Submission to the Leveson Inquiry into the Culture, Practices and Ethics of the Press

PRIVATE & CONFIDENTIAL

Submission from Michael McManus

Address: **Halton House**
20/23 High Holborn
London
EC2N 2JD

Occupation: **Director of Policy and Transition and Company Secretary**
The Press Complaints Commission Limited

1. I, Michael McManus, have been Director of Policy and Transition at the Press Complaints Commission since 1 February 2012. I am responsible for the financial management of the PCC and am primarily responsible for the development and maintenance of all policy for improved self-regulation of the press. I also support the Chairman in his public-facing duties.

2. The recent controversy over publication of certain photographs of Prince Harry and the Duchess of Cambridge has tested the system of press self-regulation and highlighted several important issues with regard to press standards. These reflections from the perspective of the PCC are sent in the hope they will be helpful to the Inquiry.

3. May I first, however, address an allegation made in the closing submission to the Inquiry by the counsel for many of the victims, Mr Sherborne. He appeared to suggest there had been no public consultation by Lord Hunt (and his team) in preparing the proposals he put forward to this Inquiry. Lord Hunt has, in fact, held numerous meetings with "core participant victims" to this Inquiry, with representative groups and also with members of the public. Lord Hunt has asked me to include in this final, written submission the following statement from him:

4. *I have travelled to all parts of the UK to share and discuss my proposals for reform of the structure of press regulation and I have learned much from the experiences and the judgements of those I have met. They have significantly affected my thinking and I also learned, very quickly, that everyone had his or her own, particular view on the best way forward, so I (and the PCC) would never presume to generalise about any group or class of people, or the views they might hold.*

5. *I fully understand why it suits some campaigners to allege otherwise, but I can assure this Inquiry once again that I in no way speak for the press, or for any element of it. The PCC may not possess the full panoply of powers that a fully-fledged*

regulator requires, but as its independent chairman my role is not to speak for the industry, but to advocate without fear or favour a system that I believe will best advance the public interest. I have always been very clear that any future regulatory system must serve the public and rebuild trust in journalism.

6. *The principal purpose behind each of these meetings was to listen to the first-hand experiences of those who had suffered at the hands of the press at its most egregious and to ensure the lessons from those cases could be properly considered as I developed my own thinking. They were not intended to provide me with an opportunity to rebut charges that the PCC lacks necessary authority and powers, or to promote any particular model of newspaper regulation. Where appropriate, I apologised for any shortcomings at the PCC.*

7. *As the Inquiry will by now be well aware, I have acknowledged from the outset of my chairmanship that the current regulatory model needs to be strengthened significantly. These meetings served only to confirm me in my view that a fresh start is both essential and inevitable, involving the replacement of the PCC with a new, fully and demonstrably independent body. This must build on the existing complaints and pre-publication work with additional and essential powers to set standards, investigate serious or systemic Code breaches and, where appropriate, to issue substantial fines.*

8. I attach a list of those victims of unsavoury, unethical and illegal practices by the press whom Lord Hunt has contacted. In each instance he offered a face-to-face meeting to discuss their experiences and their views on the future regulation of the press. An asterisk appears against the name or names of those with whom a face-to-face meeting has taken place.

HRH Prince Henry of Wales

9. I now move on to a recent case that casts fresh light on press behaviour and the influence of the Editors' Code of Practice. In previous submissions, we have drawn attention to the increasing sophistication of the PCC's pre-publication services. In recent years, these have grown rapidly both in scope and scale, but they generally receive little publicity. This is because they are, quite properly, undertaken on a private and confidential basis. They have, however, been brought to considerable public attention by the recent case involving photographs of Prince Harry. Unfortunately, they have also been subject to a degree of misrepresentation.

10. In many cases we pass on either "advisory" or, in the case of harassment, "desist" notices on behalf of individuals who are wholly unaccustomed to being in the public spotlight. Sometimes they have lawyers or other advocates acting for them, but if they do not, our complaints officers engage directly with them, providing all the help and support they require as they seek to deal with a range of unfamiliar

challenges and processes. The Commission's Head of Complaints and Pre-Publication Services, Charlotte Dewar, has already been in contact with the Inquiry on this point.

11. Two photographs of Prince Harry, taken while he was on holiday in Las Vegas, first appeared on the internet during the night of 21-22 August 2012. It is worth noting that, having given consideration to the Editors' Code as well as privacy law, no mainstream British website and no evening newspaper published those pictures during Wednesday, 22 August.

12. The PCC received a telephone call from Harbottle & Lewis, Prince Harry's solicitors, during the morning of 22 August. They informed us that St James's Palace might wish to use the Commission's pre-publication service in relation to the pictures.

13. At 4.11pm that day, Harbottle & Lewis emailed a letter to the PCC for circulation to the editors of all major newspapers and magazines. This advised us that the Palace felt Prince Harry had a reasonable expectation of privacy at the time the photographs were taken, and that publication of those images would represent an unjustified intrusion into his privacy.

14. At 4.38pm, in line with its normal policy, the PCC circulated a private "advisory" notice to editors, outlining the Palace's concerns. Discretion on whether to publish or not remained with editors and, as will be clear from the PCC's short covering note to editors which is enclosed along with the original letter from Harbottle & Lewis, there was no question of the PCC seeking either to prohibit or to sanction publication.

15. Pre-publication guidance was provided by the PCC to a number of publications on 22, 23 and 24 August, focusing on the relevant Code issues in order to assist editors in making appropriately informed decisions on how to proceed.

16. With one exception (see below) this assistance was given over the telephone. The advice, which was in broad terms, drew attention to Clause 3 (Privacy) of the Editors' Code of Practice and, in particular, to Clause 3 (iii), which provides that it is 'unacceptable to photograph individuals in private places without their consent' and which defines private places as 'public or private property where there is a reasonable expectation of privacy'.

17. Publications were reminded that, if they did decide to publish, they might in due course be required to justify the decision, in the event that the Commission undertook a formal investigation.

18. They were advised that, in such circumstances, they would be required to explain precisely what public interest considerations had been taken into account prior to publication; that the public interest would need to be proportionate to any

intrusion; and that the Commission would have regard for the extent to which the material was already in the public domain, in accordance with the terms of the Code.

19. Previous adjudications by the Commission were mentioned, including *A Woman v Loaded (2010)* and *Dannii Minogue v Daily Mirror/Daily Record (2010).* These are both enclosed.

