

JOINT PARLIAMENTARY COMMITTEE ON PRIVACY AND INJUNCTIONS

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WRITTEN EVIDENCE

This evidence is submitted in response to the questions raised by the Committee and focuses on the issues of UK and European law those questions raise, citing parliamentary and judicial sources.¹

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

a. Have anonymous injunctions and super-injunctions been used too frequently, not enough or in the wrong circumstances?

b. Are the courts making appropriate use of time limitations to injunctions and of injunctions contra mundum (i.e. injunctions which are binding on the whole world) and how are such injunctions working in practice?

c. What can be done about the cost of obtaining a privacy injunction? Whilst individuals the subject of widespread and persistent media coverage often have the financial means to pursue injunctions, could a cheaper mechanism be created allowing those without similar financial resources access to the same legal protection?

d. Are injunctions and appeals regarding injunctions being dealt with by the courts sufficiently quickly to minimise either (where the injunction is granted or upheld) prolonged unjustifiable distress for the individual or (where an injunction is overturned or not granted) the risk of news losing its current topical value?

e. Should steps be taken to penalise newspapers which refuse to give an undertaking not to publish private information but also make no attempt to defend an application for an injunction in respect of that information, thereby wasting the court's time?

1. Lord Neuberger MR's' Report on Super-Injunctions, Anonymised Injunctions and Open Justice² ("the Neuberger Report") suggested, on the basis of the evidence available, that

"[A]pplicants now rarely apply for [super-injunctions] and it is even rarer for them to be granted on anything other than an anti-tipping-off, short-term basis."³

¹ The author is indebted to the staff of the Odysseus Trust, Jo Dawson, Sophia Harris and Caroline Baker for their contribution to this paper

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2. However the Neuberger Report also acknowledged a lack of empirical evidence on the use of such injunctions, which it recognised made it

“impossible to verify whether and to what extent super-injunctions and anonymised injunctions are being granted by the courts”,⁴ and “has encouraged a view that an entirely secret process has developed in the civil courts, and that this is improper in principle, risks neutering press freedom to report matters of public interest and undermines the public’s right to be informed of court proceedings.”⁵

3. The Neuberger Report therefore recommended the introduction of a data recording system; and Practice Direction 51F now provides for a pilot scheme for the recording of data in relation to injunctions prohibiting publication of private or confidential information, to run from 1 August 2011 to 31 July 2012.
4. Having considered the circumstances in which derogations from the principle of open justice might be permissible, the Neuberger Committee concluded that:

*“What is clear, though, is that the impression, which, as Tugendhat J noted in *Terry v Persons Unknown* [2010] 1 FCR 659 (*Terry*), ‘claimants’ advisers’ seemed to have gained ‘that extensive derogations from open justice should be routine in claims for misuse of private information’ is misconceived. Derogations from open justice can never be matters of routine. They can only ever be exceptional and can only be justified on grounds of strict necessity.”⁶*

5. Lord Neuberger MR has now issued Practice Guidance on best practice in interim non-disclosure orders. The power to grant a super-injunction, that is, an injunction which contains a prohibition on reporting the fact of the proceedings, remains, but such an order will be granted only in the rarest of cases and only where strictly necessary. Applications will only be heard in private if and to the extent the court is satisfied that *“by nothing short of the exclusion of the public can justice be done”*. The burden of persuading the court that a restriction should be imposed lies with the person seeking it, who must provide cogent and clear evidence in support. The Guidance reaffirms Tugendhat J’s decision in *Terry*⁷ that any party seeking an interim non-disclosure order must notify all respondents to the application *and* any non-parties who are to be served with or otherwise notified of the order.
6. Given the lack of empirical evidence on the use of injunctions, it would be premature to make firm recommendations as to how the law might be improved until evidence has demonstrated the extent of any continuing problem on the basis of data collected under the pilot scheme. The Neuberger Committee opined that any perceived problem with the operation of the law may have been exaggerated as a result of opportunism on the part of claimants’ representatives and self-interest on the part of the media. It is to be hoped that the Master of the Rolls’ Practice Guidance will resolve the issue satisfactorily, but it is too early to tell.

⁴ Paragraph 4.4

⁵ Paragraph 4.5

⁶ Paragraph 1.37

⁷ *Terry v Persons Unknown* [2010]1 FCR 659

(2) How best to strike the balance between privacy and freedom of expression, in particular how best to determine whether there is a public interest in material concerning people's private and family life

a. Have there been and are there currently any problems with the balance struck in law between freedom of expression and the right to privacy?

7. In balancing the two fundamental rights to freedom of expression and respect for personal privacy, the European Court of Human Rights has tilted the balance towards personal privacy where "public figures" are concerned (unlike its approach in defamation cases). In *Von Hannover*,⁸ Princess Caroline of Monaco was pursued by German paparazzi photographers. She sought injunctive relief from the German courts which granted relief so far as pictures of her with her children were concerned, but refused so far as they depicted her in public going about her daily life. The German courts decided that considerations of press freedom and the public's interest in a "figure of contemporary society" militated against injunctive relief. Princess Caroline complained to the Strasbourg Court which upheld her claim of breach of Article 8, on the basis that a publication must contribute to a debate of general interest in order to outweigh Article 8 rights.
8. However, in the recent *Mosley*⁹ case the Strasbourg Court placed a greater emphasis on freedom of expression in refusing the application for a pre-notification requirement in privacy cases:

*"[T]he Court has consistently emphasised the need to look beyond the facts of the present case and to consider the broader impact of a pre-notification requirement. The limited scope under Article 10 for restrictions on the freedom of the press to publish material which contributes to debate on matters of general public interest must be borne in mind. Thus, having regard to the chilling effect to which a pre-notification requirement risks giving rise, to the significant doubts as to the effectiveness of any pre-notification requirement and to the wide margin of appreciation in this area, the Court is of the view that Article 8 does not require a legally binding pre-notification requirement."*¹⁰

9. An application to refer the *Mosley* case to the Grand Chamber was refused, so it should be treated as an authoritative ruling, leaving the UK with a wide margin of discretion as to how to balance these competing rights.
10. English law traditionally adopted a formulaic approach to personal privacy as part and parcel of the need to formulate a case not as a privacy violation but as a breach of confidence or as some other form of physical tort.¹¹ By contrast, Article 8 protects a general right to privacy, that is, an opportunity to live out one's private life free from undue interference, comment, intrusion, recording or monitoring, in both private and (where appropriate) public spaces. It

⁸ [2005] 40 EHRR 1

⁹ *Mosley v United Kingdom*, Application no. 48009/08, 10 May 2011

¹⁰ [132]

¹¹ Anthony Lester QC, "English Judges as Lawmakers", *Public Law* (1993) 269, at 284-85

is a right negatively protecting the individual against the abuse of power by the state and its agents, as well as positively requiring the state to protect an individual's private life from unwarranted intrusion by others.

