, led by Michael Beloff QC, and the former controller of Editorial Policy at the BBC.
The fatal reason for the ineffectualness of the PCC is simply that the print media do not regard it as having any authority to sanction it. There is no system of sanction for the print media, and trying to argue that the PCC represents some kind of deterrent or effective regulation is fallacious.

PCC's remedies for breaches of the Editors' Code of Practice in relation to privacy complaints?

As exemplified above, the PCC fails to use its existing limited powers in situations where it ought to, such as in instances of gross invasions into privacy and harassment by the press. We believe that for there to be effective regulation not only should there be an increased level of sanctions for those print media organisations that breach any regulatory code, but also that any code should be fairly and properly policed. Self-regulation has failed completely, and there is no public confidence in the PCC which remains.

The Paparazzi

The paparazzi tirelessly hunt celebrities, public figures and their families for the opportunity to photograph them in candid, unflattering and at times compromising moments. It is no understatement to describe their behaviour as shocking. They often yell, chase individuals, say obscene or provocative things and take them by surprise. Often, this conduct amounts to harassment. We have even experienced situations where clients' cars have been 'bugged' so as to enable the press/paparazzi to surveille them. Paparazzi often use informants and pay them for information about where their target is likely to be. Furthermore, the market for photographs taken by paparazzi is not diminishing, if anything it is growing. This demand for content is driven, mostly, by the tabloid press. It is a global business. Photographs can be transmitted instantly to picture agencies at the click of a button. By looking at the websites of some of the more popular newspapers it is apparent that at least 75% of the photographs appearing on the home page at any given time are paparazzi pictures.

Persistent paparazzi attention can create a significant intrusion and as a result, force people to change the way they conduct their daily lives and the decisions they make, where they go and how they travel, who they speak to and even prompt the employment of personal security for protection. In essence, they can take your freedom.

Although the Press Complaints Commission (PCC) Code states that, *"journalists must not engage in intimidation, harassment or persistent pursuit"* in an attempt to regulate such behaviour, the PCC cannot and has not taken action directly

against the press to enforce the Code. It will only deal with the complaints it receives and issue warnings. Also, there is a fundamental problem in that the paparazzi are not signatories to the PCC. Sadly, the police are also often reluctant to get involved, providing no sense of effective protection against such conduct. This is a prime example of where the PCC, as regulator of the press, lacks 'teeth' with regard to an element of its members' conduct that, arguably, is in dire need of regulation. Newspaper editors must ensure the principles embodied within the Code are observed and must not use photos obtained through intimidating behaviour or harassment. We cannot say with any conviction that this part of the Code is adhered to.

It is important to remember that whilst the paparazzi are not signatories to the PCC, if the newspapers adhere to the spirit of the Code it will affect how the paparazzi operate because they wont be able to sell photos which were taken improperly.

In the overwhelming majority of cases it is likely that there will be no public interest justification for the conduct of the paparazzi. Our position remains that there can never be any excuse for dangerous pursuit nor conduct that causes significant distress or concern for personal safety. We would welcome the Inquiry's review of and recommendations for ensuring adherence by the press to the PCC Code in relation to its use of paparazzi photographs, and even recommendations for criminal sanction for such behaviour.

Defamation

Injunctions

It is a long established principle in defamation cases that injunctive relief is generally not available other than in rare and exceptional circumstances. The practical position is that an injunction is seldom available ahead of the publication of a defamatory article. Whilst this has been the position for more than 100 years, it seems to us perverse that an injunction can be (rightly) granted in cases where private information is about to be published, but not in cases where false information is to be published concerning one's reputation, especially given the recent recognition in European jurisprudence of reputation as one of the rights under Article 8.

Whilst it can be said that the damage done by a defamatory allegation is often dampened by the publication of an apology and/or an award of substantial damages, some damage is likely to remain, particularly in the increasingly prominent online world. Therefore there seems to be little logic in a system which does not allow, in the right circumstances, for the prevention of damage in the first place, provided safeguards are in place for freedom of expression.

Apologies/Damages

Claimants in defamation cases generally have one overriding objective: to vindicate their reputation and repair the damage done. Damages can go some way to achieving this (see below) but more often than not the most important element will be an apology from the publisher.

The PCC Code states that any significant inaccuracy, misleading statement or distortion, once recognised must be corrected promptly and with due prominence. The unfortunate reality is that the media do not like to publish apologies at all, let alone with "due prominence". When a front page article which is grossly defamatory of an individual is published, the publisher will usually refuse point blank to put an apology on the front page, arguing that something further back in the paper will meet the requirement of 'due prominence'. We do not feel that this is an effective remedy and does not provide an equitable means of repairing the damage done to reputation. Further, publishing a small paragraph on a corrections page, which is unlikely to be read by those who read the original article, is not sufficient prominence.

There is also an issue with damages. Damages for general loss of reputation (as opposed to where a specific contract has been lost, for example) are capped at around £250,000 for the most serious category of cases. As with privacy cases, the chances are that if there is a fully contested trial, the Claimant could end up in a position where there is a shortfall between the amount they receive from the publisher (as a combination of damages and a contribution towards the costs of the Claimant) and the amount they have had to pay to take the case to trial. This is manifestly unjust and does not address the inequality of the bargaining power of many claimants against defendant media organisations.

Sufficient Notice

As with privacy cases, there is no requirement for a publisher to contact the subject of a story prior to its publication. Though a publisher will often do so, in part because it allows them to try to defend any defamatory allegations on the basis that they have published 'responsibly' in the *Reynolds* sense, in reality they will usually leave it until very late in the day. This means that the subject has little time to think or act in relation to what is about to be published and therefore more liable to give away information under pressure, giving the journalist a comment which allows the article to be published. We believe it is in the interests of society generally for a system to be fostered where the subject of a story is given a sufficient period of notice prior to any publication to fully consider the allegations being made and to take advice upon the same if required.

Conclusion

This is probably a one-time opportunity to address some of the issues that have caused the rot which has taken hold of a section of the print media and been allowed to flourish.

The media are sometimes known as the fourth estate of the realm. Valuable investigative journalism (which we are in favour of) has been degraded by the practices and attitudes of a certain section of the press, who, unimaginatively, feel that that there is more value in pursuing a footballer's sex life than exposing corruption, political hypocrisy, and issues of genuine public interest.

The role of this Inquiry is to get to the bottom of what has been happening in our newsrooms, and find out just how far this rot has affected the foundations of journalism. We implore the recommendations arising from the Inquiry to be brave and forward-thinking; not to be afraid to reform that which needs reforming. If those recommendations are anything less than that, then a valuable opportunity will have been missed for a generation, to right the wrongs that have been done, to improve the culture and ethics of the press, to engender a respect for the right to personal privacy, and to uphold freedom of speech and the rule of law.

Statement of Truth

I believe the facts stated in this witness statement are true.

Signed ..

Date ..... 15/2/12 .....