20. No UK-based newspaper published the pictures on Thursday 23 August, although they were the subject of extensive coverage. At lunchtime that day, *The Sun* newspaper notified Lord Hunt of its intention to publish the photographs the following day. David Dinsmore, acting managing editor of *The Sun,* sent a letter setting out the basis upon which his newspaper had come to the view that publication of the photographs could be justified. It was the prerogative of the editor of the newspaper to publish, or not to publish. Copies of Mr Dinsmore's letter, and the reply sent by our Head of Complaints and Pre-Publication Services, on behalf of Lord Hunt, are enclosed.

21. At its regular meeting on Wednesday, 5 September 2012, the Commission discussed this matter at considerable length and the PCC subsequently issued a statement on 6 September setting out the decision of the Commission that, in the circumstances, it would be inappropriate at that time to open an investigation into the matter without the formal cooperation of Prince Harry's representatives. This, too, is enclosed.

22. *The Sun*'s decision to publish divided public and expert opinion. The PCC received 3,809 complaints from members of the public. It was heartening for us to see that it is still the PCC to whom the public, as well as the industry, turns at such moments.

23. Had a formal complaint from Prince Harry or any of his representatives been received, it would have been investigated by the PCC in the normal fashion. On 28 September 2012, however, St James's Palace announced that no such "first-party" complaint would be submitted. The Commission discussed the matter further at its next regular meeting on 17 October 2012 and confirmed the decision not to launch an "own-volition" investigation. As noted in its 6 September statement, it also endorsed guidance on privacy and the public domain that had been drafted by the secretariat. An advanced draft of this is enclosed. If the Inquiry would like the final version (which should be little different) I should be delighted to provide it in due course.

24. It is essential to note that privacy, and expectations of it, are innately personal matters. Investigations into possible breaches of the Editors' Code on privacy are therefore very rare indeed, in the absence of a first-party complaint.

25. There are, among the reasons for this, the following considerations: the possible unwillingness of the person who was the subject of the article or photograph to participate in an inquiry, carried out against their wishes, whose outcome is

uncertain; the aggravation of the sense of hurt or distress that could be occasioned by the procedures and delays attendant on such an inquiry, and by the inevitable sense of apprehension about its outcome; the possible lack of cooperation on the part of the publication concerned, on the basis that there had been no formal complaint; and the probability that even a positive outcome might revive the sense of hurt or distress experienced at the time of the original publication, while the possibility of a negative one, however remote that might be, would amplify the same feelings immeasurably.

26. I should add that, without the opportunity of seeing detailed evidence from either Prince Harry's representatives or *The Sun*, it would be wrong to make any assumptions about what conclusions the Commission might have reached, had a complaint been pursued.

27. The PCC did receive one or two instances of criticism from the two extremes in the continuing debate about regulation and standards. From one extreme we were accused of exceeding our proper remit by attempting to "suppress" publication; from the other, we were accused of weakness, for allegedly failing to prevent publication.

28. The PCC has neither the power nor the inclination to act as a censor and in this instance it did not (and would not, as a matter of course, in advance of publication) "take sides". It acted quickly and entirely within its terms of reference, to inform editorial decision-making before publication, in line with the requirements of the Editors' Code of Practice.

29. In answer to the latter charge – that of impotence in light of the decision by *The Sun* to publish the photographs – we found it alarming that some of our critics appeared to be implying that staff in a regulator should arrogate to themselves ultimate discretion over what appears in newspapers, and what does not. That would fatally undermine any credible notion of a free press.

30. There are positive aspects to these events. Whether one agrees with *The Sun*'s decision to publish or not, its published coverage does seem to suggest that its editors and senior executives did not take the decision to publish lightly. The newspaper engaged with the Editors' Code of Practice, considered the issues involved and explained its reasoning, privately to the PCC before publication and publicly at the time of publication.

31. To date, no other British newspaper (or magazine) which subscribes to the system of self-regulation overseen by the PCC has published any of the photographs.

32. We firmly believe the culture across the industry has already changed for the better, and continues to change. More weight is being given to the words and to the spirit of the Editors' Code of Practice, and the publication of sensitive or controversial material is being handled with a far greater sense of consideration and

responsibility. It is precisely that change of climate that makes really robust and effective self-regulation a genuine possibility. This was underlined by the fact that, just a few weeks later, no UK-based newspaper or magazine published the intrusive photographs of the Duchess of Cambridge

33. These two cases have, yet again, highlighted the difficulties in regulating the press in the era of the internet, and in particular, social media. Newspapers have an intrinsic disadvantage: they are analogue in a digital age, the only news media we can physically track and capture in a regulatory net. A significant proportion of the UK population had already contemplated the photographs of Prince Harry from the comfort of their homes or offices before the debate over publication in the UK had really begun in earnest.

34. Were newspapers to become the sole focus for potentially restrictive regulation, then that could rightly be viewed as a disproportionate brake on freedom of expression, since it would apply only to a dwindling information source, at a time when the parallel world of the internet continues to grow in accessibility, reach and cultural and political influence.

35. The PCC continues to provide essential services to the public, in many cases confidentially and, therefore, invisibly so far as the general public is concerned. These services have won praise from those who have had cause to use them, and I do hope they can and will be assimilated into any new regulatory structure, in order that they can continue to be developed. They can help to inform best practice across the industry, whilst rightly being augmented by new and much-needed powers to enforce standards.

36. There is no justification in the oft-cited claim that self-regulation has failed. It is more accurate to say that it has never been tried.

37. As our chairman Lord Hunt has stated repeatedly, the PCC is not equipped to be a comprehensive external regulator: it is a self-regulating, complaints-handling organisation which has, over time, developed a significant pre-publication and anti-harassment function. The PCC may have the notional power to undertake its own-initiative inquiries, but it does not have the power to compel the attendance of witnesses or demand the production of evidence, such as is normally and more properly available to judicial inquiries or determinations, or to issue fines.

38. As the report of the House of Commons Select Committee for Culture, Media and Sport pointed out in 2007 and Lord Hunt has said on numerous occasions during the past year, self-regulation must comprise more than a body with genuine regulatory functions: it must also include meaningful regulation within publishers and newspapers, with strong compliance systems and complaints-handling capacity in place within organisations.