11. British courts have developed the tort of "misuse of private information" in giving effect to the UK's positive obligations under Article 8. Courts consider two central questions:
 - a. whether, in all the circumstances of the case, a claimant has a "reasonable expectation of privacy" in respect of the disclosed facts, so as to engage Article 8 rights;¹² and, if so
 - b. whether any countervailing public interest justifies interference with the claimant's rights.¹³
12. Where both Article 10 and Article 8 are engaged,
 - a. neither Article *as such* has precedence over the other;
 - b. where the values protected by the two Articles are in conflict, it is necessary to conduct a careful scrutiny of their comparative importance in the particular case;
 - c. the necessity for limiting each right is assessed objectively in accordance with the principle of proportionality.¹⁴
13. In his evidence to the Commons Culture Media and Sport Committee in 2009, the then Lord Chancellor, the Rt Hon Jack Straw MP, stated that:

*"My experience of decisions in respect of human rights over the years is that some of those which caused the greatest initial excitement have ended in a situation where, because of changed circumstances or appeals to the Court of Appeal or the Law Lords, things have calmed down, because those senior courts have produced a better balance."*¹⁵

14. The editor of *The Guardian*, Mr Alan Rusbridger, suggested in his evidence that the problem was that the courts had not yet been required to balance Article 8 and Article 10 in "a good case where someone has tried to gag a newspaper with a really good public interest defence" and that therefore "we have to give it a bit more time".¹⁶
15. The Culture Media and Sport Committee concluded that:

*"The Human Rights Act has only been in force for nine years and inevitably the number of judgments involving freedom of expression and privacy is limited. We agree with the Lord Chancellor that law relating to privacy will become clearer as more cases are decided by the courts."*¹⁷

¹² *Campbell v MGN Ltd* [2004] 2 AC 157, per Lord Nicholls [11]-[22]

¹³ Per Baroness Hale at [137]

¹⁴ *Re S (A child) (Identification: Restrictions on Publication)* [2005]1 AC 593 (HL)

¹⁵ *Press Standards, Privacy and Libel*, Second Report of Session 2009-10 HC 362-I, paragraph 66

¹⁶ Paragraph 63

¹⁷ Paragraph 67

16. Not many cases have yet proceeded to full trial. The judgment in the recent *Ferdinand*¹⁸ case, as well as anecdotal evidence of a reduction in the number of injunctions sought since *Terry*, suggest that the courts are striking an appropriate balance.

b. Who should decide where the balance between freedom of expression and the right to privacy lies?

17. Parliament has provided a framework of principles, by means of the Human Rights Act 1998, within which to balance the competing rights of freedom of expression and respect for personal privacy. The prime responsibility for maintaining that balance is that of the media themselves through effective self-regulation, with the courts becoming involved only where self-regulation has failed to protect the right to respect for private life against unwarranted media intrusion.

18. Section 3 of the Human Rights Act 1998 requires UK courts to take account of Strasbourg Court case law without being bound to give effect to judgments as directly binding precedents, except where those judgments directly implicate the UK.¹⁹ Section 12 emphasises the need to have particular regard to the importance of freedom of speech when deciding whether to grant relief, amongst other things, to protect respect for personal privacy.

19. The judicial recognition and development in English law of a right of personal privacy against unwarranted media intrusion was foreseen during the passage of the Bill.²⁰ Indeed, section 12 was introduced for precisely this reason: in order to set a higher threshold for the granting of interlocutory injunctions in media intrusion cases in recognition of the dangers of prior restraint for freedom of expression.

20. Ultimately the balancing act between the competing interests being claimed must be carried out by the courts. As the Neuberger Report stated:

*"It is for the courts, through a consideration of the law and its development since 2000, to examine the substantive legal issues in individual future cases taking account of the individual circumstances that arise in such cases, and, where appropriate, to provide an authoritative statement of the law."*²¹

21. However, effective self-regulation by the media is essential to avoid unnecessary litigation and the risk of courts usurping the role of editors and journalists. That was recognised by Parliament in including in section 12(4)(b) of the Human Rights Act the need for the court to have regard to any relevant privacy code. The courts have interpreted the reference to privacy codes in section 12 as creating an incentive to the media to comply with such codes so as to be able to show that a contested publication was in the public interest.²² This approach

¹⁸ *Ferdinand v MGN* [2011] EWHC 2454 (QB)

¹⁹ Article 46 of the Convention imposes an obligation on Contracting States to abide by final judgments against them

²⁰ Lord Irvine of Lairg LC HL Hansard, 24 November 1997, col 783

²¹ Paragraph 1.11

²² In *A v B (a company)* [2002] EWCA 337, [2003] QB 195, at paragraph 11 (xiv), Lord Woolf referred with approval to the comments of Brooke LJ in the Court of Appeal in *Douglas v Hello! Ltd* [2001] QB 967, at paragraph 94 that "a newspaper which flouts the Press Complaints Commission's Code on privacy is likely to find that its claim to free speech is outweighed by privacy considerations."

avoids the need for a statutory underpinning, over and above the Human Rights Act, and a similar reference to professional codes should be included in the Government's forthcoming Defamation Bill as a relevant factor in determining whether the public interest is served by the publication concerned.

22. The fact that a newspaper organisation refuses or fails to become bound by a system of self-regulation should also be treated as relevant in deciding whether the publication was in the public interest. The Committee may wish to adopt this proposal as well as the Draft Defamation Bill Committee's (the "Mawhinney Committee") recommendation, in the context of the forthcoming Defamation Bill, that "when deciding whether publication was responsible, the court should have regard to any reasonable editorial judgment of the publisher on the tone and timing of the publication."²³
23. The Strasbourg Court in *Mosley* also acknowledged the relevance and importance of self-regulation,²⁴ and recognised the importance of editorial discretion:

*"It is to be recalled that methods of objective and balanced reporting may vary considerably and that it is therefore not for this Court to substitute its own views for those of the press as to what technique of reporting should be adopted ..."*²⁵

24. It is vital therefore to have a system of effective self-regulation with adequate resources, independence and the ability to provide effective remedies which are compatible with self-regulation, as distinct from remedies that would make the PCC into a court or tribunal exercising judicial powers.

c. Should Parliament enact a statutory privacy law?

25. Before the Human Rights Act 1998 brought the Convention right to respect for private life, home and correspondence into UK law, various bodies had examined the case for and against privacy legislation. An official inquiry chaired by Sir Kenneth Younger decided that it would be wrong to introduce legislation to protect personal privacy.²⁶ Sir David Calcutt QC's inquiry²⁷ into Privacy and Related Matters was set up in 1989 following completion of two Private Member's Bills concerned with Privacy (John Browne MP, Con) and the Right of Reply (Tony Worthington MP, Lab). The Report was also against privacy legislation, although on the basis of effective self-regulation.
26. In 1995, the Conservative Government's White Paper, *Privacy and Media Intrusion*,²⁸ rejected proposals for statutory press regulation, and approved continuing self-regulation.

²³ Joint Committee on the Draft Defamation Bill Report, Session 2010-2012, HL Paper 203 paragraph 65 (e)

²⁴ [31]-[40]

²⁵ [11]

²⁶ Report of the (Younger) Committee on Privacy, July 1972, Cmnd 5012.

²⁷ 1990, Cm 1102.

²⁸ Cm 2918

27. The New Labour Government continued this approach after 1997, stating, in its response to the Commons Culture, Media and Sport Committee's recommendation that legislation be brought forward:

*"The weighing of competing rights in individual cases is the quintessential task of the courts, not of Government, or Parliament. Parliament should only intervene if there are signs that the courts are systematically striking the wrong balance; we believe there are no such signs."*²⁹

28. In its 2007 Report *Self-regulation of the Press*, the successor Commons Committee on Culture, Media and Sport concluded that:

*"To draft a law defining a right to privacy which is both specific in its guidance but also flexible enough to apply fairly to each case which would be tested against it could be almost impossible."*³⁰

29. More recently, the Committee's *Report on Press Standards Privacy and Libel* concluded:

*"Given the infinitely different circumstances which can arise in different cases, and the obligations of the Human Rights Act, judges would inevitably still exercise wide discretion. We conclude, therefore, that for now matters relating to privacy should continue to be determined according to common law, and the flexibility that permits, rather than set down in statute."*³¹

30. A Privacy Act could do little more than codify the existing Convention and UK legal criteria as to how the balance should be struck between free speech and personal privacy. It would therefore make little difference as far as the courts are concerned, because it would necessarily remain their task to weigh and balance the public interest in particular cases. As at present, it would have to comply with the Convention criteria on the right to free expression and the right to respect for personal privacy and the striking of a fair balance between these competing rights.

d. Should Parliament prescribe the definition of 'public interest' in statute, or should it be left to the courts?

e. Is the current definition of 'public interest' inadequate or unclear?

