a JUSTICE briefing paper

# The Regulation of the Press

Advancing access to justice, human rights and the rule of law

**The Regulation of the Press – a briefing paper**

1. The purpose of this paper is to provide background on the regulation of the press and related issues of privacy. This is, of course, a topical issue and the subject of the review headed by Lord Justice Leveson. This paper is directed only to the following parts of his terms of reference:

> *To inquire into the culture, practices, and ethics of the press, including:*
> *… the extent to which the current policy and regulatory framework has failed including in relation to data protection; and [t]o make recommendations … for a new more effective policy and regulatory regime which supports the integrity and freedom of the press, the plurality of the media, and its independence, including from Government, while encouraging the highest ethical and professional standards.*

2. Lord Justice Leveson has held open seminars to discuss relevant issues. This paper is designed, in particular, so that participants to this roundtable and JUSTICE get a sense of the main issues before the debate is shaped by the direction taken by the Inquiry. Uncertainty and ambiguity abound, being expressed even by the Prime Minister who admitted, uncharacteristically, that he was unsure himself of the way forward on the issue: 'It might be odd to hear it, but I don't really have the answer to this one, I need to do some more thinking about it.'[1]

3. This paper explores the options and takes no position. This roundtable is designed to provide an opportunity to take this further. There are three major questions; this paper addresses the first two:

- what are the options for reform;
- what are the advantages and disadvantages of each; and
- which is preferable?

4. It is worth remarking that JUSTICE has some history in this debate, as Jack Straw acknowledged in a lecture earlier this year:

> *In post-war Britain there has been a series of attempts … to define a law of privacy and to propose a system for its adjudication. In 1972 the Younger Committee reported. This had been established in response to the largely*

[1] The *Guardian,* 21 April 2011.

*hostile reaction to a proposed Right of Privacy Bill, based itself on a JUSTICE Report of the same year, introduced in 1970 by the late Brian Walden MP.*[2]

JUSTICE remains concerned about privacy and has recently published a paper[3] arguing for a more radical review of the Regulation of Investigatory Powers Act (RIPA) 2000 than is currently proposed in the Protection of Freedoms Bill. We have, however, undertaken no recent work specifically on the media and privacy.

5. One difficulty with the current debate is that issues get confused. For example, Paul Dacre, editor of the *Daily Mail*, passionately supports the principle of self-regulation but ended up by arguing at an open Leveson Inquiry seminar for an ombudsman, apparently with compulsory powers of enforcement and a mandatory jurisdiction.[4] This paper seeks to divide out the issues as follows:

Part 1 The main problems with the current system of press regulation
Part 2 The content of any code of practice for editors and the press
Part 3 The legal framework on privacy and the media
Part 4 Options on regulation

**Part 1: Issues arising from the current system**

6. The press in the UK has been subject to a system of self-regulation for more than 50 years. The current regulatory body, the Press Complaints Commission (PCC), was established in 1991 in the aftermath of a review by Sir David Calcutt QC (the Calcutt Report). His committee had recommended the previous year that a voluntary scheme be established and its success monitored after 18 months. He noted:

*This is a stiff test for the press. If it fails, we recommend that a statutory system for handling complaints should be introduced.*[5]

7. In its current form, the PCC has a board of 17 members, 10 of whom are independent. It is funded by a levy on newspapers and magazines which is paid to a Press Board of Finance which then meets the costs of the PCC. The PCC enforces a

[2] Jack Straw, *Gareth Williams Memorial Lecture,* 12 July 2011.
[3] *Freedom from Suspicion: surveillance reform for a digital age,* JUSTICE 2011.
[4] 12 October 2011.
[5] Calcutt Committee Report on Privacy and Related Matters (1990) Cm 1102.

code which is drafted by a committee of newspaper editors (the Editors Code of Practice Committee) and approved by the PCC. The committee is currently chaired by Paul Dacre, editor of the *Daily Mail.*

8. There are perhaps five main issues of concern in relation to press regulation:
   a. failure of the existing regime as demonstrated by a series of unacceptable breaches of privacy and widespread phone hacking;
   b. the tainted role and image of the PCC;
   c. the cost, particularly in the light of legal aid cuts, of taking court action which restricts those who can get legal redress for invasion of their privacy;
   d. a widespread uncertainty, not least among MPs, about whether Parliament and the courts should take a more leading role in regulation of privacy and the press; and
   e. the potential irrationality of different regulatory regimes for Internet, broadcasting and traditional publishing regimes.