39. In our view, self-regulation should be redefined as a system that would effect genuine cultural change within the press and the wider news-gathering industry. Self-regulation requires 'police' – in the shape of a regulator with real 'teeth' and effective sanctions at its disposal. The proposal promulgated by Lord Hunt represents a real and significant shift. If it is enacted, it will create arguably the strongest press regulator in the free world.

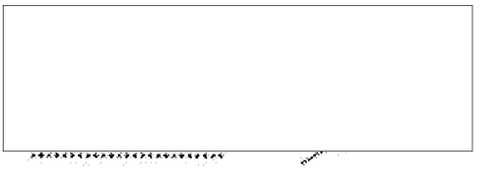
40. Recent events have provided further illustration, if any was needed, of the fact that no system can ever be perfect. A combination of human error, economic imperative and technological change will inevitably carry with it a certain risk factor. Many reasons can underpin specific editorial decisions, but one consideration for any editor that can easily be overlooked or underestimated is the market in which his or her title operates. Failure to predict readers' reactions correctly can have devastating ramifications. The legitimate job of an effective regulator is to reduce the risk of unacceptable press behaviour so far as possible, without neutering the free press and its invaluable role in a free and open society.

41. In the case of the Prince Harry photographs and then the Duchess of Cambridge photographs just a few weeks later, we were reminded that "regulating" the internet in any conventional sense is simply unfeasible: the change must come from within. This is why we have argued from the outset that modern regulation must not be confined to the newspapers alone: it must be regulation which can credibly extend its reach, necessarily on a voluntary "opt-in" basis, to digital and digital-only news providers. The more ossified and founded in statute the system is, the less it will be able to adapt to this new, rapidly changing world.

42. The only way in which these difficulties can be resolved is by having a regulatory system of which the publications are proud to be a part. It is worth noting that the Huffington Post's UK site, which is subject to the PCC, did not publish the photographs of Prince Harry, whereas its main US site did.

43. You will appreciate that the correspondence I am sharing, with and from Harbottle & Lewis and *The Sun*, was not intended for wider promulgation and was sent to the Commission in circumstances where it was not envisaged it would be made available more widely. I should be grateful, therefore, if the Commission could be provided with an opportunity to make an application under Section 19 of the Inquiries Act 2005, or alternatively to seek consent from Harbottle & Lewis and *The Sun* for publication of their correspondence, should the Inquiry wish to circulate the correspondence to the core participants or to publish it.

This statement is true to the best of my knowledge and belief.



Michael McManus

2 November 2012

List of victims whom Lord Hunt has contacted.

- [redacted]
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- [redacted]
- [redacted]

Harbottle & Lewis

Our Ref: 3
Your Ref:

Harbottle & Lewis LLP
Hanover House
14 Hanover Square
London W1S 1HP

T +44 (0)20 7667 5400
F +44 (0)20 7667 5401

www.harbottle.com
DX 44617 Mayfair

Charlotte Dewar
PCC
Head of Complaints
Halton House
20-23 Holborn
London
EC1N 2JD

STRICTLY PRIVATE AND CONFIDENTIAL
NOT FOR PUBLICATION

BY POST AND EMAIL

Charlotte Dewar (

22 August 2012

Dear Madam

We are writing to you on behalf of St James's Palace concerning the threatened publication by various members of the PCC of photographs of HRH Prince Henry of Wales which have today been published abroad.

As we understand the position following a telephone call to St James's Palace this afternoon, a number of British newspapers have jointly purchased the photographs and have served notice of their intention to publish them both on-line and in their newspapers. They have asked what the reaction of St James's Palace would be to such behaviour on their part.

As we have already discussed with you, the photographs in question were taken on an entirely private occasion and in those circumstances there was a more than reasonable expectation of privacy. No matter of public interest (as those words are understood in English law) is raised by these photographs. The fact that they have appeared in another jurisdiction is meaningless. The only possible reason for publication of the photographs is one of prurience and nothing more. As such any publication would be a clear breach of Clause 3 of the PCC Code. We should be grateful if you would circulate this letter to the relevant managing editors of your members so that they are fully aware of St James's Palace's position and the fact that they entirely reserve their rights as to any further steps that they may take should publication take place.

Yours faithfully

Harbottle & Lewis LLP

5004987-1

Charlotte Dewar

From: Charlotte Dewar
Sent: 22 August 2012 16:38
To: Charlotte Dewar
Subject: PRIVATE & CONFIDENTIAL: HRH Prince Henry of Wales
Attachments: 20120822170658132.pdf

Sensitivity: Private

PRIVATE & CONFIDENTIAL; NOT FOR PUBLICATION

The Commission has this afternoon been contacted by representatives of St James's Palace (see attached) regarding the potential publication by UK newspapers of photographs of Prince Harry which are currently circulating online.

They have asked the PCC to make editors aware of their position that these photographs were taken in circumstances where Prince Harry had a reasonable expectation of privacy, and that their publication would constitute an unjustified intrusion into his privacy in breach of Clause 3 (Privacy) of the Editors' Code of Practice. We are happy to do so.

Please feel free to call me to discuss any Code issues on 07854 960 029.

Charlotte Dewar
Head of Complaints and Pre-publication Services

Press Complaints Commission
Halton House
20/23 Holborn
London EC1N 2JD

Tel:
Website: www.pcc.org.uk

PRESS COMMISSION

The PCC is an independent body which administers the system of self-regulation for the press. We do this primarily by dealing with complaints, framed within the terms of the Editors' Code of Practice, about the editorial content of newspapers and magazines (and their websites). We keep industry standards high by training journalists and editors, and work pro-actively behind the scenes to prevent harassment and media intrusion. We can also provide pre-publication advice to journalists and the public.

A woman

3

Loaded

A woman complained to the Press Complaints Commission that an article headlined "Wanted! The Epic Boobs girl!", published in the February 2010 edition of Loaded, intruded into her privacy in breach of Clause 3 (Privacy) of the Editors' Code of Practice.

The complaint was not upheld.

The article featured a number of photographs of the complainant - who was said to have the "best breasts on the block" - taken from the internet and offered readers of the magazine a reward of £500 for assistance in encouraging her to do a photo shoot with it. The complainant said that the article was intrusive: the magazine had published her name and the photographs, which had been uploaded to her Bebo site in December 2006 when she was 15 years old, had been taken from there and published without permission. Given the length of time which had elapsed, she could not remember whether her site had any privacy settings in place and did not know the circumstances in which the photographs had been removed. The publication of the article had caused her upset and embarrassment.