31. Context is everything. It is difficult to envisage how a definition of public interest might be drafted with sufficient precision to assist the courts and others, except by prescribing a non-exhaustive list of relevant factors to be considered in determining where the public interest lies in any particular circumstances.

²⁹ Culture, Media and Sport Select Committee, *Privacy and media intrusion, Replies to the Committee's Fifth Report of Session 2002-03*, First Special Report of Session 2003-4, HC 213, paragraph 2.3

³⁰ Culture Media and Sport Committee, *Privacy and media intrusions*, Fifth Report of Session 2002-03, HC 458-I, paragraph 53

³¹ Paragraph 67

32. The Government recently considered whether a statutory definition of public interest would be desirable in relation to the *responsible journalism* defence in the Draft Defamation Bill. Rejecting the possibility the Consultation Paper stated:

*"We believe that this is a concept which is well-established in the English common law and that in view of the very wide range of matters which are of public interest and the sensitivity of this to factual circumstances, attempting to define it in statute would be fraught with problems. Such problems include the risk of missing matters which are of public interest resulting in too narrow a defence and the risk of this proving a magnet for satellite litigation adding to costs in relation to libel proceedings."*³²

33. This conclusion was endorsed by the Mawhinney Report.³³

f. Should the commercial viability of the press be a public interest consideration to be balanced against an individual's right to privacy?

34. Lord Bingham explained that:

*"In a modern, developed society it is only a small minority of citizens who can participate directly in the discussions and decisions which shape the public life of that society. The majority can participate only indirectly, by exercising their rights as citizens to vote, express their opinions, make representations to the authorities, form pressure groups and so on. But the majority cannot participate in the public life of their society in these ways if they are not alerted to and informed about matters which call or may call for consideration and action. It is very largely through the media, including of course the press, that they will be so alerted and informed. The proper functioning of a modern, participatory democracy requires that the media be free, active, professional and inquiring. For this reason the courts, here and elsewhere, have recognised the cardinal importance of press freedom and the need for any restriction on that freedom to be proportionate and no more than is necessary to promote the legitimate object of the restriction."*³⁴

35. The commercial viability of the press is obviously very important, since the media are the eyes and ears of the public and act as public watchdog in exposing abuses of power and anti-social malpractice. The commercial viability of the press is vital to enable the public to be well informed, as is the need for media plurality and protection against undue concentrations of media ownership or restrictive practices. The right to freedom of expression and communication of information and opinions is not served by a monopoly of views or a monopoly of methods of delivery, whether by the print media or the electronic media.

³² *Draft Defamation Bill Consultation*, March 2011, CP3/11, Ministry of Justice, paragraph 13

³³ *Draft Defamation Bill Report*, Session 2010-2012, HL Paper 203, HC 930-1, page 8

³⁴ *McCartan Turkington Breen v Times newspapers Ltd* [2001] 2 AC 277 (HL), at 290G-91A

36. In his recent speech on press freedom, Lord Judge LCJ recalled that:

“There can be no independent press if the independent press cannot survive in the marketplace. The different newspapers have to sell, and they sell in greater or lesser numbers as the public chooses to buy the product. And as the public chooses to buy, so the advertisers will pay for advertising space. Whether we call it choice, or competition, we need a press which responds to the demands of everyone who buys newspapers. And of course, it is part of the exercise of our own constitutional freedoms that we should be able to choose for ourselves the newspapers we buy and read. We are not cut from identical cloth.”³⁵

37. Commercial survival is vital, but the pursuit of profit and commercial viability cannot of course justify what would otherwise be unwarranted media intrusion upon an individual’s personal privacy. But recent Supreme Court cases rightly acknowledge the important role of editorial judgment in deciding how best to engage the interest of readers and so encourage a viable press. Lord Hope recalled that the Strasbourg Court had observed that:

“[I]t was not for it, nor for the national courts for that matter, to substitute their own views for those of the press as to what technique of reporting should be adopted by journalists. It recalled that article 10 protects not only the substance of the ideas and information expressed but also the form in which they are conveyed”.³⁶

38. Similarly, Lord Rodgers noted that:

“The judges are recognising editors know best about how to present material in a way what will interest the readers of their particular publication and so help them to absorb the information. A requirement to report it in some austere, abstract form, devoid of much of human interest, could well mean that the report would not be read and the information would not be passed on. Ultimately, such an approach could threaten the viability of newspapers and magazines, which can only inform the public if they attract enough readers and make enough money to survive.”³⁷

g. Should it be the case that individuals waive some or all of their right to privacy when they become a celebrity? A politician? A sportsperson?

Should it depend on the degree to which that individual uses their image or private life for popularity? For money? To get elected? Does the image the individual relies on have to relate to the information published in order for there to be a public interest in publishing it (a ‘hypocrisy’ argument)? If so, how directly?

³⁵ The Rt Hon the Lord Judge, Lord Chief Justice of England and Wales, 13th Annual Justice Lecture, *Press Regulation*, 19 October 2011

³⁶ *In re BBC* [2009] 3 WLR 142, at [25], referring to *Jersild v Denmark* (1994) 19 EHRR 1

³⁷ *In re Guardian News and Media* [2010] 2 AC 697, at [63]-[64]

h. Should any or all individuals in the public eye be considered to be 'role models' such that their private lives may be subject to enhanced public scrutiny regardless of whether or not they make public their views on morality or personal conduct (i.e. in the absence of a 'hypocrisy' argument)?

39. It is well-recognised in Convention and English case law that, in view of the role played by politicians in a democratic society, the limits of acceptable criticism of such persons are wider than with respect to private individuals. It is also well-recognised that the limits are wider as regards public figures who knowingly and inevitably expose themselves to public scrutiny, such as elected politicians or prominent business men who are actively involved in the affairs of a large public company.³⁸ As Baroness Hale stated:

*"The free exchange of information and ideas on matters relevant to the organisation of the economic, social and political life of the country is crucial to any democracy. Without this, it can scarcely be called a democracy at all. This includes revealing information about public figures, especially those in elective office, which would otherwise be private but is relevant to their participation in public life."*³⁹

40. In *Mosley v MGN*⁴⁰ Eady J explained that it is not possible to make

*"[B]road generalisations of the kind to which the media often resorted in the past, such as ... 'Public figures must expect to have less privacy' or 'People in positions of responsibility must be seen as 'role models' and set us all an example of how to live upstanding lives'. Sometimes factors of this kind have a role to play when the 'ultimate balancing exercise' comes to be carried out, but generalisations can never be determinative. In every case "it all depends".*⁴¹

41. For example in *Campbell*, Lord Carswell concluded that the publication of facts that would otherwise be regarded as confidential information was justified on the basis that Naomi Campbell was :

*"[a] well-known figure who courts rather than shuns publicity, described as a role model for other young women, who had consistently lied about her drug addiction and compared herself favourably with others in the fashion business who were regular users of drugs. By these actions she had forfeited the protection to which she would otherwise have been entitled and made the information about her addiction and treatment a matter of legitimate public comment on which the press were entitled to put the record straight."*⁴²

42. In *Ferdinand*, Nichol J concluded that it was not a matter for the court to decide whether the captain of the England football team, or presumably anyone else, was or should be seen to be a role model, but rather whether the publication contributed to a public debate on the matter:

³⁸ E.g., *Lingens v Austria* (1986) 8 EHRR 407, at [42]; *Fayed v United Kingdom* (1994) 18 EHRR 393, at [75].