(a) Unwarranted intrusion into privacy

9. There have been a series of infringements of privacy by the press in recent years that have raised concern that any public interest justification is being stretched beyond the acceptable. Among the most troubling have been:

- the sustained coverage of the parents of Madeline McCann following her disappearance in 2007;
- the treatment by the press of Chris Jefferies in the murder investigation of Joanna Yeates in Bristol at the end of 2010; and
- the phone hacking scandal, particularly when it became clear that Millie Dowler's phone had not only been hacked but interfered with for journalistic purposes.

(b) The tainted perception of the PCC

10. The PCC has long been criticised for acting in the interests of the press rather than the public and for its lack of effective remedies. However, its evident failure in the McCann case and then the phone hacking saga means that there is considerable pressure for its abolition. The extent of the PCC's support for the *News of the World* against accusations by the *Guardian* severely discredited its role and led to the

resignation of its chair, Baroness Buscombe. David Cameron accused the PCC of being 'ineffective and lacking in rigour'. Ed Miliband called it 'a toothless poodle'. The voluntary nature of the PCC has also attracted criticism with the withdrawal of Northern and Shell, publishers of the *Daily Express,* so that the PCC does not cover all of the daily newspapers.

11. In *Media Law*[6] Geoffrey Robertson QC and (now) Mr Justice Andrew Nicol give the following analysis of why, in their view, the PCC fails whereas the Advertising Standards Authority (ASA) on which it was modelled is widely seen to work:

- The PCC has no sanctions equivalent to those of the ASA;
- Sections of the media are 'entertainment-based' and 'will continue to publish circulation-boosting stories irrespective of adverse adjudications';
- The PCC, unlike the ASA, does not actively monitor compliance either with its code or responses to its adjudications;
- Complainants tend to feel that they have not had a fair hearing from the PCC because of the exclusion of lawyers and informal style of operation.

Overall, their verdict is that the PCC does 'valuable function as an informal conciliator' but little more.

(c) The barrier of cost

12. The cost of litigation to enforce privacy rights, bring a defamation case or seek injunctions are notoriously high. Legal aid is rarely available. While a complaint to the PCC is free, the lack of effective remedy and perceived media bias of the body means that people may feel deprived of any practical remedy for an infringement of their privacy. Thus, there are real advantages in an ombudsman or tribunal system that works and is free to complainants.

13. Conditional fee agreements (CFAs) have been used by those who would otherwise be unable to fund enforcement action in the courts but these arrangements are under threat in the Coalition Government's proposed legal reforms. Milly Dowler's family has said that they would not have been able to bring their action against News International without a conditional fee agreement.[7] The

[6] Penguin, 5th edition, 2008.
[7] http://www.guardian.co.uk/uk/2011/sep/22/milly-dowler-cameron-legal-reform?newsfeed=true [Accessed 28 October 2011].

current system of press regulation leaves many people either unable to enforce their rights or facing extremely high costs in an effort to do so in cases where the PCC fails to provide an effective remedy. This will just get worse if the government abolishes CFAs.

(d) Courts or Parliament

14. There is no general statutory privacy law in the UK – save for specific legislation such as the Data Protection Act - and the law such as it is has been developed by the courts since 2000 by interpreting the Human Rights Act (HRA) 1998. In cases such as *Campbell v Mirror Group Newspapers* in 2004, *Douglas v Hello! Ltd (No.3)* in 2005 and *Mosley v News Group Newspapers* in 2008, as well as in recent super injunction cases, the courts have developed a generalised respect for privacy, particularly where associated with a breach of confidence. This gives rise to the concerns expressed in Part 3.

