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Press standards, privacy and libel

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The Culture, Media and Sport Committee

The Culture, Media and Sport Committee is appointed by the House of Commons to examine the expenditure, administration, and policy of the Department for Culture, Media and Sport and its associated public bodies.

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Summary

The UK is a country which values the freedom of its press to report and comment on events, public figures and institutions, to be critical of them and to be a platform for dissenting views. These are important freedoms which are not available in all countries. In return, the public expects that members of the UK press will uphold certain standards, be mindful of the rights of those who are written about, and, as far as possible, be accurate in what they report.

The current system of self-regulation of the press, under the auspices of the Press Complaints Commission (PCC), came into force in 1991, following the Calcutt inquiry of 1990. Since then there have been times when events have led the public and politicians to question the integrity of the methods used by the press, and the competence of the PCC as an industry regulator.

Our inquiry was primarily prompted by the persistent libelling by the UK press of the McCann family and others, following the disappearance of their daughter Madeleine in Portugal in May 2007, the limited intervention of the PCC and its failure to launch an inquiry into the industry's failings in the case. We also sought to address concerns that the operation of libel laws in England and Wales and the impact of costs were stifling press freedom in the UK, as well as considering the balance between personal privacy and press freedom.

This Report is the product of the longest, most complex and wide-ranging inquiry this Committee has undertaken. Our aim has been to arrive at recommendations that, if implemented, would help to restore the delicate balances associated with the freedom of the press. Individual proposals we make will have their critics – that is inevitable – but we are convinced that, taken together, our recommendations represent a constructive way forward for a free and healthy UK press in the years to come.

Privacy and breach of confidence

In this section we examine the case brought by Max Mosley against the *News of the World*, as well as considering other recent case law and the impact of injunctions and super-injunctions on freedom of speech. We also comment on the operation of the Human Rights Act, which incorporates the European Convention on Human Rights in UK law. The European Convention includes both the right to freedom of expression and the right to a private and family life, rights that must be balanced against each other.

That being the case, we make a number of recommendations designed to ensure that the balance between the two Convention rights is appropriate. We do not consider however that it would be right, at this time, to legislate on privacy. We rule out mandatory pre-notification. We recommend however that the PCC should amend its Code to include a requirement that journalists should normally notify the subject of their articles prior to publication, subject to a 'public interest' test, and should provide guidance for journalists and editors on pre-notifying in the Editors' Codebook. We also recommend that failure to pre-notify should be an aggravating factor in assessing damages. To balance this, we recommend the development of a fast track procedure for a final decision where an interim injunction banning publication of a story has been granted, or where a court refusal has been appealed.

We comment on the recent events surrounding the imposition of a 'super-injunction' obtained by Trafigura, a company trading in oil, base metals and other items, preventing the publication of a report on alleged dumping of toxic waste in the Ivory Coast, and subsequent debate over

reporting of Parliamentary Questions relating to that report. We express our concern at the confusion over the level of protection provided to the reporting of Parliamentary proceedings by the Parliamentary Papers Act 1840 and recommend that these important elements of freedom of speech should be put beyond doubt through the enactment of a modern statute.

We also recommend that the Lord Chancellor and the Lord Chief Justice act on concerns regarding injunctions more generally in cases of both breach of privacy and confidence.

Libel and press freedom

In this section we focus on the operation of libel law in England and Wales and its impact on press reporting. We consider important recent cases and developments since the 1996 Defamation Act, including ‘responsible journalism’, the government’s consultation on the issue of ‘multiple publication’ in the internet age and legislation to abolish criminal libel.

We consider the fairness of the ‘burden of proof’ being on the defendant, but in relation to individuals conclude that in order to satisfy natural justice the defendant should still be required to provide the proof of his allegations. However, with regard to corporations and defamation, we recommend that the Government should consider reversing the general burden of proof.

We discuss the damage ‘libel tourists’ have caused to the UK’s reputation as a country which protects free speech and freedom of expression, especially in the United States, where a number of states have enacted legislation to protect their citizens from the enforcement of libel settlements made in foreign jurisdictions. We also comment on bills currently before the US Congress which are designed to afford similar protections. We conclude that it is a humiliation for our system that the US legislators should feel the need to take steps to protect freedom of speech from what are seen as unreasonable incursions by our courts. We note that neither the Lord Chancellor nor his officials have sought to discuss the matter with their US counterparts, and urge that such discussions should take place as soon as possible. We further suggest that, in cases where the UK is not the primary domicile or place of business of the claimant or defendant, the claimant should face additional hurdles before being allowed to bring a case.

We consider whether the statute of limitations and the multiple publication rule are fit for purpose in the internet age, and recommend that the Government should introduce a time limitation of one year for defamation cases relating to publication on the internet, subject to the test of when the claimant could reasonably have been aware of the article’s existence.

We welcome the Lord Chancellor’s establishment of a ‘Working Group on Libel’ to consider reform of the defamation laws. We also urge the Government to consult further, in particular over placing a broadened defence of ‘responsible journalism’ on a statutory footing.

Costs

Throughout our inquiry we have been mindful of the over-arching concerns about the costs of mounting and defending libel actions, and the ‘chilling effect’ this may have on press freedom. The evidence we have heard leaves us in no doubt that there are problems which urgently need to be addressed in order to enable defamation litigation costs to be controlled more effectively. We find the suggestion that the problem confronting defendants, including media defendants, who wish to control their costs can be solved by settling cases more promptly to be an extraordinary one. If a defendant is in the right, he should not be forced into a settlement which entails him sacrificing justice on the grounds of cost.

All the evidence which we have received points to the fact that the vast majority of cases brought under a Conditional Fee Agreement (CFA) are won. We therefore see no justification for lawyers to continue to demand 100% success fees which are chargeable to the losing party. We recommend that the recovery of success fees from the losing party should be limited to no more than 10%, leaving the balance to be agreed between solicitor and client. We further recommend that the Government should make After the Event Insurance premiums irrecoverable.

Press standards

In this section we discuss press standards and the level of public confidence in the press, which we explore through two recent cases – Madeleine McCann’s disappearance; and the suicides in and around Bridgend in 2008. We also consider the impact of the *Guardian*’s revelations regarding phone-hacking and blagging – the practice of obtaining information through deception.

With regard to the McCanns we conclude that competitive and commercial factors led to an inexcusable lowering of standards in the gathering and publishing of “news” about the case. While the lack of official information clearly made reporting more difficult, we do not accept that it provided an excuse or justification for inaccurate, defamatory reporting. We conclude that in this case self-regulation signally failed.

We reopened oral evidence to consider the allegations contained in the *Guardian* in July 2009 that the *News of the World*’s parent company had paid over £1m in damages and costs to settle three civil actions relating to phone-hacking. We took these claims very seriously as they cast doubt on assurances we had been given during our 2007 inquiry *Privacy and media intrusion* that the phone-hacking at *News of the World* had been limited to one ‘rogue reporter’, Clive Goodman.

We find that it is likely that the number of victims of illegal phone-hacking will never be known, not least because of the silence of Clive Goodman and Glenn Mulcaire, their confidentiality settlements with the *News of the World* and the ‘collective amnesia’ at the newspaper group which we encountered during our inquiry. It is certainly more than the ‘handful’, however, cited by both the newspaper and the police.

There is no doubt that there were a significant number of people whose voice messages were intercepted, most of whom would have been of little interest to Clive Goodman as the paper’s royal editor. The evidence, we find, makes it inconceivable that no-one else at the *News of the World*, bar Mr Goodman, was aware of the activity. We have, however, not seen any evidence that the then Editor, Andy Coulson, knew, but consider he was right to resign. We find, however, that the newspaper group did not carry out a full and rigorous inquiry, as it assured us and the Press Complaints Commission it had. The circumstances of pay-offs made to Messrs Goodman and Mulcaire, as well as the civil settlements with Gordon Taylor and others, also invite the conclusion that silence was effectively bought.