³⁹ *Campbell v MGN* [2004] UKHL 22, at [148]

⁴⁰ [2008] EWHC 1777 (QB)

⁴¹ [12]

⁴² *Campbell v MGN Ltd* [2004] UKHL 22

*"The captain of England's football team, for a substantial body of the public, would come comfortably within [a list of those from whom higher standards were expected]."*⁴³

43. The case law illustrates the wide variety of factual circumstances and the importance of the specific context in the particular case.

i. Are the courts giving appropriate weight to the value of freedom of expression in 'celebrity gossip' and 'tittle-tattle'?

j. In the context of sexual conduct, should it be the case that a person's conduct in private must constitute a significant breach of the criminal law before it may be disclosed and criticised in the press?

44. The Strasbourg Court has explained that:

*"[T]here is a distinction to be drawn between reporting facts – even if controversial – capable of contributing to a debate of general public interest in a democratic society, and making tawdry allegations about an individual's private life In respect of the former, the pre-eminent role of the press in a democracy and its duty to act as a 'public watchdog' are important considerations in favour of a narrow construction of any limitations on freedom of expression. However, different considerations apply to press reports concentrating on sensational and, at times, lurid news, intended to titillate and entertain, which are aimed at satisfying the curiosity of a particular readership regarding aspects of a person's strictly private life. Such reporting does not attract the robust protection of Article 10 afforded to the press. As a consequence, in such cases, freedom of expression requires a more narrow interpretation."*⁴⁴

45. Nichol J recently stated in *Ferdinand*:

*"Freedom of expression applies to banal and trivial expression as well as matters of public interest, but that right has to be balanced against the rights of others to protect their privacy, the extent to which the content is of public interest or contributes to a debate of general interest assumes a much greater importance. Indeed, the contribution which the publication makes to a debate of general public interest is the decisive factor in deciding where the balance falls between Article 8 and Article 10."*⁴⁵

46. In *Terry*, Tugendhat J stated that when determining whether there is a public interest in the exposure of conduct, it is not for the court to express a view on such matters, rather what matters is whether there is some level of public debate on the issue:

"There is much public debate as to what conduct is or is not socially harmful. Not all conduct that is socially harmful is unlawful The fact that conduct is private and lawful is not, of itself, conclusive of the question whether or not it is in the public interest that it be discouraged. There is no suggestion that the conduct in the present

⁴³ *Ferdinand v MGN* [2011] EWHC 2454(QB) at [90]

⁴⁴ *Mosley* [114]

⁴⁵ [62]

case ought to be unlawful or that any editor would ever suggest that it should be. But in a plural society there will be some who would suggest that it ought to be discouraged Freedom to live as one chooses is one of the most valuable freedoms. But so is the freedom to criticise (within the limits of the law) the conduct of other members of society as being socially harmful, or wrong. Both the law and what are and are not acceptable standards of behaviour have changed very considerably over the years, particularly in the last half century or so. During that time these changes ... [have] been achieved as a result of public discussion and criticism of those engaged in what were, at the time, lawful activities."

47. Again, it is not possible to prescribe general rules to apply to particular categories of information. Where the balance falls between the different interests depends upon the context and particular circumstances.

k. Could different remedies (other than damages) play a role in encouraging an appropriate balance?

48. An account of the profits is available as a discretionary remedy, and may sometimes play a role in achieving an appropriate balance.

49. As regards injunctive relief, the fundamental principle in defamation cases is that, where the defendant undertakes to prove the truth of the libel, injunctive relief will be granted only where the claimant can show that the plea of justification is bound to fail.⁴⁶ Injunctions may be granted to restrain the publication of confidential information, based on the principle that damages are unlikely to be an adequate remedy, or that if relief is not granted, there will be no confidence in the material by the time of the trial.⁴⁷

50. Injunctions may also be granted to restrain wrongful invasions of personal privacy, but they require a very high level of justification because of their impact upon freedom of expression. The Strasbourg Court has emphasised the particular dangers inherent in prior restraints and the need for particular scrutiny by the courts of such measures, given that as far as the press is concerned news is a perishable commodity, and to delay its publication even for a short period may well deprive it of all value and interest.⁴⁸ Where the information is not intimate and is more in the nature of a commercial interest, the rule against prior restraint should apply to applications for injunctive relief based on a threatened invasion of personal privacy.

51. The Court of Appeal has rejected an attempt to lower the threshold for the granting of injunctions in defamation cases in light of the Human Rights Act.⁴⁹ The Court was prepared to accept that reputation was protected by Article 8, but concluded that such rights are protected under English law by the trial process. They could not be given great weight before the trial of the action, compared with the importance of the freedom of the press to report matters of public interest. This was because section 12(3) of the Human Rights Act had been inserted specifically to protect freedom of expression and Parliament could not be taken to have intended the enactment to abrogate existing common law rights.

⁴⁶ *Bonnard v Perryman* [1891] 2 Ch 269, 284.

⁴⁷ *Attorney-General v Newspaper Publishing Ltd* [1988] Ch 333, at 358, *per* Sir John Donaldson MR.

⁴⁸ *Observer and Guardian v United Kingdom* (1991) 14 EHRR 153, at [60]

⁴⁹ *Greene v Associated Newspapers Limited* [2005] QB 972

52. This approach has been followed in privacy cases where the claimant's main concern is protection of reputation. For example in *Terry Tugendhat J* refused to grant an injunction on the basis that:

*"[T]he nub of the applicant's complaint is to protect [LNS's] reputation, in particular with sponsors, and so ... the rule in *Bonnard v Perryman* precludes the grant of an injunction; and ... in any event damages would be an adequate remedy for LNS."*⁵⁰

l. Are damages a sufficient remedy for a breach of privacy? Would punitive financial penalties be an effective remedy? Would they adequately deter disproportionate breaches of privacy?

53. In *Mosley*, the Strasbourg Court considered the use of punitive financial penalties as a means of enforcing a pre-notification requirement, and concluded that this would:

*"[R]un the risk of being incompatible with the requirements of Article 10 of the Convention. [The court] reiterates in this regard the need to take particular care when examining restraints which might operate as a form of censorship prior to publication. It is satisfied that the threat of ... punitive fines would create a chilling effect which would be felt within the spheres of political reporting and investigative journalism, both of which attract a high level of protection under the convention."*⁵¹

54. There are a number of principled objections to the use of punitive damages which apply beyond the context of claims for breach of privacy. As Eady J pointed out in *Mosley*:

"It is trite knowledge that punitive damages are anomalous in civil litigation in a number of respects. First, they bring the notion of punishment into civil litigation when damages are usually supposed to be about compensation. Secondly, the defendant's means can be taken into account because these damages are in some ways analogous to a fine ... Thirdly, despite that, every such sum awarded goes not to the state itself, as is the case with a fine, but to the claimant in the litigation. It represents to that extent a windfall.

[...]

*"I therefore rule that exemplary damages are not admissible in a claim for infringement of privacy, since there is no existing authority ... to justify such an extension and, indeed, it would fail the tests of necessity and proportionality."*⁵²

m. Should we introduce a prior notification requirement, requiring newspapers and other print media to notify an individual before information is published, thereby giving the individual time to seek an injunction if a court agrees the publication is more likely than not to be found a breach of privacy? If so, how would such a requirement function in terms of written content online eg blogs and other media?