(e) Irrationality

15. In an age of media convergence, it may be irrational to have different systems of regulation for broadcasting, the Internet and the traditional printed media. The difficulty is that broadcasting is strongly regulated through the Communications Act 2003, Ofcom and the ultimate sanction of expulsion from the airwaves. The Internet is weakly regulated - see the impact of Wikileaks - although the work of the Child Exploitation and Online Protection Centre illustrates that Internet service providers are susceptible to regulatory pressure. The printed media is unevenly self-regulated. It is logical to argue that there should, as much as possible, be one regime. However, that would mean effectively that Ofcom or some similar body would become a statutory regulator, albeit perhaps with a separate printed media jurisdiction. Against this, it might be argued that the print media can credibly have a separate regulatory regime because of the authority that its content attracts. Any decision that a separate regime was justified at the present time might have to be reviewed as newspapers merge their printed and web publication a step further – though it might still be argued that newspapers can be distinguished from other content on the web even if published electronically. Certainly, Jack Straw thought so:

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*Drawing the line will be difficult, but not impossible. I do not accept that just because it is not possible, nor desirable, to seek to regulate all public sites on the Internet, it is not possible to regulate any of them.*[8]

**Part 2: The content of any code of practice**

16. The *Editors Code of Practice* is available on the PCC's website. It receives a detailed critique from Robertson and Nicol.[9] The most obvious difficulties lie in enforcement rather than drafting. However, some issues remain with the code itself. For example, various types of journalistic intrusion are justified when 'in the public interest'. This includes 'preventing the public from being misled by an action or statement of an individual or organisation'. Thus, on the face of it, media coverage of a matter which was substantively private could be justified simply on the basis that it was publicly denied.

17. Various alternative formulations of ethical codes for journalists exist. The NUJ has a *Code of Conduct*. *The New York Times*, arguably the world's most respected newspaper, has the equivalent. The contrast of approach between the three documents can be illustrated by comparing the treatment of the very first article in the Editor's Code: 'The press must take care not to publish inaccurate, misleading or distorted information, including pictures.' The NUJ puts this positively, requiring a journalist 'to ensure that information disseminated is honestly conveyed, accurate and fair'. The *New York Times* guidelines on integrity go into more detail: 'Falsifying any part of a news report will not be tolerated and will result automatically in disciplinary action, including termination.' It then goes into detail. For example, '*The Times* does not "clean up" quotations … approximate quotations can undermine readers' trust.'

18. Accordingly, whatever status might be given to any code of practice or equivalent – advisory, mandatory, statutory – it might be better and more positively drafted.

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[8] As above.
[9] The *Editors Code of Practice,* p777-796.

**Part 3: The legal framework on privacy and the media**

19. The current constitutional framework within which the press operates is provided by judicial determination of the balance between Articles 8 and 10 of the European Convention. It was clear during the debates on the Human Rights Bill that the media were nervous of a judicially-imposed law of privacy and this may account for a good deal of the hysteria in the media against the HRA. As he introduced the Bill in the House of Lords, Lord Irvine of Lairg, then Lord Chancellor, spoke direct to the media's concerns:

> *You know that, regardless of incorporation, the judges are very likely to develop a common law right of privacy themselves. What I say is that any law of privacy will be a better law after incorporation [of the European Convention on Human Rights (ECHR)] because the judges will balance Article 10 and Article 8, giving Article 10 its due high value.*[10]

20. As further protection for the press, s12 HRA provides that a court 'must pay particular attention to the Convention right of freedom of expression', the public interest and 'any relevant privacy code'. Ministers confirmed at the time that they intended this to include the *Editor's Code of Practice.*[11]