The magazine said that that it had not taken the photographs from the complainant's Bebo site; rather, they were widely available on the internet. The complainant's photograph, for example, came up in the top three in a Google image search on the word "boobs". At the time of complaint, there were 1,760,000 matches that related to her and 203,000 image matches of her as the "Epic Boobs" girl. Moreover, the complainant's name had been widely circulated and achieved over 100,000 Google hits, including over 8,000 photographs.

The complainant said that - until the article appeared in the magazine - she was not aware that the images had been widely disseminated, something which the magazine considered to be surprising.

Not Upheld

This case raised the important principle of the extent to which newspapers and magazines are able to make use of information that is already freely available online. The Commission has previously published decisions about the use of material uploaded to social networking sites, which have gone towards establishing a set of principles in this area.

However, this complaint was different: the magazine had not taken the material from the complainant's Bebo site; rather it had published a piece commenting on something that had widespread circulation online (having been taken from the Bebo page sometime ago by others) and was easily accessed by Google searches.

It was not a matter of dispute that images of the complainant had been freely available for some time (having been originally posted in 2006) or that she had been identified online as the person in the pictures. The Commission could quite understand that the complainant objected strongly to the context in which they appeared online: what were images of her and her friends in a social context had become proclaimed as "pin-up" material, the subject of innuendo and bawdy jokes.

It was, of course, within this context that the magazine article operated. This was an important point: the magazine had not accessed material from a personal site and then been responsible for an especially salacious means of presenting it; instead it had published a piece discussing the fact that this material was already being widely used in this way by others.

The Commission did not think it was possible for it to censure the magazine for commenting on material already given a wide circulation, and which had already been contextualised in the same specific way, by many others. Although the Code imposes higher standards on the press than exist for material on unregulated sites, the Commission felt that the images were so widely established for it to be untenable for the Commission to rule that it was wrong for the magazine to use them.

That said, the Commission wished to make clear that it had some sympathy with the complainant. The fact that she was fifteen-years-old when the images were originally taken - although she is an adult now - only added to the questionable tastefulness of the article. However, issues of taste and offence - and any question of the legality of the material - could not be ruled upon by the Commission, which was compelled to consider only the terms of the Editors' Code. The Code does include references to children but the complainant was not a child at the time the article was published.

The test, therefore, was whether the publication intruded into the complainant's privacy, and the Code required the Commission to have regard to "the extent to which material is already in the public domain". In the Commission's view, the information, in the same form as published in the magazine, was widely available to such an extent that its republication did not raise a breach of the Code. The complaint was not upheld on that basis.

11/05/2010

Ms Dannii Minogue

3

Daily Record

Ms Dannii Minogue complained to the Press Complaints Commission through Hackford Jones PR that an article headlined "X Factor Dannii is pregnant", published in the Daily Record on 9 January 2010, intruded into her private life in breach of Clause 3 (Privacy) of the Editors' Code of Practice.

The complaint was upheld.

The article reported that Ms Minogue was expecting a baby with her boyfriend, Kris Smith. The complainant's representative said that she had not yet had her twelve-week scan at the time of publication, and the newspaper had known this. Nonetheless, it had gone ahead to publish the story which represented a gross intrusion into her private life.

The newspaper said that it was aware of the general 'first scan' rule in regard to pregnancy. However, the news of the pregnancy had been in the public domain before publication, appearing on the Faded Youth blog and on the Sydney Morning Herald website the previous day. In those circumstances, the news had already ceased to be private. The newspaper argued that information is either "in" or "not in" the public domain; it cannot be partially in the public domain. Nonetheless, the newspaper was happy to publish an apology to the complainant, as a gesture of goodwill.

Upheld

The Commission's case law on this matter is absolutely clear: "as a matter of common sense newspapers and magazines should not reveal news of an individual's pregnancy without consent before the 12-week scan, unless the information is known to such an extent that it would be perverse not to refer to it". This is because this scan can reveal complications relating to the health of the baby and the viability of the pregnancy.

For the newspaper to justify publication on this occasion, it would have to argue that the references in the Sydney Morning Herald and online - which were, in any event, speculative - made it "perverse" for it not to have referred to the pregnancy. This was manifestly an untenable argument and was rejected by the Commission. The Code specifically requires the Commission to have regard to the "extent" to which the information has previously appeared. This was no more than common sense: otherwise, any reference online would represent automatic justification for a newspaper to publish otherwise intrusive material.

On this occasion, the Commission considered that the article constituted a regrettable lapse in editorial judgement at the newspaper. It had no hesitation in upholding the complaint.

Relevant rulings

Riding v The Independent, Report 73

Church v The Sun, Report 75

28/01/2010

COMPLAINANT NAME:
Ms Dannii Minogue

CLAUSES NOTED: 3

PUBLICATION: Daily Mirror

COMPLAINT:

Ms Dannii Minogue complained to the Press Complaints Commission through Hackford Jones PR that an article headlined "Look who's Xpecting!", published in the Daily Mirror on 9 January 2010, intruded into her private life in breach of Clause 3 (Privacy) of the Editors' Code of Practice.

The complaint was upheld.

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DECISION:
Upheld

ADJUDICATION:

The Commission's case law on this matter is absolutely clear: "as a matter of common sense newspapers and magazines should not reveal news of an individual's pregnancy without consent before the 12-week scan, unless the information is known to such an extent that it would be perverse not to refer to it". This is because this scan can reveal complications relating to the health of the baby and the viability of the pregnancy.

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Relevant rulings

Riding v The Independent, Report 73

Church v The Sun, Report 75

DATE PUBLISHED:
28/01/2010

<< Go Back

3 Thomas More Square, London E98 1SN Telephone: 020 7782 4000 Fax: 020 7782 5606/020 7488 3253

Lord Hunt of Wirral MBE
Chairman
Press Complaints Commission
Halton House
20/23 Holborn
London
EC1N 2JD

23 August 2012

Dear Lord Hunt

Prince Harry pictures

I write regarding the recent pictures of a naked Prince Harry taken in a Las Vegas hotel room. Today, The Sun, along with the rest of the British press did not publish the pictures following representations from Clarence House, their lawyers, Harbottle and Lewis and the Press Complaints Commission.

Having given the matter more consideration overnight, we believe it is becoming increasingly perverse not to publish the pictures.