⁵⁰ [149]

⁵¹ [129]

⁵² [194]-[197]

55. The Strasbourg Court rightly decided in *Mosley* that such a requirement would give rise to an unjustified chilling effect on legitimate journalism and would in any case be ineffective because of the generally acknowledged need for a public interest exception.⁵³
56. The fundamental objection to a duty to give prior notice is the same, whether it is imposed by statute law, the common law, or a professional code. The objection is that such a general duty involves a sweepingly broad prior restraint that would chill freedom of expression.
57. There is wide consensus among the great majority of Convention States, and in the wider common law world (eg., Australia, Canada, New Zealand, South Africa, the UK and the USA) against the imposition of a duty of this kind, because of the importance of freedom of expression. This is in contrast with former Soviet bloc States. For example, Article 49 of the 'Russian Statute on the Mass Media' provides, as regards the Duties of Journalists, that "*The journalist shall be obliged to obtain the consent of a private citizen or his lawful representatives (except where it is necessary to protect public interests) to the spread in a mass medium of information about his private life.*" Similar provisions are to be found in the laws of Albania, Azerbaijan, Latvia, Moldova, Poland and Ukraine, requiring prior notice, at least where the public interest is not implicated.

n. Should aggravated damages be payable if a media publisher does not give prior notification to the subject of a publication which a court finds is in breach of that individual's privacy?

58. The Culture, Media and Sport Committee suggested that it would be "*appropriate to encourage editors and journalists to notify in advance the subject of a critical story*" when assessing damages, subject to a public interest exception, by amending the Civil Procedure Rules to make failure to pre-notify an aggravating factor.⁵⁴
59. The Strasbourg Court commented in *Mosley* that the conduct of the newspaper was "*open to severe criticism*"⁵⁵ and took "*note of the recommendation of the Select Committee that the Editors' Code be amended to include a requirement that journalists should normally notify the subject of their articles prior to publication*".⁵⁶
60. However, the Court also noted the availability of "*aggravated damages where additional features or the intrusion or the defendant's post publication conduct makes the original injury worse.*"⁵⁷
61. In the current state of the law, the court may take into account the absence of prior notification when assessing damages. The Civil Procedure Rules could perhaps be amended to make this clear.

⁵³ [132]

⁵⁴ Paragraph 93

⁵⁵ [130]

⁵⁶ [131]

⁵⁷ [41]

o. Is section 12 of the Human Rights Act 1998 appropriately balanced? Should the media's freedom of expression be protected in stronger terms? Or is there a disproportionate emphasis on the media's freedom of expression over the right to privacy? Has Section 12 of the Human Rights Act 1998 ensured a more favourable press environment than would be the case if Strasbourg jurisprudence and UK injunctions jurisprudence were applied in the absence of Section 12?

62. Section 12 was included in the Human Rights Act 1998 so as to set a higher threshold for the granting of interlocutory injunctions in privacy cases in recognition of the dangers of prior restraint for freedom of expression.⁵⁸
63. The following guidance on the application of section 12 was given by the House of Lords in *Cream Holdings v Banerjee*:⁵⁹

*"There can be no single, rigid standard governing all applications for interim restraint orders. Rather, on its proper construction the effect of section 12(3) is that the court is not to make an interim restraint order unless satisfied the applicant's prospects of success at the trial are sufficiently favourable to justify such an order being made in the particular circumstances of the case. As to what degree of likelihood makes the prospects of success 'sufficiently favourable', the general approach should be that courts will be exceedingly slow to make interim restraint orders where the applicant has not satisfied the court he will probably ('more likely than not') succeed at the trial. In general, that should be the threshold an applicant must cross before the court embarks on exercising its discretion, duly taking into account the relevant jurisprudence on article 10 and any countervailing Convention rights. But there will be cases where it is necessary for a court to depart from this general approach and a lesser degree of likelihood will suffice as a prerequisite."*⁶⁰

64. The Culture, Media and Sport Committee considered the operation of section 12 in practice, and concluded that:

*"Without appropriate data on injunctions we are unable to come to definitive conclusions about the operation of section 12 of the Human Rights Act, nor do we believe that the Ministry of Justice can effectively assess its impact."*⁶¹

65. The Neuberger Report endorsed this conclusion and the need for empirical data, albeit with the proviso that data would need to be "*scrutinised in the wider context of the nature of the substantive law and the claims involved.*"⁶²

p. Is the test in section 12 for an injunction to be granted too high a threshold? Should that test depend on the type of information about to be published? Has the court struck the right balance in applying section 12?

⁵⁸ "... the provision (HRA s12) is intended overall to ensure ex parte injunctions are granted only in exceptional circumstances.... we expect that injunctions will continue to be rare, as they are at present." The Rt Hon Jack Straw MP, HC Hansard, 02 July 1998, col 535.

⁵⁹ [2004] UKHL 44; [2004] 1 AC 253

⁶⁰ [22]

⁶¹ Paragraph 37

⁶² Paragraph 4.8

66. The threshold for the granting of injunctions in cases involving freedom of expression is not too high. It reflects the Strasbourg Court's statement of principle in *Spycatcher* that:

"The dangers inherent in prior restraints are such that they call for the most careful scrutiny on the part of the court. This is especially so as far as the press is concerned, for news is a perishable commodity and to delay its publication, even for a short period, may well deprive it of its value and interest."

67. The requirement in section 12 that the court have regard to the extent to which it would be in the public interest, together with the guidance in *Cream Holdings v Banerjee*, mean that the test is already applied according to the context of the type of information about to be published.

68. For example, in *John Terry (LNS) v Persons Unknown*⁶³, Tugendhat J discharged an earlier injunction, having concluded that damages would be an adequate remedy in the circumstances of the case:

"This is not a case where, on the evidence before me, the potential adverse consequences are particularly grave. On the evidence,... I do not think it likely that [John Terry] regards as particularly sensitive information of the kind that is sought to be protected."

q. Is there an anomaly requiring legislative attention between the tests for an injunction for breach of privacy and in defamation?

69. There is no anomaly requiring legislative attention, for the reasons given in answer to the previous questions.

(3) Issues relating to the enforcement of anonymity injunctions and super-injunctions, including the internet, cross-border jurisdiction within the United Kingdom, parliamentary privilege and the rule of law

e (i) With regard to the enforcement of privacy injunctions and the breach of them during parliamentary proceedings, is there a case for reforming the Parliamentary Papers Act 1840 and other aspects of Parliamentary privilege? Should this be addressed by a specific Parliamentary Privilege Bill or is it desirable for this Committee to consider privilege to the extent it is relevant to injunctions?

70. Article 9 of the 1689 Bill of Rights ensures that neither the Crown nor the courts can interfere with the business of Parliament. Consequently there is no question that a super-injunction or any court order could extend to Parliament or restrict Parliamentary debate or proceedings. As the report of the 1999 Joint Committee on Parliamentary Privileges stated that *"in the case of court injunctions restraining publicity: these bind the media but not either House."*⁶⁴ However, as the Companion to the Standing Orders and Guide to the Proceedings of the House of Lords states: *"The privilege of freedom of speech in Parliament places a corresponding duty on members to*

⁶³ [2010] EWHC 119

⁶⁴ Report of the Joint Committee on Parliamentary Privileges, chaired by Lord Nicholls of Birkenhead, First Report, HL 43-I / HC 214-I, paragraph 204

use the freedom responsibly. This is the basis of the sub judice rule. Under the rule both Houses abstain from discussing the merits of disputes about to be tried and decided in the courts of law”.⁶⁵

71. It is important that *sub judice* rules are applied in practice to “*avoid any possible interference with the administration of justice*”.⁶⁶ Their purpose is to strike the balance between Parliament’s constitutional duty and role and the constitutional role of the courts.
72. The Neuberger Report⁶⁷ makes clear that, although there is no question that a super-injunction or any court order could extend to Parliament or restrict Parliamentary debate or proceedings, the position in relation to media reporting is less clear.
73. In general, media reporting of the proceedings of Parliament would not appear to come within the protection of the Parliamentary Papers Act 1840 because it does not simply reprint copies of *Hansard* or amount to summaries of *Hansard* or parliamentary proceedings so they may not attract qualified privilege. When media reporting of Parliamentary proceedings does not attract qualified privilege, it is unclear whether it would be protected at common law from contempt proceedings if it breached a court order.
74. The Neuberger Committee concluded that:

*“[it] appears to be an open question whether, and to what extent, the common law protects media reporting of Parliamentary proceedings where such reporting appears to breach the terms of a court order and is not covered by the protection provided by the 1840 Act. What is clear is that unfettered reporting of Parliamentary proceedings (in apparent breach of court orders) has not been established as a clear right.”*⁶⁸
75. The Committee are invited to adopt the recommendations by the Mawhinney Report⁶⁹ that the Defamation Bill to be introduced by the Government should include provisions in the forthcoming Defamation Bill which provide the press with “*a clear and unfettered right to report on what is said in Parliament and with the protection of absolute privilege for any such report which is fair and accurate*” as well as “*protecting all forms of communication between constituents and their MP (acting in his or her official capacity as an MP) by qualified privilege.*”
76. The Mawhinney Report expressed concern at the time which would elapse before a Parliamentary Privilege Bill would be introduced and enacted, and therefore recommended urgent legislative action by means of the forthcoming Defamation Bill.⁷⁰ It is to be hoped that the Committee will reach a similar conclusion.