The readiness of all concerned – News International, the police and the PCC – to leave Mr Goodman as the sole scapegoat without carrying out full investigations is striking. The verdict of the PCC’s latest inquiry, announced last November, we consider to be simplistic, surprising and a further failure of self-regulation.

In seeking to discover precisely who knew what among the staff of the *News of the World* we have questioned a number of present and former executives of News International.

Throughout we have repeatedly encountered an unwillingness to provide the detailed information that we sought, claims of ignorance or lack of recall, and deliberate obfuscation. We strongly condemn this behaviour which reinforces the widely held impression that the press generally regard themselves as unaccountable and that News International in particular has sought to conceal the truth about what really occurred.

Self-regulation of the press

Finally we consider the future viability of self-regulation of the press, and set out a considered programme of reform aimed at making regulation of the press in the UK more effective.

We recommend that the PCC should be renamed the Press Complaints and Standards Commission, reflecting its role as a regulator, not just a complaints handling service, and that it should appoint a deputy director for standards. We further recommend that the PCC should have the power to fine its members where it believes that the departure from the Code of Practice is serious enough to warrant a financial penalty, including, in the most serious of cases, suspending the printing of the offending publication for one issue.

In the future the PCC must also be more proactive in its work. If there are reasonable grounds to believe that coverage of a case means that serial breaches of the Code are being made or are likely to take place, then the PCC should not wait until a complaint is received before it investigates and makes contact with the parties involved. We suggest that a convenient test as to whether a proactive inquiry is appropriate might be that three lay members of the Commission had indicated to the Chairman that, in their view, a proactive inquiry would be in the public interest.

We suggest that the membership of the PCC should be rebalanced to give the lay members a two thirds majority, making it absolutely clear that the PCC is not overly influenced by the press, that there should be lay members of the Code Committee and that one of those lay members should be the Code Committee's Chairman.

We recognise that there must be some incentive for newspapers to subscribe to the self-regulatory system, and suggest that the Government should consider whether proposals to reduce the cost burden in defamation cases should only be made available to those publications which provide the public with an alternative route of redress through their membership of the PCC.

1 Introduction

1. A free press is a vital component of a healthy democracy. Our history shows, and current experience in many other countries confirms, that this freedom must not be taken for granted. It cannot be achieved without effort and sacrifice, nor preserved without vigilance. Long experience has also taught us that the freedom of the press has to be held in balance with other freedoms and rights, such as the right of citizens to privacy and to protection from libel. Moreover, the public has a right to expect high ethical standards in the press, so for more than half a century we have had press self-regulation in various forms. Freedom of the press is therefore a complex matter. Difficult balances must be struck, and since the cultural, legal, economic and technological context in which the press operates changes constantly, the balances change too. There are no once-and-for-all solutions; every age must maintain the balances as best it can.

2. This inquiry was prompted by concerns expressed by many, both inside and outside the industry, that the necessary balance was being lost. On the one hand, it was argued that the freedom to report was being unjustifiably curtailed, and on the other that press self-regulation was failing and standards were falling. These concerns related to a number of recent events and developments. Chief among the events were:

- the successful prosecution of the *News of the World* by Max Mosley for breach of privacy;
- the coverage of the disappearance of Madeleine McCann and its aftermath;
- the critical United Nations Human Rights Committee's report on British libel laws and 'libel tourism';¹
- the reporting of suicides in Bridgend in 2007 and 2008;
- Tesco's libel action against the *Guardian* in April 2008.

Longer-term developments which were seen to have placed new stresses on the press and press freedom include:

- the rise of the internet;
- the passage of the Human Rights Act, which has had a notable impact in privacy matters;
- the growth in the use of conditional fee agreements (so-called 'no-win, no-fee arrangements') in libel proceedings;
- moves in the United States to legislate to protect US citizens from the enforcement of libel judgments handed down in British courts;
- the long-term decline in newspaper sales and the impact of recession.

¹ United Nations Human Rights Committee, Sixth Periodic Report of the United Kingdom on the implementation of the International Covenant on Civil and Political Rights (ICCPR), July 2008

3. Scrutiny of such matters has been a regular feature of the work of this Committee and its predecessor Committee. In 2003, our predecessors published the report *Privacy and media intrusion*² (discussed below at paragraph 58), and as recently as 2007 we published *Self-Regulation of the press*³ (see paragraphs 548 and 549). In the light of the events and developments listed above, and the concerns they aroused, we felt the time was right for a wide-ranging inquiry embracing privacy, libel and standards in the press. Examining all these issues at once would give us an overview of the various balances between freedoms and rights that we could not achieve through piecemeal investigation.

4. We therefore launched our inquiry on 18 November 2008 with the following terms of reference:

- To establish why the self-regulatory regime was not used in the McCann case, why the Press Complaints Commission had not invoked its own inquiry and what changes news organisations themselves have made in the light of the case;
- Whether the successful action against the *Daily Express* and others for libel in the McCann case indicates a serious weakness with the self-regulatory regime;
- The interaction between the operation and effect of UK libel laws and press reporting;
- The impact of conditional fee agreements on press freedom, and whether self-regulation needs to be toughened to make it more attractive to those seeking redress;
- The observance and enforcement of contempt of court laws with respect to press reporting of investigations and trials, particularly given the expansion of the internet;
- What effect the European Convention on Human Rights has had on the courts' views on the right to privacy as against press freedom;
- Whether financial penalties for libel or invasion of privacy, applied either by the courts or by a self-regulatory body, might be exemplary rather than compensatory;
- Whether, in the light of recent court rulings, the balance between press freedom and personal privacy is the right one.

5. We received more than 170 written submissions from journalists, editors, lawyers and non-governmental organisations, as well as individuals who had experienced media intrusion and/or litigation. Between 24 February and 2 June 2009 we held ten public oral evidence sessions and one in private. We visited the Press Complaints Commission on 4 March and 13 October 2009, and the offices of the *Sunday Mirror* on 11 November 2009. We also took the opportunity to meet the Catalonian Press Complaints Commission and the editor and staff of *La Vanguardia* newspaper, during a visit to Barcelona which primarily focused on the Olympics, in February 2009, and travelled to America to hold

2 Culture, Media and Sport Select Committee, Fifth Report of Session 2002–03, *Privacy and media intrusion*, HC 458

3 Culture, Media and Sport Select Committee, Seventh Report of Session 2006–07, *Self-regulation of the press*, HC 375

meetings with lawyers, legislators, press representatives, authors and members of the UN Committee on Human Rights in Washington DC, Albany and New York from 29 March to 3 April 2009.

6. On 8 July 2009, after we had concluded oral evidence sessions, the *Guardian* reported that the publisher of the *News of the World*, News Group Newspapers, had paid £700,000 to settle legal actions brought by three individuals who alleged that they had been the victims of unlawful telephone message interceptions by the newspaper. The *Guardian* suggested that others, including Government ministers, may also have had their voicemail messages accessed.⁴ Given the relevance of these allegations to our investigation of press standards, and their relation to our previous inquiry, we reopened oral evidence, holding a session on 14 July 2009 with the *Guardian* and the PCC and subsequently receiving oral and written evidence from representatives of the *News of the World*, the Metropolitan Police Service and others.

7. Each time, indeed, we sought to draw this enquiry to a close, fresh developments occurred which warranted examination and inclusion. In October, as Parliament reconvened, the use by an international oil trading company Trafigura of a so-called ‘super-injunction’ to suppress coverage of a toxic waste dumping scandal raised constitutional questions about the media’s right, unfettered, to report questions in Parliament. Further controversial libel actions also occurred, on which we were sent written evidence. In November 2009, the PCC issued its own conclusions – based on evidence given to our inquiry – about the further phone-hacking revelations. In January 2010, Lord Justice Jackson’s review of the costs of civil litigation concluded with the publication of his final report and the Ministry of Justice issued a specific consultation with recommended changes to conditional fee agreements (CFAs).