21. Thus, the current legal framework is provided by the HRA, the ECHR and specific privacy legislation not directed specifically at the media - such as the RIPA provisions criminalising phone hacking and offences under the Data Protection Act. It is worth bearing in mind that the issue in the recent phone hacking cases involving the *News of the World* was not the absence of available offences but initial half-hearted interpretation of their provisions and subsequent failure to pursue evidence of their breach. In other words, there may be a credible argument that the essential background privacy legislation is satisfactory – or, at least, needs to be considered as an issue itself rather than as part of an inquiry into the media – as we have recently argued in relation to RIPA.[12]

22. There can realistically be little chance for both legal and political reasons of a return to the status quo ante in which the media operated under easy-going

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[10] 'The Human Rights Bill, House of Lords' published in Lord Irvine of Lairg *Human Rights, Constitutional Law and the Development of the English Legal System,* Hart, 2003, p11.
[11] HC Debate col 541, 2 July 1998.
[12] See n3 above.

common law provisions. The press will, henceforth, continue to operate within the overarching structure of the ECHR – whatever the fate of the HRA. Thus, UK law will continue to be shaped by the balance between Articles 8 and 10 ECHR. Indeed, in principle, there seems little objectionable about that and it might be helpful if all those considering the issue indicated that this was their starting point. Notwithstanding that, it has to be admitted that these articles were drafted in a different age: Article 10, in particular, is rather strong on exceptions to freedom of expression. Neither article expressly refers to the media or makes provision for breaches of privacy when in the public interest as such. The European Charter of Fundamental Rights and Freedoms does at least contain a specific reference to the media: 'The freedom and pluralism of the media shall be respected.'[13] However, the Charter gives little more assistance than this in balancing freedom of expression with the right of privacy.

23. The real issue here is whether there should be legislation that seeks to shape the case-by-case development of the common law within the ECHR framework. David Cameron argues:

> *What's happening here is that the judges are using the European Convention on Human Rights to deliver a sort of privacy law without Parliament saying so … we do need to have a proper sit back and think: is this right, is this the right thing to happen? The judges are creating a sort of privacy law, whereas what ought to happen in a Parliamentary Democracy is Parliament – which you elect and put there – should decide how much protection do we want for individuals and how much freedom of the press and the rest of it … It is an odd situation if the judges are making the law rather than Parliament.*[14]

24. Jack Straw has gone a little further. In a recent lecture, he specifically called for: the 'resurrection of Sir David Calcutt's recommendation of a new tort of infringement of privacy'. In fact, the Calcutt Review also proposed new criminal offences. As explained at the time to the Commons, these were, in summary:

> *three new criminal offences: of trespass on private property to obtain personal information for publication; of planting a surveillance device on private property*

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[13] Article 11.
[14] The *Guardian,* 21 April 2011

*to secure information for publication; and of taking a photograph, or recording the voice, of someone on private property for publication and with the intention that he should be identifiable. All three offences would be subject to defences of public right to know, for example when done to expose crime or other wrongdoing, and of lawful authority.*[15]

25. Thus, leaving aside the specific issue of the structure of press regulation (and, in particular, the legally binding nature or otherwise of various enforcement provisions) there is the logically prior question of the basic legal framework. If the press were effectively bound by a satisfactory framework of general civil and criminal requirements in relation to privacy then that might remove any perceived need for further regulation specifically in relation to the media. The media – or part of it - could then decide whether it wanted to fund a PCC (or equivalent) as an informal conciliator or it could take its chances in the courts. The disadvantage would be that complainants would have to meet the expenses of litigation to enforce their rights in circumstances where voluntary conciliation structures did not work to their satisfaction.

26. A system of voluntary mediation or arbitration in the shadow of possible court determination might reduce costs and enlarge access for the public to remedies for breach of privacy. It might also reduce court workloads. It might, however, be expensive - though costs could be defrayed by orders against the media for where they lost.