⁶⁵ Companion to the Standing Orders and Guide to the Proceedings of the House of Lords, 2010, p.73 paragraph 4.60.

⁶⁶ Lord Judge, 2009, quoted at paragraph 6.8 of the Neuberger Report

⁶⁷ Report of the Neuberger Committee, p76, paragraph 6.33

⁶⁸ Report of the Neuberger Committee, p76, paragraph 6.33

⁶⁹ HL Paper 203, HC 930-1, 19 October 2011, paragraphs 51-2

⁷⁰ HL Paper 203, HC 930-1, October 2011, paragraph 50

(ii) Should Parliament consider enforcing 'proper' use of Parliamentary Privilege through penalties for 'abuse'?

77. The Bill of Rights 1689 forbids the impeachment or questioning of parliamentary debates and proceedings "*in any court or place out of Parlyament*". Parliament in return has made it a rule that it will not interfere with the decisions of the courts. Each House already possesses the inherent power to discipline its members and both disciplinary and penal powers are applicable to Members and non-Members.⁷¹
78. Both Houses of Parliament have Codes of Conduct which are overseen by independent Commissioners investigating breaches. These investigations are then submitted to the Select Committee on Standards and Privileges and the Sub-Committee on Lords' Conduct, respectively. The Codes of Conduct relate to the general behaviour of Members and Peers and include the registration of financial interests.
79. The *sub judice* rules for both Houses are contained in resolutions. In both Houses, the *sub judice* rules prohibit the discussion of active criminal proceedings and active civil proceedings including any application made in civil proceedings, such as an injunction. Active appellate proceedings are also covered.
80. Proceedings in the House of Commons are overseen by the Speaker. The Speaker can call Members to order, order Members to resume their seat or ask Members to leave the Chamber. Persistent disregard for the Standing Orders can lead to the Member being named by the Speaker. This is followed by a motion for suspension moved by the Government. The Serjeant at Arms can forcibly remove a Member who refuses to withdraw and the ultimate penalty available against Members is expulsion.⁷²
81. Proceedings in the House of Lords are overseen by the Lords Speaker. Peers can be suspended temporarily which can last until Parliament is dissolved.⁷³
82. The Lords Committee on Privileges has found that the writ of summons issued to each Peer contains the implied condition that Peers must respect the rules of the House. The House must, therefore, possess the powers necessary to enforce its rules.⁷⁴
83. Since both Houses have the inherent power to discipline their Members, the means by which they decide to exercise this power fall within the regulation of the Houses of their own procedures. Either House could, therefore, create additional disciplinary sanctions.

⁷¹ Joint Committee on Parliamentary Privilege, First Report, HL 43-I / HC 214-I, paragraph 262

⁷² House of Commons, Factsheet G6, Disciplinary and Penal Powers of the House, September 2010

⁷³ House of Lords, Companion to the Standing Orders and Guide to the Proceedings of the House of Lords, 2010

⁷⁴ House of Lords Privileges Committee, First Report, The Powers of the House of Lords in respect of its Members, HL 87, paragraph 6

(iii) What is the 'proper' use and what is 'abuse' of Parliamentary Privilege?

84. In *R v Chaytor*,⁷⁵ the Court of Appeal concluded that, in relation to the activities of an MP, parliamentary privilege is confined to speaking in Parliament, participation in the work of Committees, and activities closely connected to those core functions.
85. An 'abuse' of Parliamentary Privilege amounts to a contempt of Parliament. Erskine May defines this broadly as:

*"[A]ny act or omission which obstructs or impedes either House in the performance of its functions, or which obstructs or impedes any Member or officer of the House in the discharge of his duty, or which has a tendency to produce such a result, may be treated as a contempt (or abuse) even if there is no precedent for the offence."*⁷⁶

86. In deciding whether or not to proceed against someone against whom a charge of contempt has been made, the House of Commons has particular regard to their resolution of February 1978 that such action should be taken only when the House is satisfied that to do so is in the interests of reasonable protection against obstruction causing or likely to cause substantial interference with its functions.⁷⁷
87. The Commons Committee of Privileges has advised that parliamentary privilege does not protect those who may volunteer information of public concern to Members in their personal capacity. However, the position of someone providing information to a member in connection with the exercise of his or her parliamentary duties has in some instances been regarded as enjoying qualified parliamentary privilege at common law.⁷⁸
88. It is important that *sub judice* rules are applied by the Speakers of both Houses to avoid an abuse of parliamentary privilege and the breach of the well-established constitutional principle that Parliament will not interfere with the courts and the courts will not interfere with parliamentary proceedings. On the other hand, too expansive an interpretation of the *sub judice* rules would diminish the effectiveness of the work of parliamentary committees, such as the Joint Committee on Human Rights,⁷⁹ since it would mean that the courts should refrain from having regard to relevant committee reports to avoid any "questioning" of Parliamentary proceedings.

(iv) Is it desirable to address the situation whereby a Member of either House breaches an injunction using Parliamentary Privilege using privacy law, or is that a situation best left entirely to Parliament to deal with? Indeed, is it possible to address the situation through privacy law or is that constitutionally impermissible? Could the current position in this respect be changed in any significant way? If so, how?

89. The effect of Article 9 of the Bill of Rights 1689 is that an injunction or court order cannot extend to Parliamentary debate or proceedings, so the issue here is not the breach of an

⁷⁵ *R v David Chaytor (1), Elliot Morley (2), James Devine (3), Lord Hanningfield (4)* [2010] EWCA Crim 1910

⁷⁶ 23rd edition, 2004, p128 (referring to the Report of the Select Committee on the Official Secrets Act 1938-1939)

⁷⁷ Halsbury's Laws, (5th ed 2010), Vol. 78, "Parliament", paragraph 1083

⁷⁸ *Ibid.*, paragraph 1089

⁷⁹ The author serves as a member of that Committee

injunction or court order by a Member of either House, it is the breaching of the *sub judice* rules. These exist to strike the balance in accordance with the separation of powers between Parliament and the independent judiciary in a democracy governed by the rule of law.

90. If an MP or Peer could be prosecuted via a newly-fashioned privacy law for the breach of an injunction this would erode the principle of absolute parliamentary privilege protected by Article 9 of the Bill of Rights. It would be more appropriate to make effective use of the House's disciplinary and penal procedures when an MP or Peer flouts the *sub judice* rules. Both Houses possess the inherent power to discipline their members and therefore to create effective sanctions for breach of the Standing Orders or Resolutions.
91. The Joint Committee on Parliamentary Privilege suggested that the House of Commons should take to itself the power to fine Members for contempt. This would be an extension of the principle of financial penalty which is already inherent in the suspension of a Member.⁸⁰ They also recommended that the House of Lords' power to fine Peers should be confirmed.⁸¹
92. These are matters that are better left to Parliament in clarifying and enforcing the disciplinary powers of each House rather than via legislation.