We believe it is legitimate to publish for the following reasons:

1. The entire UK media including both print, online and television has reported on the fact and existence of these photographs. This has in turn generated a legitimate public debate as to the Prince's behaviour. There is now a debate across the country as to whether such conduct is acceptable from the third in line to the throne who is increasingly taking on a more public and official role, as was seen most recently at the closing ceremony of the Olympics. That debate should not take place in a vacuum.

2. The entire UK media including television news reports have in fact told their readers/viewers where online to view the images themselves using the Internet. As a matter of common sense, those members of the public in this country who have access to the Internet and who have taken an interest in this story are, in my view, very likely to have looked up the relevant website (TMZ) and looked at the photographs online. I understand that according to the Office of National Statistics, in 2011, 19 million households in Great Britain had access to the internet at home representing 77% of households. To that end, the UK media has in effect brought those images already fully into the public domain online. Reference to the TMZ website in this way has meant that the photographs have been simply one "click" away from online readers of the UK media's website editions. The PCC Code of course requires you to take account of the extent to which material is already in the public domain or will become so. Given the ongoing debate across the country generated by the Prince's behaviour it can only be assumed that the number of UK Internet users accessing the TMZ website to look at the images themselves will continue to grow. It is easy to locate the TMZ website by a simple Google search using only the minimum search terms such as "Harry naked".

Registered Office: News Group Newspapers Ltd., 3 Thomas More Square, London E98 1XY.
Registered No. 679215 England

3. An indication of the level of interest in this matter comes as the number of search results for "Prince Harry Naked Pictures" rose, I am told, from 25.8 million yesterday to 160 million by 11am this morning; the actual number of people viewing these sorts of results will be much higher. This search also produced 2,550 results on YouTube. The photographs have been published on websites (largely I suspect English language sites) which emanate from other countries not only the USA, such as Canada, India, Turkey, Malta, New Zealand, Ireland, Australia, South Africa, Barbados. The Evening Herald in the Republic of Ireland published the photographs and this title circulates in Northern Ireland. I understand that the photographs are also being shared on Facebook which has 900million users worldwide. We entirely refute the suggestion in the letter from Harbottle & Lewis that the fact that the photographs have appeared in another jurisdiction is "meaningless"; that is to miss the point that the Internet in these circumstances transcends jurisdictions.

4. That is not so say however that the fact that the photographs are so widely available online should mean it renders it unnecessary for the UK media now to publish the photographs. It cannot be said that all the UK readership of the print media have access to the Internet. That means that there is now an unfair and inappropriate situation adversely affecting the ongoing debate in this country as to the Prince's behaviour; a debate in which a large number of the public have seen the photographs online but in which an equally large number may well not have done simply because they receive their news in print and do not have immediate access to the Internet. That situation cannot be allowed to continue in a debate of such importance where everybody should have equal access to the photographs in question and not just those who can access the Internet. I now turn to question of public interest.

5. I also dispute the notion in the Harbottles letter that the only reason for publication of the photographs would be one of "prurience and nothing more" and that "no matter of public interest" arises. The widespread coverage of this story since yesterday (and indeed since the Prince first went on holiday to Las Vegas) as to his conduct and the implications for him as a senior Member of The Royal Family who represents this country on the international stage, by definition is a matter of public interest. Whatever the merits of the various arguments, such as questions of his personal security; questions as to the effect this has on his ability to represent this country officially; questions as to the effect this may have on his position in the army; for that debate to take place in an informed light these photographs should be published in accordance not only with our Article 10 right to impart information but also in accordance with the general public's right to receive it.

6. The PCC itself has previously ruled (in a complaint against Loaded magazine in 2010) on a situation very similar to this and came to these conclusions:

The Commission did not think it was possible for it to censure the magazine for commenting on material already given a wide circulation, and which had already been contextualised in the same specific way, by many others. Although the Code imposes higher standards on the press than exist for material on unregulated sites, the Commission felt that the images were so widely established for it to be untenable for the Commission to rule that it was wrong for the magazine to use them.

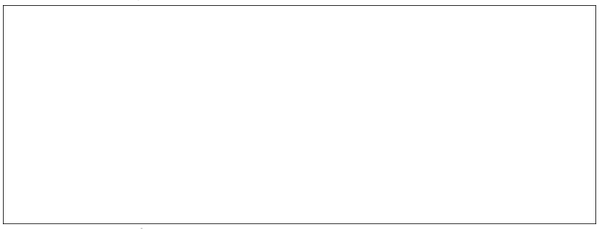
I should be grateful if the PCC could distinguish that complaint and your findings from the situation now arising with Prince Harry.

7. For present purposes I am assuming you, like many millions of other UK Internet users will have accessed the photographs on the Internet to view them. If not, you will be able to do so without any difficulty. Obviously the Prince is naked in the photographs, but you will see from those images that, in fact, they do not show the Prince in any situation of extreme personal embarrassment nor do they reveal any intimate details of his body or any other fact or matter such as a medical condition or sexual activity.

Taking all of the above into account, I have come firmly to the view that the circumstances are now such that it cannot be right that the Prince any longer can have a reasonable expectation of privacy in these photographs if indeed he did when they first appeared on the TMZ website. The situation now must be addressed with clear Guidance from the PCC. If the PCC maintains that publication would be in breach of its code, then it must now explain why not only for the benefit of the media but for the benefit of the general public who must by now be mystified as to why it is that they can readily access

the images online (and inevitably they will have done so) yet the British media feels constrained by the PCC from publishing them in their newspapers.

The Sun has consistently respected the wishes of the Royal Family in recent times, for example Harry in Afghanistan, William at St Andrews and the William and Kate's honeymoon. This is a situation we would expect to continue in the future. However, in this case we feel strongly that we must publish.



David Dinsmore
Interim Managing Editor

cc Charlotte Dewar, Head of Complaints and Pre-publication Services

Charlotte Dewar

From: Charlotte Dewar
Sent: 23 August 2012 13:58
To: 'Dinsmore, David'
Subject: RE: Prince Harry

Dear David,

Thank you for your letter to Lord Hunt. I have spoken to him about this matter and am replying on his behalf as he is out of the country.

I am always available to provide pre-publication advice on relevant Code issues, as are PCC Complaints Officers; as you are of course aware, you and I have spoken a number of times yesterday and today about this story. The secretariat also operates a system of advisory notices which enables individuals to make clear to the industry their concerns about coverage on a pre-publication basis; St James's Palace has chosen to use the service on this occasion. The PCC does not, however, operate a system of prior restraint: the decision whether or not to publish will always be a matter for the editor of a publication.