27. In addition, the press might be required to give people about whom they write notice of their intention to publish a story so that, if appropriate, they can seek an injunction preventing publication. A ruling after the event can only do so much and this would give the subject the chance to prevent the irreparable damage that can be done by a story being published because the editor in question decides that on balance that is the preferable cause of action. The case most often referred to here is the Max Mosley case where Mr Mosley was not pre-notified and was generally accepted not to be able to undo the harm to his reputation that the *News of the World's* breach of his privacy had caused.

[15] David Waddington, HC Debate vol 174 cc1125-34, 21 June 1990.

28. Many subjects are already pre-notified, hence the large numbers of injunctions that are obtained, but there is no obligation to do this and editors are sometimes accused of running stories that they know would be subject to an injunction if they notified. There would probably need to be a 'public interest' exception to any obligation to pre-notify which would provide more complications for the courts in deciding privacy cases, and therefore a better approach may be to take into account whether pre-notification took place, and if not whether it would have been appropriate, as an aggravating factor when deciding damages. Jack Straw has advocated something along these lines whereby the onus is on the defendant newspaper to show why it was in the public interest that prior notification not be given, with exemplary damages awarded if it does not successfully persuade the court.

29. The difficulties with this are, however, clear. It would open the door to pre-emptive injunctions designed to bury legitimate news stories.

**Part 4: Various forms of regulation**

30. There are an almost infinite variety of different possible forms of regulation. They can be divided as follows.

*Self-regulation*

31. An advantage of self-regulation is that it keeps the media completely independent of the government and therefore provides a high degree of protection for freedom of expression. The PCC is funded by the institutions it regulates so that it does not require public money. Its continuation in some form would not require the setting up of new bodies or the passing of new legislation. Thus, it would be cheaper and less complex than to implement than any new system.

32. Almost everyone would favour self-regulation if it worked, but it doesn't. And, apart from the questions over the exercise of its powers, the PCC has a fatal flaw. It does not cover the whole industry. The *Daily Express* newspapers have voluntarily excluded themselves from the PCC scheme – largely it seems because they do not want to pay their subscription – and *Private Eye* has always refused to join. Ian Hislop told the Culture, Media and Sport Committee:

*We do not pay and* Private Eye *does not belong to the Press Complaints Commission ... I have always felt* Private Eye *should be out of that. It means that we just obey or do not obey or we are judged by the law rather than by the Press Complaints Commission. Practically two and a bit pages per issue of* Private Eye *are criticism of other individuals working in journalism. On the whole, they appear on the board of the Press Complaints Commission adjudicating your complaint, so I would be lying if I said that it did not occur to me. So no, I always thought it would be better for the* Eye *to be out of it.*[16]

33. The disadvantage of self-regulation is that it leaves the initial balancing act between privacy and freedom of expression in the hands of the media, who are perceived to have failed at this in recent years. A person aggrieved is free to make a complaint to the PCC but, if that is not resolved satisfactorily, then subsequent court action can be expensive and time consuming.

34. The PCC points out that it has already recognised the need for fundamental change and has committed specifically to review 'its own constitution and funding arrangements, the range of sanctions available to it, and its practical independence.'[17] It is, however, not clear whether, even with fundamental changes, this would be enough to head off widespread public and political scepticism of the PCC's effectiveness though it is generally admitted that, in low profile cases, the PCC does often broker some form of compromise.

35. Many who passionately support what they refer to as self-regulation actually argue for something more complicated. For example, Ed Milliband argues for self-regulation. However, he called for the abolition of the PCC 'toothless poodle' and its replacement by: 'A new body would need far greater independence of its board members from those it regulates, proper investigative powers, and an ability to enforce corrections.'[18] Any power of enforcement implies a degree of statutory intervention. In terms of this paper, he is arguing not for self-regulation but for statutory or co-regulation.

36. Speaking at a recent JUSTICE's human rights conference, Lord Judge expressed the view that any reformed PCC should have the power to demand an

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[16] http://www.publications.parliament.uk/pa/cm200809/cmselect/cmcumeds/uc275-ix/uc27502.htm.
[17] http://www.pcc.org.uk/news/index.html?article=NzMxOA== [Accessed 27 October 2011].
[18] The *Guardian,* 7 July 2011.

apology and possibly fine where there is a serious breach of the code of practice.[19] Again, it is unclear how the power to fine (or to enforce fines) or to demand that newspapers participate would be possible without some form of statutory intervention.