8. We would like to thank all those who wrote submissions, gave evidence and held meetings with us. We would also like to thank our specialist advisers for this inquiry, Professor Brian Cathcart of Kingston University for his specialist media knowledge and Sara John for her help on legal matters.⁵

⁴ “Revealed: Murdoch’s £1m bill for hiding dirty tricks” – the *Guardian*, 8 July 2009

⁵ For information on the interests of the Committee’s advisers see the Committee’s Formal Minutes 2009–10, www.parliament.uk/cmscom

2 Privacy and breach of confidence

Introduction

9. Until 2000, private information could only be protected under English law by recourse to legal remedies such as breach of confidence (see paragraphs 103 to 113 below), contempt of court, defamation, malicious falsehood, trespass and nuisance.

10. On several occasions in the past half-century, Parliament considered introducing a general law of privacy. Bills were introduced in 1961⁶ and 1969,⁷ but neither went beyond a second reading. In 1989, after two private members' bills concerning privacy completed the House of Commons Committee stage, the Government of the day asked Sir David Calcutt QC to conduct an inquiry. Sir David's report, *Privacy & Related Matters*, recommended that the media should set up a complaints body but warned that, if this did not prove effective, a statutory tribunal should take its place.⁸ In 1992, Sir David reviewed the work of the new Press Complaints Commission and concluded that it had failed and a privacy law was required. His proposal was not taken up.⁹ Instead, in 1995 the then Secretary of State for National Heritage, Virginia Bottomley MP, announced that the Government would focus on improving self-regulation.¹⁰ Important change came when Parliament passed the Human Rights Act 1998, which came into force in 2000 and, in effect, incorporated the European Convention on Human Rights (ECHR) into UK law.¹¹

11. Before we pass on to considering the impact of the Human Rights Act, it should be noted that the approach to privacy law in the UK both before and since 2000 stands in contrast to the approach elsewhere in Europe. In France, for example, the right to privacy is held to be implicit in the constitution,¹² and the French Civil Code has included a specific right to privacy since 1970.¹³ Rights to control over personal information have been strictly interpreted by the French courts.¹⁴ In Germany, meanwhile, the Federal Constitutional Court has recognised the citizen's right to personal respect, including a right to control one's own image in private life. A German court held that the publication of photographs of Princess Caroline of Monaco with her children breached her constitutional rights.¹⁵ In Italy recently, too, Prime Minister Silvio Berlusconi has had recourse to privacy laws over the use by Italian and Spanish publications of photographs taken at private parties he held, which were allegedly attended by escort girls.¹⁶

6 Right of Privacy Bill [Bill 35 (1960–61)]

7 Right of Privacy Bill [Bill 25 (1969–70)]

8 Report of the Committee into Privacy and Related Matters, Cm 1102

9 Review of Press Regulation, Cm 2135

10 Cm 2918

11 Human Rights Act 1998

12 Décision 94–352 du Conseil Constitutionnel, 18 January 1995.

13 Article 9 The Civil Code

14 See generally J Bell, S Boyron and S Whittaker, *Principles of French Law* (OUP, 1998), pp 354–391

15 German Federal Constitutional Court, 1999

16 "Berlusconi fury over naked photos", *BBC news online*, 5 June 2009 news.bbc.co.uk

12. Privacy laws tend to reflect the media cultures in which they operate, and, as we were reminded during our visit to Spain, these can be very different from the UK's. Staff at *La Vanguardia* told us that their newspaper would publish a story about a footballer having an extra-marital affair, but not a story about a politician having an affair. They explained that this was because the footballer's professional performance might be affected while the politician's would not, and also because readers would not be interested in a politician's affairs. The same news values do not apply in Britain.

The Human Rights Act

13. In passing the Human Rights Act, Parliament did not introduce specific rights for individuals into UK law, but required public authorities, including courts and tribunals, to act in accordance with the rights set out in the European Convention on Human Rights of 1950.¹⁷ Parliamentary sovereignty over Convention rights was retained, since public authorities are protected if an action contravening Convention rights is giving effect to, or trying to give effect to, primary legislation.¹⁸

14. The Convention guarantees to everyone a right to privacy and a family life through Article 8, and the right to freedom of expression through Article 10.

15. Article 8 states:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

16. Article 10 states:

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or the rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

17. No one Convention right has priority over another, so when a conflict arises between the Convention rights of the parties in a case, the courts are required to carry out a balancing exercise.

¹⁷ Human Rights Act 1998, Section 6 (1)

¹⁸ *Ibid.*, Section 6 (2)

18. The balance was explored by the courts, notably, in the case of *Campbell v Mirror Group Newspapers* which was decided in 2004.¹⁹ The model Naomi Campbell was photographed leaving a Narcotics Anonymous meeting. The *Daily Mirror* published the photographs together with (inaccurate) details of Ms Campbell's treatment and history of drug addiction. In the subsequent court case, it was accepted by both sides that Ms Campbell's repeated 'public lies' that she did not have a drug addiction justified reporting evidence to the contrary. Article 8, however, was held to apply to the details of her treatment, as she had a 'reasonable expectation' that these would remain private.

19. The balance was further explored in *Douglas v Hello! Ltd. (No. 3)* from 2005, in which the House of Lords held that the actors Catherine Zeta-Jones and Michael Douglas had a right to protect private information, specifically photographs of their wedding. In *His Royal Highness the Prince of Wales v Associated Newspapers Ltd* in 2006,²⁰ the Court of Appeal found that Article 8 covered a travel journal, written by the Prince of Wales, which had a reasonably wide circulation. The Court rejected the newspaper group's argument that there was a public interest in publishing comments contained in the diaries on the Chinese politicians and officials at the handover dinner in Hong Kong in 1997.

20. Judges have continued to stress the importance of Article 10. In his judgment in *Jameel v Wall Street Journal* in 2006,²¹ Lord Bingham commented:

"The central importance of this Article in the Convention regime is clear beyond question [...]. Freedom to publish free of unjustifiable restraint must indeed be recognised as a distinguishing feature of the sort of society which the Convention seeks to promote."²²

Section 12 of the Act

21. The potential difficulties in balancing the right to privacy and the right to freedom of speech were apparent at the time the Human Rights Bill was before Parliament, and the media and the judiciary both raised concerns about them. The then Lord Chief Justice, Lord Bingham, said during the passage of the Bill:

"Discussion of the new Bill so far would suggest, I think rightly, that one of the most difficult and sensitive areas of judgment will involve reconciliation of the right of privacy guaranteed by Article 8 with the right of free expression guaranteed by Article 10. While the law up to now afforded some protection to privacy (in actions for breach of confidence, trespass, nuisance, the new tort of harassment, defamation, malicious falsehood and under the data protection legislation) this protection has been patchy and inadequate. But it seems very likely that difficult questions will arise on where the right to privacy ends and the right to free expression begins. The media are understandably and properly concerned that the conduct of valuable investigative journalism may be hampered or even rendered impossible. It is very

19 [2004] UKHL 22

20 [2006] EWCA Civ. 1776

21 [2006] UKHL 44

22 Lord Bingham of Cornhill in *Jameel v Wall Street Journal* [2006] UKHL 44 at 17

difficult, and probably unwise, to offer any opinion in advance about where the line is likely to be drawn.”²³

22. In response to such concerns, Lord Wakeham introduced in the House of Lords an amendment which became section 12 of the Human Rights Act, as follows:

12 (1) This section applies if a court is considering whether to grant any relief which, if granted, might affect the exercise of the Convention right to freedom of expression.