Should the photographs be published by The Sun (or any other publication), and should we receive a formal complaint, the Commission will of course undertake a full investigation. In the meantime, the Commission can neither prohibit nor sanction the publication of these pictures. For your information, we have not forwarded a copy of your email to Harbottle & Lewis but given its content, you will no doubt consider carefully whether to notify them of your position.

As always I am happy to discuss this further.

With best wishes,

Charlotte

From: Dinsmore, David [mailto:
Sent: 23 August 2012 12:16
To: Kim Baxter
Cc: Charlotte Dewar
Subject: Prince Harry

Dear Kim,

I would be grateful if you could pass the attached to Lord Hunt.

Regards

David

PCC statement on Prince Harry photographs

At its regular meeting this week, the Press Complaints Commission discussed the issues raised by photographs of Prince Harry taken in Las Vegas that have been published widely online and, to a limited extent, in the UK press. The Commission received around 3,800 complaints that the publication by The Sun newspaper of these photographs raised a breach of Clause 3 (Privacy) of the Editors' Code of Practice. The Commission is in continuing dialogue with Prince Harry's representatives but as yet has not received a formal complaint.

The Commission would be best placed to understand these issues - including the circumstances in which the photographs were taken - with the formal involvement of Prince Harry's representatives. In addition, an investigation by the Commission, without consent, would have the potential itself to pose an intrusion.

The Commission is grateful to the many members of the public who have contacted it to express concerns about The Sun's coverage but has concluded that it would be inappropriate for it to open an investigation at this time for the reasons above.

It wishes, however, to place on record the actions it has taken.

On 22 August the Commission issued an advisory notice drawing to editors' attention the concerns of Prince Harry's representatives, on privacy grounds, about the potential publication of the photographs in the UK press. The advisory notice system provides a means to help individuals who find themselves at the centre of a news story to communicate their concerns that the Editors' Code of Practice is being breached or may be breached in forthcoming coverage. These notices do not prohibit publication; they help editors to make well-informed decisions about how to cover the news in a way that meets their obligations under the Code. In this instance, as always, the decision whether or not to publish remained with the editor of each publication.

In addition, as the story was unfolding the Commission provided advice, on request, to editors about the relevant issues under the Code. This noted the terms of Clause 3 of the Code and, in particular, Clause 3 (iii), which states that it is "unacceptable to photograph individuals in private places without their consent" and which defines private places as "public or private property where there is a reasonable expectation of privacy". The Commission recognises exceptions to the terms of Clause 3 where publication can be shown to be in the public interest. The Code also requires that the Commission "consider the extent to which material is already in the public domain, or will become so". Publications were reminded that they would be required to justify any decision to publish should the Commission later undertake a formal investigation.

It would be wrong to pre-empt the conclusions the Commission might reach were a complaint to be pursued. Nonetheless, the Commission notes that the question of how to apply the terms of Clause 3 (Privacy) in relation to material that is freely available on the internet is one that it has faced on a number of occasions in recent years, including in the cases of *Mullan, Weir & Campbell v Scottish Sunday Express* (2009); *A Woman v Loaded* (2010); *Minogue v Daily Mirror/Daily Record* (2010); and *Baskerville v Daily Mail/The Independent on Sunday* (2011). In each instance it reached a decision only after a detailed examination of the facts of the case.

The Commission proposes to publish guidance for publications on these matters, drawing from its decisions on previous cases.

For further information contact Jonathan Collett by email: [redacted] or call [redacted]

06/09/2012

DRAFT GUIDANCE NOTE: Privacy and the Public Domain

It is a fundamental requirement of the Editors' Code of Practice that editors must justify intrusions into any individual's private life without consent. This principle applies to all editorial content, including material sourced from third parties and non-journalists.

As is widely recognised, however, privacy is not an absolute right: it can be qualified by factors such as an individual's conduct; previous disclosures made by the individual; and the extent to which the material is in the public domain, or will become so. This is reflected in the terms of the Code. The terms of Clause 3 (Privacy) state that "account will be taken of the complainant's public disclosures of information". In addition, the Commission is also required to "consider the extent to which material is already in the public domain, or will become so" when assessing possible public interest exceptions to the terms of the Code, which is particularly relevant to concerns about intrusion.

The publication of information by individuals on social networking platforms such as Facebook, Twitter and MySpace can blur the distinction between "private" and "public", particularly where the individual has not made use of privacy settings to indicate an intention to restrict the circulation of the information to a limited group. Nonetheless, the mere availability of material online is not a *carte blanche* to republish to the public at large.

The Commission has previously acknowledged that it may be acceptable in some circumstances to publish information taken from social networking websites, even if the material was originally intended for a small group of acquaintances. A decision to publish material protected by privacy settings will generally require an editor to demonstrate a sufficient public interest in publication, but even where no privacy settings are in place editors should consider carefully whether publication is justified. In a case of bereavement or serious injury, when the terms of Clause 5 (Intrusion into grief or shock) apply, editors should take particular account of the likely effect on close friends and family of the publication of images or material taken from such sites.

In considering complaints about privacy in relation to material that is arguably in the public domain, the Commission must first assess the extent to which something is or will be in the public domain; and second, it must decide how to weigh its conclusions in this regard against other factors that tend to justify publication or otherwise.

In many instances it is possible to determine that material is well-established in the public domain. For example, proceedings in open court will generally fall into this category (see below). But in other cases, it is not straightforward. The greatest caution should be taken where information is obviously private in nature (for instance matters relating to health), but the Commission will take account of all relevant factors, which include:

- The nature of the material.
- The nature and extent of previous publications (including previous disclosures by the complainant themselves).
- The context in which the newspaper presented the republished material.
- The proportionality of the republication to material already in the public domain.
- Any public interest in publication.

The following cases provide useful guidance to how the Commission has applied the provisions of the Code in practice.

The nature of the material

The family of Alice Claypoole v Daily Mirror (2005)

In this case, a national newspaper published a photograph of a woman missing after the 2004 Asian tsunami, against her family's wishes. The father's request that no photograph of his daughter be used had not been passed on, due to a miscommunication, and an image from a publicly-accessible website was published. The Commission expressed great sympathy with the complainants but did not uphold the complaint: it ruled that publication of a publicly available, innocuous image of someone caught up in such a shocking and newsworthy event was not intrusive under the terms of Clause 5.