(4) Issues relating to media regulation in this context, including the role of the Press Complaints Commission and the Office of Communications (OFCOM)

PCC

a. Do the guidelines in section 3 of the Editors' Code of Practice correctly address the balance between the individual's right to privacy and press freedom of expression?

93. The guidelines in section 3 of the Editors' Code set out the basic right to respect for privacy in similar terms to Article 8 ECHR. Section 3 includes the ruling of the European Court of Human Rights in *Von Hannover*⁸² that public individuals have a right to privacy when in public in places where there is a reasonable expectation of privacy, and also requires editors to justify an interference with any individual's private life without their consent.
94. These provisions must be read together with the definition of public interest set out by the Editors' Code which provides an exception to the Section 3 rules. Public interest is defined as including but not limited to: "*i) detecting or exposing crime or serious impropriety; ii) protecting public health and safety; iii) preventing the public from being misled by an action or statement of an individual or organisation.*"⁸³ This last aspect – preventing the public from being misled by an action or statement of an individual or organisation – has been circumscribed by the courts, notably in *Campbell v MGN*⁸⁴ and *MGN v UK*⁸⁵ where it was held that only the core facts necessary to correct a misleading statement are within the public interest.

⁸⁰ Joint Committee on Parliamentary Privilege, First Report, 30 March 1999, HL 43-I / HC 214-I, paragraph 279

⁸¹ *Ibid.*

⁸² *Von Hannover v. Germany*, Application no. 59320/00, (2005) 40 EHRR 1

⁸³ Editors' Code of Practice available at: http://www.pcc.org.uk/assets/111/Code_of_Practice_2011_A4.pdf

⁸⁴ *Campbell v MGN Limited* [2004] UKHL 22

95. The Editors' Code therefore correctly requires editors to balance the individual's right to respect for personal privacy with the public interest in publishing information and opinions about the individual. The Editors' Code also requires editors, whenever the public interest is invoked, *"to demonstrate fully that they reasonably believed that publication, or journalistic activity undertaken with a view to publication, would be in the public interest."* Section 3 combined with the Editors' Code's provisions on the public interest require the same sort of objective balancing exercise between privacy and freedom of expression as is undertaken by the courts.

b. How effective has the PCC been in dealing with bad behaviour from the press in relation to injunctions and breaches of privacy?

c. Does the PCC have sufficient powers to provide remedies for breaches of the Editors' Code of Practice in relation to privacy complaints?

96. In his recent speech on press freedom, Lord Judge LCJ made observations which deserve to be quoted fully, and with which the author respectfully agrees. He said:⁸⁶

"Whatever means of regulation are designed to reduce the occasions of unacceptable behaviour by elements of the press they must not simultaneously, even if accidentally, diminish or dilute the ability and power of the press to reveal and highlight true public scandals or misconduct

"The Press Complaints Commission is now 20 years old. Not long after its 10th Birthday the Media Committee of the House of Commons pointed out that the PCC has neither authority nor resources 'other than what is ceded voluntarily to it by the press industry'. Membership is not obligatory. The Commission has no investigative power. In reality it has no disciplinary power. When it works, as most of the time it does, it is because the press itself is prepared to comply with its rulings, not because it is under legal compulsion to do so. Its main role, and I do not seek to diminish it with faint praise, is to provide a sort of ombudsman/mediation service between the newspaper and an individual group which is aggrieved by an article. It cannot award compensation. To criticise the PCC for failing to exercise powers it does not have is rather like criticising a judge who passes what appears to be a lenient sentence, when his power to pass a longer sentence is curtailed.

"Nevertheless the PCC has been subjected to a number of criticisms.... Even if they are fully justified, the criticisms of themselves do not automatically exclude self-regulation or a form of self-regulation in the future. In other words, it does not follow that we should jump from the present system to government regulation or regulation by a government appointed body which would give ultimate power to government. I hasten to add that I will be equally unenthusiastic about regulatory control in the hands of the judiciary....

⁸⁵ *MGN Limited v. The United Kingdom* (Application no. 39401/04), 18 January 2011

⁸⁶ The Rt Hon the Lord Judge, Lord Chief Justice of England and Wales, 13th Annual Justice Lecture, *Press Regulation*, 19 October 2011

"We must remember, that whatever lies ahead, the ordinary law of the land will continue. Crime will be crime. Injunctive relief where appropriate, with alleged breaches of any Code should be available to be deployed in argument in support of the application. Contempt of court powers will remain. So will liability to damage for breach of confidence and defamation.

"May I offer just a few thoughts very brief on how the PCC might be strengthened. What should be its new powers? Perhaps the first question is whether it should continue to be called the PCC. Is the brand's name too damaged? I shall call it an improved PCC, by which I mean a more powerful body. It is immediately attractive to suggest all sorts of controlling and disciplinary powers being vested in the new body – that it must not be a toothless tiger. But we need to be careful. There is no point in a toothless tiger, but the concept of giving what would in effect be censorship and licensing powers over a constituent part of the press to a body vested with responsibilities for the whole of the press should set alarm bells ringing. And the problems would be aggravated by the fact that in a self regulatory body, at least some of the members will be editors of rival competing newspapers, and this might then call into question the fairness of any such adjudicating system. Should the body have power to prevent publication, or should its role be limited to remedies for publication outwith the Code?

"The first responsibility of the new PCC would be, of course, to continue the conciliatory/mediation work which is so successfully carried now. But consideration would have to be given to whether it would be vested with power to make express findings that the code then current had been broken, and if so to direct the terms of any apology or appropriate article in the offending newspaper, and if the power is granted, to make an order for compensation. Two further points. The new PCC – that is the new body currently in my contemplation in any new system of self-regulation – must be all inclusive. You might perhaps be willing to discount a news sheet circulated to about 25 people, but any national or regional paper would have to be included. In short any new PCC would require to have whatever authority is given to it over the entire newspaper industry, not on a self-selecting number of newspapers.

"The final point for mention ... is the issue of the appointment of the membership of the new regulatory body. I suggest that the sensible approach would be to avoid all government involvement in the process. The choice of members and their removal should similarly be independent of government. Again the structures would arise for discussion. There are a very large number of bodies operating in the public interest which are independent of government. One example is the Bar Standards Board. Another is the Judicial Appointments Commission. It is, of course essential to the way in which any of this may work that the membership should include a significant number of editors, and/or representatives of the newspaper industry as well as what I shall describe as 'civilians'. All I am saying is that structures like these are not beyond the realm of achievement."

97. The PCC's present remedy for breaches of the privacy provisions of the Editors' Code is limited to the power to require the publication of a critical ruling "with due prominence". The

PCC says this “is a serious outcome for any editor and puts down a marker for future press behaviour.” The PCC does not have the power to fine newspapers or order the payment of damages, nor does it have the power to prevent publication.⁸⁷

98. The courts have indicated, in the context of section 12 of the Human Rights Act, that a newspaper which flouts the Press Complaints Commission’s Code on privacy is likely to find that its claim to free speech is outweighed by privacy considerations. That important incentive should, in the author’s view, be strengthened in libel cases by including in the forthcoming Defamation Bill, a provision making compliance with a professional code a relevant factor in determining whether a given publication is in the public interest.
99. It would also be desirable for the PCC to be able to make direct findings of breaches of the Code and to direct the offending publisher to display the finding prominently. However, a power to require an apology would not be sensible. An apology must be sincere rather than coerced.
100. It would be very problematic to introduce a power to fine or to award damages, for two main reasons. First, the existence of such a power would be likely to deter publishers who might otherwise be willing to become bound by the PCC’s Code and the exercise of the PCC’s powers. Secondly, a power to fine or award damages would involve the determination of civil rights and obligations within the meaning of Article 6(1) of the European Convention on Human Rights, and would have to be exercised or reviewed by a body satisfying the Article 6 (1) requirement of being an independent and impartial court or tribunal.

d. Should the PCC be able to initiate its own investigations on behalf of someone whose privacy may have been infringed by something published in a newspaper or magazine in the UK?