(2) If the person against whom the application for relief is made (“the respondent”) is neither present nor represented, no such relief is to be granted unless the court is satisfied –

- (a) that the applicant has taken all practicable steps to notify the respondent; or
- (b) that there are compelling reasons why the respondent should not be notified.

(3) No such relief is to be granted so as to restrain publication before trial unless the court is satisfied that the applicant is likely to establish that publication should not be allowed.

(4) The court must have particular regard to the importance of the Convention right to freedom of expression and, where the proceedings relate to material which the respondent claims, or which appears to the court, to be journalistic, literary or artistic material (or to conduct connected with such material), to –

- (a) the extent to which –
 - (i) the material has, or is about to, become available to the public; or
 - (ii) it is, or would be, in the public interest for the material to be published;
- (b) any relevant privacy code.

(5) In this section –

- “court” includes a tribunal; and
- “relief” includes any remedy or order (other than in criminal proceedings).

23. The intention was to set a higher bar for the granting of injunctions that might impact on freedom of expression. While someone applying for an interim injunction in any other type of civil case is only required to show that there is a ‘serious issue to be tried’, section 12(3) above requires the claimant to have a case ‘sufficiently favourable to justify [an injunction] in the circumstances of the case’.²⁴ This has been interpreted by the courts as meaning that claimants must show that they have a better than 50 per cent chance of success if the matter were to come to trial.

24. During the passage of the bill the then Home Secretary, the Rt Hon Jack Straw MP, was confident that this would provide an adequate safeguard to the press: “[section 12 will] send a powerful signal to the United Kingdom courts that they should be at least as circumspect as judgments of the European Court of Human Rights have been about any action that would give the article 8 rights any supremacy over the freedom of expression rights in article 10. I hope and believe that an amendment along those lines will deal satisfactorily with the concerns of the press.”²⁵

²³ Ev 203

²⁴ *Cream Holdings v Bannerjee and Others* [2004] UKHL 44

²⁵ HC Deb 16 February 1998, col 775

25. He also felt that section 12 would benefit the self-regulatory system: “[it] provides an important safeguard by emphasising the right to freedom of expression. Our intention is that that should underline the consequent need to preserve self-regulation. That effect is reinforced by highlighting in the amendment the significance of any relevant privacy code, which plainly includes the code operated by the PCC.”²⁶

Section 12 in practice

26. We have heard varying opinions on the impact of section 12, both on the balance between Articles 8 and 10 required by the courts and on the use of injunctions. Marcus Partington of the Media Lawyers Association told us:

“I think section 12 has failed to do what Parliament intended it to do; which was clearly that the courts were to give freedom of expression a greater stress than they actually have. The truth is now, we believe, that it is very easy to get through the Article 8 doorway, but it is much harder to defend something in Article 10 terms.”²⁷

27. Rod Christie-Miller of Schillings solicitors had reservations about the operation of section 12, but acknowledged the difficulties inherent in the decision to grant an injunction:

“Personally, acting for claimants, I think the judges have made individual decisions which I would rather they had not made. I would rather they were more claimant-friendly and the media will say exactly the opposite, that they would rather the judges apply this in a more defendant friendly manner, but the judges are applying an intense focus on the specific facts and are deciding whether or not something is likely to be injuncted at a trial or not.”²⁸

28. In written evidence to us Professor Julian Petley, of the Campaign for Press and Broadcasting Freedom, commented that “the ECHR has had a salutary effect in requiring the courts to balance competing claims to the right to privacy and the right to press freedom, with a clear presumption in favour of the latter.”²⁹ The Lord Chancellor, the Rt Hon Jack Straw MP, agreed, telling us that while “they [the media] have concerns about particular decisions in the courts, not least in the *Mosley* case, section 12, as the Master of the Rolls has spelt out, has worked to their advantage without any question.”³⁰

29. In oral evidence to us, the then Master of the Rolls explained the difficulties facing judges making decisions on interim injunctions:

“section 12 should operate to give judges great cause for concern before granting it, even late at night on a Saturday night. It is quite true that, across the board, generally, for those of us who have been on duty late at night on a Saturday night when you have been given some terrible story, in most cases the sensible thing to do is to grant

26 HC Deb 2 July 1998, col 541

27 Q 28

28 Q 105

29 Ev 399

30 Q 976

the injunction, to hold the ring until Monday, because, mostly, the balance of convenience or the balance of justice is to say, ‘Let’s decide that now, and then the thing can be thought out and decided on a Monday.’³¹

30. We have been told, however, that appeals against the refusal to grant or for the lifting of interim injunctions may lead to lengthy delays and enormous costs. In May 2009, Ian Hislop, editor of *Private Eye*, told us about a case in which he was involved:

“We attempted to run a story in January [2009] and we still have not been able to run it. The journalist involved put it to the person involved, which was an error; there was an immediate injunction; we won the case; they have appealed; we are still in the Appeal Court. Essentially it is censorship by judicial process because it takes so long and it costs so much.”³²

31. The case involved Michael Napier, a former president of the Law Society, and the refusal by Mr Justice Eady to grant an injunction, on grounds of confidentiality, about the outcome of professional complaints made against Mr Napier and his firm. The Court of Appeal subsequently refused to overturn the ruling, following which Mr Napier resigned from his position on the Legal Services Board.³³ *Private Eye* estimated that had it lost, the bill for both sides’ costs would have been some £400,000; and had the case gone to the House of Lords, it would have been at risk for £600,000. The magazine said it had originally intended to publish two paragraphs on the issue.

32. We understand that the refusal by a court to grant an injunction does not necessarily mean the defendant can publish straightaway: if the claimant appeals the decision, then the Court of Appeal has to hold the ring, pending the outcome of that appeal. That said, it seems to us wrong that once an interim injunction has been either refused or granted in cases involving the Convention right to freedom of expression a final decision should be unduly delayed. Such delay may give an unfair advantage to the applicant for the injunction as newspapers often rely on the currency of their articles. We recommend that the Ministry of Justice should seek to develop a fast-track appeal system where interim injunctions are concerned, in order to minimise the impact of delay on the media and the costs of a case, while at the same time taking account of the entitlement of the individual claimant seeking the protection of the courts.

33. We have heard concerns from a number of witnesses that interim injunctions are frequently applied for out-of-hours, and are therefore heard by duty judges who may lack specialist knowledge. Ian Hislop told us: “I have to say if you go for an injunction in the middle of the night or on a weekend or a Saturday, you get a judge who does not know a great deal about this sort of thing and they give the injunction.”³⁴

34. Paul Dacre, editor of the *Daily Mail*, commented, in relation to the *News of the World*’s exposé of Max Mosley:

³¹ Q 970

³² Q 866

³³ *Napier v Pressdram Ltd.* [2009] EWCA Civ 443 Law Gazette, “Michael Napier steps down from the Legal Services Board”, 28 May 2009

³⁴ Q 866

"If it had been a Saturday morning you would have had a part-time judge on who would not be expert in defamation or privacy. Almost certainly that judge would have granted an injunction. Almost certainly it would have got bogged down in the long grass and taken several weeks."³⁵

35. Peter Hill, editor of the *Daily Express*, had similar concerns: "I can assure you that injunctions are granted on very flimsy grounds often, not always, but by judges who are not necessarily highly qualified in that area."³⁶

36. A further concern on which we have received evidence is the apparently growing practice of widely-drawn injunctions being received by newspapers and other publications, binding them, though they have had no opportunity to contest the order. These are unrelated to those regularly granted by the Family Division of the High Court to preserve the anonymity of children and to which the press rarely takes issue. From his experience, Mr Hislop estimated that the courts were issuing new such injunctions about once a fortnight:

"[...] since the beginning of 2008 *Private Eye* has begun to receive a number of privacy injunctions granted at hearings of which it had no prior notice and designed to prevent the media generally from publishing allegations about individuals, usually well-known celebrities. In these instances, *Private Eye* has been sent copies of the court order, although it was not a defendant in the proceedings (orders which are sometimes made against "persons unknown")."³⁷

37. Any meaningful consideration of the impact of Section 12 on the use of interim injunctions requires a basis of statistics relating to the number of injunctions granted or refused and how many claimants are subsequently successful at trial. It seems that these data do not exist. During our inquiry, the then Master of the Rolls was able to give us limited information,³⁸ but Bridget Prentice, Parliamentary Under-Secretary of State for Justice, confirmed in response to a written parliamentary question that the High Court only collects figures on the number of applications for injunctions, not the outcome of those applications.³⁹ **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. We recommend that the Lord Chancellor, Lord Chief Justice and the courts should rectify the serious deficiency in gathering data on injunctions and should commission research on the operation of section 12 as soon as possible.**

38. **We do not overlook the fact that, in *Cream Holdings v Bannerjee*, the House of Lords held that the effect of section 12(3) of the Human Rights Act was that, in general, no injunction should be granted in proceedings where Article 10 was engaged unless the claimant satisfied the court that he or she was more likely than not to succeed at**

³⁵ Q 595

³⁶ Q 736

³⁷ Ev 198

³⁸ Ev 223

³⁹ HC Deb, 15 October 2009, col 1010W

trial. Although there is little statistical evidence available, we are nevertheless concerned at the anecdotal evidence we have received on this matter. Section 12 of the Human Rights Act is fundamental in protecting the freedom of the press. It is essential that this is recognised by the Courts.

39. It is entirely understandable, as news and gossip spread fast, that parties bringing privacy (and confidence) cases may wish to bind the press in its entirety, not just a single enquiring publication. On the face of it, however, this appears contrary to the intention behind section 12, if the press has not been given proper notice and opportunity to contest an injunction. We recommend, therefore, that the Lord Chancellor and Lord Chief Justice also closely review these practices.

Max Mosley and the *News of the World*

40. On 30 March 2008, the *News of the World* revealed that Max Mosley, then president of the Federation Internationale de l'Automobile (FIA), had engaged in a sado-masochistic sex session with a number of women.⁴⁰ The front-page headline declared 'F1 Boss has Sick Nazi Orgy with 5 Hookers', and the report, written by chief reporter Neville Thurlbeck, referred to an 'SS-style medical examination', orders being 'barked' in German and 'mock death camp' uniforms.⁴¹ Mr Mosley is the son of Oswald Mosley, founder of the British Union of Fascists. The story had been obtained with the help of one of the women participants in the session, later known as Woman E, who secretly filmed the proceedings using a camera supplied by the *News of the World* and who was paid £12,000 by the paper.

41. The video was published on the *News of the World* website and was viewed hundreds of thousands of times. It was removed on 31 March 2008 pending an application by Mr Mosley for an injunction against its continued dissemination, which was heard on 4 April 2008. The video was returned to the website after Mr Justice Eady ruled that it had already been so widely viewed that further viewings could make 'very little practical difference'.⁴²

42. On 6 April 2008, the *News of the World* repeated its allegations, under the headline 'My Nazi Orgy with F1 Boss'. Devoting four pages to an account of the sex session by Woman E, it dismissed assertions by Mr Mosley that there had been no Nazi theme, quoting Woman E as stating that Mr Mosley had specifically 'ordered' the theme.⁴³

43. Mr Mosley sued the *News of the World* for breach of confidence and/or unauthorised disclosure of personal information amounting to a breach of his Article 8 right to privacy under the European Convention on Human Rights. Following a full trial in the High Court, the details of which were widely reported in the press, Mr Justice Eady found that the newspaper had breached Mr Mosley's right to privacy. He also noted that Woman E had committed 'an old fashioned breach of confidence', as well as a violation of the Article 8 rights of all those involved.⁴⁴ Mr Mosley asked for exemplary or punitive damages from

40 "F1 Boss has sick Nazi orgy with 5 hookers", *News of the World*, 30 March 2008

41 Para 5 *Mosley v News Group Newspapers* [2008] EWHC 1777 (QB) (*Mosley* (2)).

42 Para 36 *Mosley v News Group Newspapers* [2008] EWHC 687 (QB) (*Mosley* (1)).

43 Para 40 *Mosley* (2)

44 Para 108, *Ibid.*

the *News of the World* essentially as a deterrent, but the court found that not only was there no power to award such damages, but also that there would, in any event, be insufficient grounds to do so.⁴⁵

44. Mr Mosley's victory did not reverse his failure to obtain an injunction restraining publication of the video taken by Woman E, although it is not now on the *News of the World* website. We consider the consistency of this ruling with other cases concerning breach of confidence – including Barclays bank and the *Guardian* in March 2009, and the recent action involving Trafigura, Carter-Ruck solicitors and the *Guardian* again – see paragraphs 107 to 113 – addressing the issues of prior restraint and injunctions.

45. The *News of the World*'s defence in court included the contention that publication of the story had been in the public interest, and that this was a case where Article 10 of the ECHR should trump Article 8. Mr Justice Eady discussed this in his judgment:

“[...] the argument is raised that the Claimant's right to privacy under Article 8 of the Convention is outweighed by a greater public interest in disclosure, such that the Defendant's right to freedom of expression under Article 10 should, in these particular circumstances, be allowed to prevail. The public interest argument has somewhat shifted as matters have developed. The primary case would appear to be that the public has an interest in knowing of the newspaper's and/or Woman E's allegation that the events of 28 March involved Nazi or concentration camp role-play. A somewhat later variation on the theme, perhaps primarily attributable to the Defendant's legal team, is that what took place was at least partly illegal. It was said that the Defendant was committing offences such as assault occasioning actual bodily harm and brothel-keeping.”⁴⁶

46. In oral evidence to us, Tom Crone, legal manager for News Group Newspapers, which includes the *News of the World*, argued that there had been a public interest in publishing because Mr Mosley had a lead role in Formula One racing and was an international spokesman for the UK automobile associations, the AA and the RAC.⁴⁷

47. In his judgment, Mr Justice Eady said that there might have been a public interest in revealing the Nazi theme of the session, if there had been such a theme:

“I have come to the conclusion (although others might disagree) that if it really were the case, as the newspaper alleged, that the Claimant had for entertainment and sexual gratification been ‘mocking the humiliating way the Jews were treated’, or ‘parodying Holocaust horrors’, there could be a public interest in that being revealed at least to those in the FIA to whom he is accountable. He has to deal with many people of all races and religions, and has spoken out against racism in the sport. If he really were behaving in the way I have just described, that would, for many people, call seriously into question his suitability for his FIA role. It would be information which people arguably should have the opportunity to know and evaluate. It is probably right to acknowledge that private fantasies should not in themselves be

⁴⁵ Para 210 Mosley (2)

⁴⁶ Paras 24–25, *Ibid.*

⁴⁷ Q 782

subjected to legal scrutiny by the courts, but when they are acted out that is not necessarily so.”⁴⁸

48. In the absence of any evidence of a Nazi theme, however, the judge concluded that there was no public interest in revealing non-criminal sexual acts, regardless of their ‘unconventional’ nature, and found, as a matter of law, that Mr Mosley had not committed any illegal acts. He also criticised the manner in which the *News of the World*’s reached its decision to link the sex session with Nazism, saying it was not based on rational analysis of the evidence:

“Rather, it was a precipitate conclusion that was reached ‘in the round’, as Mr Thurlbeck put it. The countervailing factors, in particular the absence of any specifically Nazi indicia, were not considered. When Mr Myler was taken at length through dozens of photographs, some of which he had seen prior to publication, he had to admit in the witness box that there were no Nazi indicia and he could, of course, point to nothing which would justify the suggestion of ‘mocking’ concentration camp victims. That conclusion could, and should, have been reached before publication. I consider that this willingness to believe in the Nazi element and the mocking of Holocaust victims was not based on enquiries or analysis consistent with ‘responsible journalism’. Returning to the terminology used by Lord Bingham in *Jameel* [...] the judgment was made in a manner that could be characterised, at least, as ‘casual’ and ‘cavalier’.”⁴⁹

49. In his judgment, Mr Justice Eady considered how the *News of the World* had pursued the story following the publication of its exclusive on 30 March 2008. Mr Thurlbeck, the reporter responsible for both the initial article and the follow-up on 6 April 2008, decided to seek an interview with other women involved, besides Woman E. These women were referred to in court as Women A, B, C and D.