Baskerville v Daily Mail / Baskerville v The Independent on Sunday (2010)

In these cases, a civil servant who had been using Twitter to describe aspects of her professional life complained about the publication of her messages in two national newspapers. The complainant accepted that "in theory" anyone could view the material, but believed that she had a "reasonable expectation that [her] messages...would be published only to [her] followers". The Commission noted that there were 700 subscribers to the complainant's account, and that the potential audience was much greater, particularly because any message could be "re-tweeted" by other users without the complainant's consent. No privacy settings were in place. The Commission also had regard to the quality of the information and how it was used by the publication: it related directly to the complainant's role as a public servant, and the newspaper had used it to comment on concerns about civil servants using social media platforms. The Commission was satisfied that the material published by the newspaper did not constitute an unjustifiable intrusion into the complainant's privacy.

The extent of previous publications

Minogue v Daily Mirror/ Daily Record (2010)

Dannii Minogue complained a newspaper had intruded into her private life by publishing the fact of her pregnancy before her twelve week scan (and before any public announcement). The newspaper acknowledged the Commission's previous rulings that publication of such information without consent before the 12 week scan is intrusive but argued that the information was in the public domain having appeared on a blog and on an Australian newspaper website the previous day. It said that such information was either in the public domain or not in the public domain – it could not be partially in the public domain. The Commission did not agree with the newspaper's position: the references it cited were speculative rather than confirmed, and did not mean that it would have been "perverse" for the Daily Record not to refer to it. The Commission upheld the complaint and commented that its ruling was "no more than common sense; otherwise, any reference online would represent an automatic justification for a newspaper to publish otherwise intrusive material".

A Man v Perthshire Advertiser (2004)

A man from Scotland complained that an article which repeated information that was referred to in open court or contained in a judgment intruded into his privacy in breach of clause 3. The complainant was a serving prison officer who had been the offending party in a car accident. He complained that the inclusion of his job title, his full home address and the full registration of his car in a newspaper report might put his family at risk due to the sensitive nature of his work. In the circumstances of this case the Commission did not find that exceptional reasons had been established by the complainant for interfering with the editor's legal right to publish the information which had been revealed in open court and entered the public domain. Generally speaking, and in the absence of a court order to the contrary, information reported in open court will be considered as established in the public domain, and publications will be free to refer to it.

JK Rowling v Daily Mirror (2005)

J K Rowling complained that an article in the Daily Mirror intruded into her privacy in breach of Clause 3 of the Code by publishing a photograph of her London property with the name of the road. Because of the security problems that some celebrities have encountered from stalkers and obsessive fans, when publishing details about a celebrity's home without consent, publications must take care to ensure that they do not publish information that would enable people to find the exact location of the property. In this case, the complainant had previously been subject to security threats at her homes. The newspaper argued that the address was already in the public domain, as the name of the road had already been published in another newspaper, and the electoral register and Land Registry identified the complainant as the owner. The Commission did not accept however that this was the decisive factor: it was satisfied that the photograph and its caption contained sufficient information to identify the exact location of the property, and it did not agree that the information was in the public domain to such an extent as to justify publishing it in this way. It upheld the complaint.

The complainant also complained about information that had been published in relation to two Scottish properties she owned. The newspaper had named the suburb in which a town house was located, and had given the name of her country house and which county it was in, together with an aerial photograph. The Commission was not persuaded that the details of the country house were sufficient to identify it to those not already familiar with it. The Commission was satisfied that the fact that the complainant owned the house had been widely reported and was in the public domain. It did not uphold this part of the complaint.

Blair v The Daily Telegraph / Daily Mail (2002)

Tony Blair and Cherie Blair complained about two articles revealing that their son had applied for a place at Oxford University. The newspapers relied in part on the fact that the story had entered the public domain by virtue of the fact that a list of applicants had been posted in the Porter's Lodge of the College to which he had applied. The Commission did not agree that this act had placed the information firmly in the public domain: the college had done no more than pin up a list of applicants on its own property for the information of the relatively few people who were directly affected. This did not entitle to newspapers to publish information about the Prime Minister's son that would otherwise breach the terms of Clause 6 (Children) of the Code. The complaints were upheld.

Proportionality

The Commission will also give consideration to the intrusiveness of the material in comparison to any material that can be demonstrated to have entered the public domain previously (with or without the consent of the complainant). A decision by an individual to put some matters concerning their private lives into the public domain (or not to complain formally about the publication of such material on a previous occasion) does not deprive them of any right to privacy under the Code. The subsequent publication of material that is far more detailed or intrusive than previous disclosures may not be justified. There are often delicate and fact-sensitive balances to be drawn in this area, as the following cases illustrate.

Granada Television (on behalf of Jacqueline Pirie) v News of the World (2000)

The actress Jacqueline Pirie complained that an article which included details of a previous romantic relationship had invaded her privacy in breach of Clause 3 of the Code. The newspaper did not advance a public interest justification for the article, but argued that there was a sufficient volume of material about Ms Pirie in the public domain to justify further articles about her private life. It contended that Ms Pirie had actively sought publicity in the past and produced several articles which, it said, demonstrated her willingness to talk about her private life. Although it accepted that the complainant had willingly provided some information about her private life for publication in the past, the Commission noted that it had not included the "highly personal" material revealed in the article. Aside from general details about her previous relationships, there was little in the previous articles about the detail of her private life. The Commission noted that Ms Pirie had not complained about a previous article that had included comments of a former boyfriend, but it did not consider that the failure to complain implied general consent for further intrusion. The Commission emphasised that there was little or no proportionality between the subject matter of the article – which was extremely personal and devoid of any public interest – and the material that was already in the public domain, and it upheld the complaint.

Lisa Carling v Daily Mail (2000)

The article took the form of an interview with the complainant's ex-husband, which detailed his attempt to gain greater access to his two children who were then living with the complainant and her new husband Will Carling; the complainant considered that this breached the terms of Clause 6 (Children). The newspaper argued that the children had previously been named in national newspapers in the context of the marital problems experienced by the complainant and Mr Carling. It also noted that the complainant had given an in-depth interview to another newspaper in which she revealed her pregnancy before marriage, how her children had been teased at school, detailed visiting arrangements for the children, and provided photographs of the children for publication. The Commission considered that the material contained in the article under complaint was in proportion to the previously published material, including the material put into the public domain by the complainant herself, and it did not uphold the complaint.