37. An enhanced but still voluntary PCC is in line with the recommendations made by the Culture, Media and Sport Committee in 2009 which included increasing the number of lay members to a two-thirds majority and conferring a power to fine. The Committee stopped short of suggesting that membership of the PCC be compulsory but asked the government to consider some form of incentive in relation to libel damages to encourage membership.

*Statutory regulation*

38. It is possible to see self-regulation as having failed so completely that external statutory regulation of the press should be introduced. This would involve an independent body with strong investigatory and sanctioning powers conferred by statute regulating the press and hearing complaints. Statutory regulation would facilitate bringing together existing different regulatory regimes for different forms of publication.

39. Ofcom is already in place as the statutory regulator for the broadcasting media, and it, therefore, seems logical to use its existing framework for any statutory regulation of the press. An entirely new body and system could be set up, but this would add an unnecessary layer of complexity and expense to what is already likely to be a fairly costly process. It would take some thought as to how to integrate regulating the print media with Ofcom's existing responsibilities in relation to the broadcasting media. A new code would be drafted for Ofcom to enforce, although large parts of the existing code could be replicated in this.

40. A statutory regulator would have the advantage over the PCC of having more 'teeth' to ensure compliance with a code and to enforce protection of privacy. As it is neither funded nor staffed by members of the media it is also likely to have a better public perception as a body that regulates the press in the interests of the press and public, rather than just the former and to be a more effective regulatory body.

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[19] The *Guardian,* 19 October 2011.

41. If statutory regulation were introduced then care would need to be taken to ensure that freedom of the press and freedom of expression were adequately protected. Statutory bodies are susceptible to political influence and any perception that the government is involved in press regulation would raise concerns for the protection of freedom of expression. On the other hand, if sufficient safeguards are put in place then such a body could provide independent oversight of the press without interference from the government or the press it is regulating.

42. There are concerns that any statutory regulation of the press would be an attack by the government of freedom of speech and expression. Certainly, any form of licensing of journalists under a statutory body would be an unacceptable infringement of freedom of expression and of the press. However, concerns over the effect statutory regulation would have on freedom of speech and expression were reiterated by the House of Commons select committees in 2007 and 2010 and have been expressed by journalists and editors, and it is very important to make sure that this is not the case either in reality or in the public perception.

*Co-regulation*

43. A possible option would be to set up a form of co-regulation involving a self-regulatory body and some form of supervisory 'super-regulator'. The most obvious super-regulator would be Ofcom. The PCC could continue but its work would have to be approved by Ofcom. This would, in some ways, be similar to the current arrangement between Ofcom and the ASA.

44. A super-regulatory body set up in this way would provide a buffer between the media and government. However, appointments are likely ultimately to be made by ministers – as is the case for the legal profession's Legal Services Board.

45. A variant on this model would be to establish not only a super-regulator to supervise the PCC but also some form of statutory model for the determination of disputes.

46. Some form of co-regulation may well prove the most attractive way forward – either through a super-regulator or some form of statutory ombudsman or tribunal.

47. Nick Clegg seems attracted to this kind of model. He has championed independent regulation, reiterating that any future regulator must have the statutory backing to be able to impose proper sanctions including fines and that submission to its jurisdiction must be compulsory. That also seems effectively to be Paul Dacre's position in relation to enforcement.

48. There are infinite variants in detail. For example, a statutory ombudsman or tribunal might be combined with a voluntary PCC scheme with incentives to divert cases away from statutory enforcement. All systems that involve a new enforcement body would require both statutory provision and resources which it is unlikely that government will find at the current time and for which the media would realistically have to pay.

**Conclusion**

49. There may be further alternatives and there are definitely other arguments. Your help in exploring these would be gratefully received.

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