50. On 2 April 2008, Mr Thurlbeck sent an email to Women A and B offering money for an interview. On the following day he emailed again in the following terms:

“I’m just about to send you a series of pictures which will form the basis of our article this week. We want to reveal the identities of the girls involved in the orgy with Max as this is the only follow-up we have to our story. Our preferred story however, would be you speaking to us directly about your dealings with Max. And for that we would be extremely grateful. In return for this, we would grant you full anonymity [sic], pixilate your faces on all photographs and secure a substantial sum of money for you. This puts you firmly in the driving seat and allows you much greater control as well as preserving your anonymities [sic] (your names won’t be used or your pictures).”⁵⁰

48 Para 122 *Mosley* (2)

49 Para 170, *Ibid.*

50 Para 81, *Ibid.*

The judge concluded that this email constituted a ‘clear threat’ to Women A and B that, if they did not co-operate by giving an interview, their identities would be revealed in the *News of the World* on the following Sunday.⁵¹

51. Mr Thurlbeck was cross-examined on this in court, and explained his position thus:

“I’m not pretending this was an easy choice for them [Women A and B], but it was the only choice. I was a journalist with two stories, one of which I got from my own investigating, and here it was, and the alternative was another story, an interview with them anonymously for which they’d be paid. Those were the choices. I’m not saying it was an easy choice and I’m not saying it was a choice they particularly relished. It was a tough choice but nevertheless they were the only options I could give them. But I thought the second option of talking to me anonymously and for money was a very fair option [...].”⁵²

52. He did not accept that the exchanges could be seen as blackmail:

“I’m offering to give them something. I’m offering to pay them money for an anonymous interview. I’m offering to pay them, not to take anything from them, so in that sense I’m not blackmailing them at all. That thought never crossed my mind. I’m offering them a choice.”⁵³

53. The court concluded: ‘It seems that Mr Thurlbeck genuinely did not see the point. Yet it is elementary that blackmail can be committed by the threat to do something which would not, in itself, be unlawful.’⁵⁴ The editor of the *News of the World*, Colin Myler, when cross-examined about the email exchange, accepted that Mr Thurlbeck’s communications ‘could be interpreted as a threat’ and, while saying he was ‘not so sure’ they amounted to blackmail, could not produce a justification for his reporter’s methods.⁵⁵ Mr Justice Eady, having sought to clarify whether Mr Myler had challenged Mr Thurlbeck over the emails, concluded that Mr Myler’s ‘non-answer’ revealed that: “it would appear that Mr Myler did not consider there was anything at all objectionable about Mr Thurlbeck’s approach to the two women, as he did not query it at any stage. This discloses a remarkable state of affairs.”⁵⁶

54. By the time Mr Myler appeared before us, Mr Mosley had issued proceedings against the *News of the World* for libel in relation to the articles of March and April 2008. Mr Myler was therefore reluctant to comment on these matters. However, a hypothetical question was put to him as to whether it would constitute misbehaviour for a journalist to say to somebody involved in a story that there were two ways of writing it and it was up to them which way it was written. Mr Myler replied: “I think it can be construed as

51 Para 82 *Mosley* (2)

52 Para 87, *Ibid.*

53 Para 87, *Ibid.*

54 Para 87, *Ibid.*

55 Para 85, *Ibid.*

56 Para 86, *Ibid.*

misbehaviour but I think a lot of it depends on exactly what is said. I think that is very important, because two people can have different interpretations of what is meant.”⁵⁷

55. In oral evidence to us Tom Crone denied that Mr Thurlbeck’s behaviour could constitute blackmail, or that Mr Justice Eady considered that it may amount to such.⁵⁸ Having examined the judgment, we cannot agree.

56. A culture in which the threats made to Women A and B could be seen as defensible is to be deplored. The fact that *News of the World* executives still do not fully accept the inappropriateness of what took place is extremely worrying. The ‘choice’ given to the women by Neville Thurlbeck was in fact no choice at all, given the threat of exposure if they did not co-operate.

57. We found the *News of the World* editor’s attempts to justify the Max Mosley story on ‘public interest’ grounds wholly unpersuasive, although we have no doubt the public was interested in it.

Is it time to legislate on privacy?

58. The introduction of the Human Rights Act did not end calls for Parliament to enact legislation on privacy. In June 2003, our predecessor Committee considered the issue and concluded:

“On balance we firmly recommend that the Government reconsider its position and bring forward legislative proposals to clarify the protection that individuals can expect from unwarranted intrusion by anyone—not the press alone—into their private lives. This is necessary fully to satisfy the obligations upon the UK under the European Convention of Human Rights. There should be full and wide consultation but in the end Parliament should be allowed to undertake its proper legislative role.”⁵⁹

59. In its response the Government disagreed, saying:

“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.”⁶⁰

60. We subsequently examined the subject of press intrusion in our 2007 Report *Self-regulation of the press*.⁶¹ We found that the case had not been made for a law of privacy:

57 Q 768

58 Q 788; para 87 *Mosley* (2)

59 Culture, Media and Sport Committee, Fifth Report of Session 2002–03, *Privacy and media intrusion*, HC 458-I, para 111

60 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 2003–04, HC 213, para 2.3

61 Culture, Media and Sport Committee, Seventh Report of Session 2006–07, *Self-regulation of the press*, HC 375

“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. Many people would not want to seek redress through the law, for reasons of cost and risk. In any case, we are not persuaded that there is significant public support for a privacy law.”⁶²

61. The development of a generalised ‘respect for privacy’ by the courts, as required under the Human Rights Act, has inevitably been piecemeal and is likely to remain so for a considerable time given the low number of privacy cases which go to trial. Almost all cases are settled between parties without trial. Only two have been heard in the High Court since January 2008, one of which was Mr Mosley’s and the other was not against a defendant in the media and was settled five days into the trial.⁶³ The low number of substantive privacy cases is not surprising, given the deterrent effect that the prospect of a public trial can have on claimants who are by definition concerned about privacy. Mark Thomson, then of Carter-Ruck, told us: “I have a number of claims where the client would have won, but given that they [the press] published the article, which was deeply embarrassing, they just did not want to go to court and face the full publicity of an action.”⁶⁴

62. The high costs of litigation combined with the legal uncertainty, owing to the small amount of case law, undoubtedly discourages the media from contesting privacy cases. Sean O’Neill of *The Times* told us that in many cases a newspaper lawyer would ask: “We think we would win on public interest, but this privacy law is so uncertain, we don’t know where we are going, and is this the one on which we want to make our stand?”⁶⁵ While critical of the operation of the current law on privacy, media witnesses were divided on the need for legislation on privacy. Many thought that it would do more harm than good. Paul Dacre said: “unequivocally I would not be in favour of a Privacy Act. I believe it would have a very deleterious effect, a chilling effect, on the press and the media in general.”⁶⁶