101. If the power to investigate is understood in this context to mean a power to engage with the publisher to resolve or examine a complaint, then the existence of such a power is necessary for the effective functioning of the PCC. But the PCC’s powers should not be extended to those given to the police service, including powers of search and seizure. Police powers are subject to statutory and common law safeguards. It would be incompatible with a system of voluntary self-regulation to entrust the PCC with coercive powers.
102. The PCC currently has the power to conduct an investigation only where there is a complaint. The power is exercised by requesting a response from the editor. In the author’s opinion, the PCC should have the power to initiate its own inquiries on behalf of someone whose privacy may have been infringed. It should also have the power to inquire and report on compliance with its Code generally, and not only in individual cases.

e. Should the PCC have the power to consider the balance between an individual’s privacy and freedom of expression prior to the publication of material – or should this power remain with the Courts?

⁸⁷ PCC guidance, Making a Complaint, available at: <http://www.pcc.org.uk/complaints/makingacomplaint.html>

103. The European Court of Human Rights has ruled that damages are a sufficient remedy for breaches of privacy,⁸⁸ and that a pre-notification regime is not required to protect the right to privacy even where it is clear that the publication in question had no public interest.⁸⁹
104. If an assessment undertaken prior to the publication of material involved a power to restrain publication, it would amount to a prior restraint on freedom of expression and communication, and a determination of the publisher's civil right to freedom of expression. It would have to be exercised by a body satisfying the Article 6 requirement of being an independent and impartial court or tribunal. Even if that were feasible in practice, it would replicate the function of the ordinary courts in granting injunctive relief. In principle the power should remain with the courts, and any pre-publication role for the PCC should be purely advisory.
- f. Is there sufficient awareness in the general public of the powers and responsibilities of the PCC in the context of privacy and injunctions?*
105. It appears that, of the over 3,000 complaints to the PCC since 1 January 2011, 61 have been privacy complaints. Of those, 56 cases were resolved without the need for adjudication. Of the five adjudicated cases, three were upheld.⁹⁰
106. In 2010 there were over 6,000 complaints to the PCC of which 534 were resolved, 18 upheld on adjudication and 22 not upheld upon adjudication. Of these over 6,000 complaints, 389 were privacy complaints and, of those, six were upheld on adjudication and eight were not upheld on adjudication.⁹¹
107. It is a matter of speculation whether these statistics indicate a lack of sufficient general awareness of the PCC's role in relation to privacy concerns, or an awareness that the PCC lacks the power to provide effective remedies.

OFCOM

g. Do the guidelines in Section 8 of the Ofcom Broadcasting Code correctly address the balance between the individual's right to privacy and freedom of expression?

108. In the author's opinion, the answer is in the affirmative.
109. The guidelines set out at Section 8 of the Broadcasting Code are based on the "warranted" principle:

⁸⁸ *Von Hannover v Germany*, Application 59320/00, (2005) 40 EHRR 1.

⁸⁹ *Mosley v United Kingdom*, Application no. 48009/08, 10 May 2011. A request by Mr Mosley to refer the case to the Grand Chamber has since been refused.

⁹⁰ An analysis of the PCC 'Cases' site indicates that there were 3,239 complaints between 1 January 2011 and 23 September 2011. Of those 388 were resolved without an adjudication, 15 were upheld on adjudication and eight were not upheld on adjudication, see <http://www.pcc.org.uk/cases/index.html>

⁹¹ Further analysis and aggregation of the PCC's monthly statistics for 2010 show that there were 6,122 complaints overall: <http://www.pcc.org.uk/cases/monthlysummaries.html>

*"[A]ny infringement of privacy in programmes, or in connection with obtaining material included in programmes, must be warranted."*⁹²

110. The Broadcasting Code defines the meaning of "warranted" as follows:

"In this section "warranted" has a particular meaning. It means that where broadcasters wish to justify an infringement of privacy as warranted, they should be able to demonstrate why in the particular circumstances of the case, it is warranted. If the reason is that it is in the public interest, then the broadcaster should be able to demonstrate that the public interest outweighs the right to privacy. Examples of public interest would include revealing or detecting crime, protecting public health or safety, exposing misleading claims made by individuals or organisations or disclosing incompetence that affects the public."

111. The Broadcasting Code correctly recognises, in accordance with Convention criteria, that individuals can have a legitimate expectation of privacy even in public places, and it requires broadcasters to obtain the informed consent of individuals or organisations before their privacy is infringed by the making or the broadcast of a programme.

112. The Broadcasting Code defines key terms, such as "vulnerable people", and sections on how broadcasters should act in particular situations, for example, how broadcasters should treat individuals who are suffering or in distress. It is more detailed than the Editors' Code, while allowing broadcasters to justify alleged infringements of privacy. The Broadcasting Code encourages broadcasters to carry out their own balancing of privacy and freedom of expression.

113. Under the terms of their broadcast licences, broadcasters must abide by the provisions of the Broadcasting Code. It is rare that Ofcom penalises infringements of the right to personal privacy with anything more than publication of its adjudication in the Broadcast Bulletin, but Ofcom has the power to direct the broadcaster to broadcast a summary of its findings in exceptional cases, and, in very exceptional and serious cases, Ofcom may consider imposing a statutory sanction such as a fine upon the broadcaster.⁹³

114. Ofcom's Procedures for the consideration and adjudication of Fairness & Privacy complaints⁹⁴ state that complaints must first be made through the broadcaster's own complaints procedure. Only if the complainant is not satisfied with the response is Ofcom's complaints procedure brought into play.

115. Ofcom's published decisions show a sophisticated analysis of whether or not the right to privacy is engaged, whether it has been infringed and then whether or not the infringement was justified and proportionate. This is very similar to the analysis conducted by the courts.

⁹² Rule 8.1 Broadcasting Code

⁹³ Ofcom, Consumers, Advice & Complaints, TV and Radio, A specific programme complaint, A specific programme: <https://stakeholders.ofcom.org.uk/tell-us/specific-programme-advice-3>

⁹⁴ Procedures for the consideration and adjudication of Fairness & Privacy complaints, 1 June 2011: <http://stakeholders.ofcom.org.uk/broadcasting/guidance/complaints-sanctions/fairness/>

The Section 8 regime correctly addresses the balance between privacy and freedom of expression.

h. How effective has Ofcom been in dealing with breaches of the Ofcom Broadcasting Code in relation to breaches of privacy?

i. Is there a case that the rules on infringement of privacy should be applied equally across all media content?

116. The 'rules' (perhaps better described as principles) on infringement of privacy do apply equally across all media content by virtue of the Human Rights Act and the obligations imposed upon public authorities (including the courts, Ofcom and (indirectly) the PCC) by the Convention. However, the way in which those principles are applied differs as between the electronic and printing media.
117. To apply a uniform system of regulation to the electronic and printing media would involve a failure to recognise and respect the differences between them. The electronic media, unlike the print media, are licensed under statutory regimes derived from EU as well as domestic legislation.
118. Freedom of the press is an ancient civil liberty based on the principle of an unlicensed press. That principle has been upheld in this country ever since the abolition of the Court of Star Chamber in 1641. The electronic media require a system of licensing and regulation. To treat the print and electronic media alike by imposing a common statutory regime upon them would be oppressive and in violation of the freedom of the press.