The Right Hon David Maclean MP v Mail on Sunday (2005)

In 2002 David Maclean MP, then the Conservative Party Chief Whip, had not challenged a diary item in a Sunday newspaper suggesting that he had had an affair with a senior civil servant in the early 1990's. Two years later, he did complain about a bigger and more detailed article in another newspaper that reported those allegations in the context of a new story about warnings he was said to have given a fellow Member of Parliament about dealing

with allegations relating in his own private life. Mr Maclean maintained that the two small diary items published two years previously had not placed his own alleged affair into the public domain sufficiently to justify publication of the story. The Commission disagreed, making it clear that even though the diary items were small, the information was undeniably in the public domain. It warned that individuals who are the subject of such pieces should be aware that a decision not to complain about them when they are published may pose difficulties in complaining about republication of the same information.

Context

Editors should take particular care when considering whether to republish potentially private or personal information in a different context to that in which it was originally published. This can be of particular importance when using material sourced from social networking sites as the following cases demonstrate.

Mullan, Weir, & Campbell v Scottish Sunday Express (2009)

In this case, the coverage under complaint claimed that several survivors of the Dunblane shooting in 1996 – who at the time of publication were turning 18 – had "shamed" the memory of their schoolfellows by posting "foul mouthed boasts about sex, brawls and drink fuelled antics" on social networking sites. The article was illustrated with photographs taken from these sites. The Commission upheld the complaint. It found that the individuals concerned were not public figures in any meaningful sense and had done nothing to warrant media scrutiny as 18 year-olds. Although the boys' identities had been made public at the time of the shootings, and the images were available freely online, they had been taken out of context and presented in a way that was designed to humiliate and embarrass them. The Commission emphasised that in some circumstances the publication of publicly accessible material hosted on social networks may constitute an unwarranted intrusion into privacy, even when no specific steps such as password protection have been taken to protect the material.

A Woman v Loaded (2010)

Here a woman complained that an article headlined *"Wanted! The Epic Boobs Girl!"* invaded her privacy. The article identified the complainant by name and featured (without consent) a number of photographs taken from the internet as part of a campaign by the magazine aimed at persuading her to take part in a photo-shoot. The photographs had originally been uploaded by the complainant to a social networking site when she was fifteen years old (several years before) but had since been widely republished on the internet. She had also been widely named online as the individual featured in the photographs.

The Commission stressed that the Code imposes a higher standard on the press than exists for unregulated sites and expressed sympathy with the complainant's hurt and embarrassment. It made clear, however, that it could not make a ruling on taste grounds. It was crucial to the case that the magazine had not accessed the material from a personal site to present it in a newly salacious manner. The photographs had been exceptionally widely available on the internet: at the time of the complaint the complainant appeared in the top three results in a Google image search on the word "boobs". There were millions of relevant matches to her as the "epic boobs" girl, and over 100,000 matches for her name. The Commission concluded

that in some cases – including this one – it is not possible to censure a publication for reproducing and commenting material that is exceptionally widely available and has already been contextualised by others in the same way.

Public interest

In some situations material that has been obtained from social networking sites may be published even if the subject of that material has limited its availability to a small number of people. But this is likely to be true only when there is a public interest justification to permit what would otherwise be an invasion of privacy.

Goble v The People (2009)

A serving police officer complained (via a family representative) that an article headlined "My Lot Have Murdered Someone Again. S*** Happens" intruded into his privacy in breach of Clause 3. The officer had posted comments on two social networking sites that referred to the death of Ian Tomlinson during the London G20 protest in April 2009, using privacy settings. The newspaper said that the officer's comments had been brought to its attention by a third party with whom he was acquainted and who had legitimate access to his online profiles; in addition the officer had accepted the newspaper's journalist as an online "friend" for a brief period. The Commission was satisfied that there was a public interest in information which threw light on police attitudes (whether publicly or privately expressed) to the incident. It considered that the officer had taken a risk by posting such controversial comments to people who were not obliged to keep the information secret. It was satisfied that any intrusion into the officer's privacy was justified.

A Woman v The News (2004)

A woman complained that the newspaper had intruded into her privacy by identifying her, without her consent, as a TB sufferer. The newspaper argued that under the circumstances there were clear grounds to justify her identification: a sizeable proportion of the local community (including hundreds of parents) knew her name already, and as a teacher with a contagious disease which spread into the school she worked at, she was at the centre of a major public health alert. The Commission considered that as an adult with a position of responsibility who had been identified as the source of a TB outbreak at a school, scrutiny of the complainant – however unwelcome to her personally – was inevitable. Information about her health that would otherwise have been private had become part of a necessary public debate. As the complainant's identity was demonstrably in the public domain to some degree, the Commission concluded that it would have been unreasonable for the local paper to be restricted from publishing it. The Commission noted the complainant's contention that, while people connected to the school were aware of her identity, people where she lived were not. While the Commission expressed sympathy for the complainant's position, it concluded that in the circumstances it was impractical to take into account such geographical distinctions. It did not uphold the complaint.

Summary

In considering whether to publish any material that has entered the public domain – whether online or in another medium – editors should ask themselves the same questions as they would in respect of any other potentially intrusive material, including:

1) What is the quality of the information? (How personal is it? What is the context in which it was originally published?)
2) What previous disclosures have been made by the individual concerned?
3) If the material has been sourced online, who uploaded the material? (Is the person actually responsible for uploading the material themselves?)
4) Has the individual taken steps to indicate that they regard the information as private, either by complaining about the previous publication of such material, placing on the record their concern about the publication of such material, or putting in place specific steps to protect their privacy such as privacy settings?
5) How is the material going to be presented? (What is the proposed new context?)
6) Is any new disclosure proportionate to the material that is already in the public domain?
7) Is there a public interest in publication proportional to the potential intrusion?

Editors should note that whenever the public interest is invoked, the terms of the Editors' Code of Practice require editors to demonstrate fully that they reasonably believed that publication, or journalistic activity undertaken with a view to publication, would be in the public interest and how, and with whom, that was established at the time.

Senior PCC staff are available (24 hours a day) to discuss any concerns in advance of publication. They will be happy to talk through specific cases and offer advice on relevant Code issues.