63. Alan Rusbridger, whose newspaper has not been sued to date for breach of privacy, favoured a wait-and-see approach: “I am much more worried about libel than privacy, and I think what is happening is that judges are being required to balance Article 8 against Articles 10 [...] and they have not had very good cases yet and I think probably we have to give it a bit more time, because I do not think there has been a good case where someone has tried to gag a newspaper with a really good public interest defence.”⁶⁷

64. However, Ian Hislop felt that the time had come for Parliament to take action:

“if we are going to have a privacy law or not have a privacy law or we are going to tinker with the elements of privacy, Parliament is where this should be happening, I do not think it should be just left to judges interpreting the Human Rights Act.”⁶⁸

⁶² Culture, Media and Sport Committee, Fifth Report of Session 2002–03, *Privacy and media intrusion*, HC 458-I, para 53

⁶³ *A & Another v Priory Healthcare*, heard in February 2008

⁶⁴ Q 108

⁶⁵ Q 317

⁶⁶ Q 519

⁶⁷ Q 875

⁶⁸ *Ibid.*

65. Tom Crone, the *News of the World*'s lawyer, also expressed his unhappiness with the result of court judgments: "we are very unhappy with the way privacy law has gone as a result of judgments."⁶⁹ The Media Lawyers Association also supported legislation to ensure clarity:

"Determining what is in the public interest or is a "higher priority" to the protection of someone's reputation or privacy has become entirely dependent on the subjective views of a High Court judge. We say that this is not a matter that should be left up to the subjective determination of the judiciary."⁷⁰

66. The Lord Chancellor suggested to us that law in this area would become clearer in time:

"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. Since I am a respondent to a large number of cases any day in the courts on human rights bases and others, I can think of a number of cases in my area."⁷¹

67. 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. On balance we recognise that this may take some considerable time. We note, however, that the media industry itself is not united on the desirability, or otherwise, of privacy legislation, or how it might be drafted. 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.

Mr Justice Eady and privacy law

68. In November 2008, Paul Dacre made a speech to the Society of Editors in which he accused one judge, Mr Justice Eady, of 'introducing a privacy law by the back door'.⁷² Mr Dacre subsequently said in oral evidence to us:

"In my speech I described his judgments as 'arrogant' and 'amoral'. I am aware those are strong words – they are not personal, I am talking about his judgments – but I used those words because I felt passionately that he was adjudicating in matters that Parliament should be deciding, and the fact he was not taking on board Parliament, which represents the public, has huge implications for British society."⁷³

69 Q 848

70 Ev 12

71 Q 977

72 Paul Dacre's speech to the Society of Editors, Press Gazette, 9 November 2008

73 Q 510

69. Ian Hislop also expressed concern that one or two judges might be developing privacy law. He admitted that there had been cases when Mr Justice Eady found in *Private Eye's* favour, but added: "on balance, it would be better if it was not just him and one other judge making all the law".⁷⁴ Roy Greenslade however pointed out that judges are compelled to make decisions on a case by case basis under consistent rules: "It would be said by anyone defending the idea of a statutory control that judges themselves would take everything on a case by case interest. Indeed, that is what Mr Justice Eady – much maligned – does on every occasion; he treats everything on a case by case basis and so that would seem to fall in line."⁷⁵

70. Jeremy Clarke-Williams of Russell Jones and Walker strongly defended the judge to us:

"[...] if one reads something like the *Mosley* judgment, I do not think that Mr Justice Eady could have done a more conscientious job in seeking to balance freedom of expression against the rights to respect for privacy and come up with the decision which he did. I think it [section 12 of the Human Rights Act] is being fairly applied. I think to suggest otherwise is to come back to the unfair suggestion that the judges who are determining these cases are in some way biased against the media or biased in favour of an individual's right to respect for privacy and I do not think that is a fair allegation to make."⁷⁶

71. We discussed these matters both with the Lord Chancellor, who has a constitutional duty to defend the independence of the judiciary, and with the then Master of the Rolls, Sir Anthony Clarke. The Lord Chancellor told us that he did not feel it would have been appropriate for him to intervene to defend Mr Justice Eady because the criticism was insignificant:

"My duty, indeed I swear an oath – three oaths altogether – to this effect: to uphold the integrity and independence of the judiciary. If I had judged that that was being significantly challenged in this case, I might have said something but I did not judge it necessary [...]."⁷⁷

72. Sir Anthony Clarke told us that the allegation that Mr Justice Eady was developing a privacy law concerned him because it was simply wrong and showed poor knowledge of court judgments:

"it is quite important for us to make sure that our judgments are accurately reported, and all the business about whether Mr Justice Eady created a privacy law all by himself would not perhaps have had the publicity it had if people had actually read a lot of these judgments, because it is simply not the case."⁷⁸

73. In Parliament the Joint Committee on Human Rights has already rejected Mr Dacre's allegations outright. In its Annual Report 2007–2008 the Committee commented:

⁷⁴ Q 904

⁷⁵ Q 488

⁷⁶ Q 105

⁷⁷ Q 1013

⁷⁸ Q 964

“Mr Dacre was wrong on a number of counts. The Human Rights Act – which was, of course, passed by Parliament – incorporated Articles 8 (right to a private life) and 10 (right to freedom of expression) of the European Convention on Human Rights into UK law. Parliament required the judiciary to balance these sometimes conflicting rights in making decisions in libel and privacy cases. Far from creating a privacy law to suit his own ‘moral sense’, Lord [sic] Justice Eady was implementing legislation passed by Parliament in deciding cases such as the recent action by Max Mosley against the *News of the World*. Indeed English courts have long protected confidential information, good reputation and aspects of personal privacy at common law and in equity, quite apart from Article 8 of the European Convention and the Human Rights Act.”⁷⁹

74. Mr Justice Eady has not responded directly in public to the attacks on him, but in a speech to the Intellectual Property Lawyers Association in February 2009 he posited the argument that the application of Article 8 was now so clear that it was inevitable that the media would take out their ‘frustration’ on first-instance judges rather than pursue a hopeless appeal. He concluded: “I think it simply has to be recognized as an inevitable consequence of adopting the balancing approach and the “intense focus” on the particular facts of the case.”⁸⁰

75. The record, in any case, does not sustain the view that Mr Justice Eady has a dominant role in determining privacy law. The leading cases on privacy, *Campbell* and *Douglas*, both reached their conclusions in the House of Lords, as would be expected in judgments of such significance. In the cases involving privacy issues where the decision made by the High Court has been appealed to the Court of Appeal, Mr Justice Eady has either not been involved, or his decisions have been almost entirely upheld.⁸¹ As discussed at paragraph 37 above, statistics on many types of injunction are currently not collected. It is noteworthy, however, that the limited information we do have on injunctions shows that, of a total of six contested applications for privacy injunctions, Mr Justice Eady heard three, refusing two and granting one, while the other three applications, heard by different judges, were all granted.⁸²

76. We have received no evidence in this inquiry that the judgments of Mr Justice Eady in the area of privacy have departed from following the principles set out by the House of Lords and the European Court of Human Rights. While witnesses have criticised some of the judge’s individual decisions, they have praised others. If he, or indeed any other High Court judge, departed from these principles, we would expect the matter to be successfully appealed to a higher court. The focus on this one judge regarding the development of privacy law, however, is misplaced and risks distracting from the ongoing national debate on the relationship between freedom of speech and the individual’s right to privacy.

79 Joint Committee on Human Rights, Second Report of Session 2008–2009, *Work of the Committee 2007–2008*, HL 10/HC 92, para 14

80 Ev 479

81 *Ash v McKennitt*[2005] EWCA Civ 1714; *Browne v Associated Newspapers* [2007] EWCA Civ 295; *Murray v Big Pictures (UK) Ltd.* [2008] EVCA Civ 446

82 Ev 223

Compulsory pre-notification

77. Mr Mosley used his appearance before us to make a case for legislation requiring editors and journalists to give people about whom they write, not just the opportunity to comment, but also notice of their intention to publish, so that such people would have time, if appropriate, to seek injunctions preventing publication. He has also issued proceedings against the UK Government in the European Court of Human Rights seeking a ruling that the Government's failure to enact such a legal requirement constitutes a breach of his Article 8 rights.

78. In his evidence to us, Mr Mosley spoke of the damage done to his reputation by a revelation which was ultimately found to be an unlawful breach of his privacy:

"I had been doing this [S & M] for 45 years and there had never been a hint, nobody knew [...]. No matter how long I live, no matter what part of the world I go to, people will know about it. It is not that I am ashamed of it like I am not ashamed of my bodily functions but I do not want them on the front page of the newspaper."⁸³

79. He also described the 'appalling' impact on his family:

"My wife did not do anything, my sons did not do anything, but they are the ones that feel more embarrassed than anyone [...]. If there was a huge genuine public interest in subjecting a family or individuals to that sort of thing, of course one should do it, but it has to be a very big public interest because the suffering you impose not just on the victim but on his family is really, really serious."⁸⁴

80. Mr Mosley described as unjust a position where newspapers can cause irreparable damage of this kind, and derive commercial benefit from doing so, when they know there is a risk that, much later, the courts will find they have acted unlawfully. He suggested: 'they [the newspapers] should be obliged, in cases where they know that the person is going to object to that publication and there is a substantial chance that he will go to court and could get an injunction, that they should notify him.'⁸⁵

81. Mr Mosley argued that such a requirement would not impinge on the right to freedom of expression, and he felt that a High Court judge was a more suitable person than the editor of a newspaper to make a decision as to whether a story was in the public interest:

"It is, I would suggest, inconceivable that a judge, where there is serious investigative journalism – unless there are other factors which one cannot speculate on – would give an injunction because that is exactly the basis of a free press, that you can have investigative journalism and it is in the public interest [...]. It is the areas where neither *The Observer* nor *The Independent* nor Reuters would venture that the red tops and the tabloids go. That is where you get the terrible abuse of the rights of an

⁸³ Q 127

⁸⁴ Q 128

⁸⁵ Q 130

editor [...]. They actually abuse freedom of the press which is a very valuable thing and they damage the whole of the press by their abuse.”⁸⁶

82. In his own case, Mr Mosley stated that he would certainly have sought an injunction if he had had advance notification of the *News of the World*'s intention to publish. Mr Myler told us that he and his colleagues at the newspaper were conscious of this: “we knew that probably Mr Mosley would get an injunction, and I felt very strongly that this was a story that actually should not be stopped because of an injunction.”⁸⁷

83. Rod Christie-Miller, of Schillings solicitors, agreed in evidence to us that pre-notification was a problem area. He suggested that editors were able to be extremely calculating in considering whether to pre-notify the subject of a story, and that this led to an abuse of power:

“There have been a number of examples recently where the media knew or suspected that they were going to be publishing something which a court would injunct because it was invasive of somebody's privacy and they decided, ‘Well, if we run this and if we tell the target they will probably get an injunction and we will not be allowed to run it. Let's run it anyway.’”⁸⁸

84. Paul Dacre, editor of the *Daily Mail*, dismissed such an approach in evidence to us as “kamikaze journalism”.⁸⁹ But evidence of such practices is to be found in diaries published by Piers Morgan, the former editor of the *Daily Mirror*, which state that he would deliberately publish stories without notifying the subject because he knew that otherwise the person involved would get an injunction.⁹⁰

85. Equally, we heard evidence of editors or journalists who have taken the decision to give notice of an intention to publish, usually with a view to soliciting comments and reaction, only for an injunction to be immediately served or the threat of one to be raised.⁹¹ Ian Hislop described his frustration at making inquiries of the subject of a story only to immediately receive a lawyer's letter threatening action.⁹² Alan Rusbridger spoke of fighting a costly legal battle over an injunction while the delay in publication played into the hands of the claimant:

“The injunction prevented us from publishing information which we believed was important to make known. We would have to spend a great deal of time and money to overturn what seems like a casual piece of censorship by the courts.”⁹³

86. Nick Davies explained to us the dilemma faced by journalists:

⁸⁶ Q 133

⁸⁷ Q 812

⁸⁸ Q 83

⁸⁹ Q 557

⁹⁰ Piers Morgan, *The Inside: private diaries of a scandalous decade* (London, 2005)

⁹¹ Ev 289–290

⁹² Qq 851–856

⁹³ Ev 291

"the journalist's instinct is to go to the other side to check because you do not want to get caught out with some killer fact then your story is wrong. However, if you are doing a story which could be deemed to be confidential or – which is slightly different but similar – private, you are very, very reluctant to go to the other side because they can injunct you and these injunctions can sit there for months, particularly on breach of confidence."⁹⁴

87. If compulsory pre-notification were introduced, others besides newspapers would be affected. Global Witness, a non-governmental organisation investigating profiteering and human rights abuses resulting from exploitation of natural resources, told us that they feared a compulsory pre-notification requirement could put their staff and sources in danger.⁹⁵

88. Mark Stephens, a lawyer who represents human rights organisations, suggested to us that, to protect vital investigative work, there would have to be a public interest exception.⁹⁶ But such an exception, allowing editors not to give notice where there was a pressing public interest, would be difficult to define and to operate, as several witnesses told us. Professor Roy Greenslade put it this way:

"No-one has ever drafted a perfect definition of public interest. Nick [Davies] has rightly pointed to its fuzziness. Even in the editor's code of practice it is a really wide definition that they have and it is impossible I think to encode the public interest, which is, by the way, a moving feast."⁹⁷

89. We have also heard evidence that pre-notification does not necessarily prevent inaccurate reporting. Gerry McCann told us that pre-notification had not prevented inaccurate stories being published about him and his wife in the UK press: "In terms of advance notice, I would often hear Clarence [Mitchell, the couple's media adviser] on the phone to journalists expressly telling them that the information they had was rubbish. It would not stop it being published."⁹⁸

90. Newspaper editors insisted to us that in the great majority of cases journalists contact the people they are writing about. Paul Dacre said that in '99 times out of 100'⁹⁹ the *Daily Mail* would contact the subject of a story, and Peter Hill, editor of the Daily Express, said:

"In pretty much every case we do give people the opportunity to respond to something which is about to be written about them or we will go to people and say we have this [...]. They might have a complete answer to it. There is the odd story [...] where I think it would not be possible to do that because it would have ended up as an injunction and somehow the story would be lost."¹⁰⁰

⁹⁴ Q 448

⁹⁵ Ev 241-242

⁹⁶ Q 1060

⁹⁷ Q 458

⁹⁸ Q 196

⁹⁹ Q 594

¹⁰⁰ Qq 733-735

91. Clearly pre-notification, in the form of giving opportunity to comment, is the norm across the industry. Nevertheless we were surprised to learn that the PCC does not provide any guidance on pre-notification. Giving subjects of articles the opportunity to comment is often crucial to fair and balanced reporting, and there needs to be explicit provision in the PCC Code itself.

92. We recommend that the PCC should amend the Code to include a requirement that journalists should normally notify the subject of their articles prior to publication, subject to a “public interest” test, and should provide guidance for journalists and editors on pre-notifying in the Editors’ Codebook.

93. We have concluded that a legal or unconditional requirement to pre-notify would be ineffective, due to what we accept is the need for a “public interest” exception. Instead we believe that it would be appropriate to encourage editors and journalists to notify in advance the subject of a critical story or report by permitting courts to take account of any failure to notify when assessing damages in any subsequent proceedings for breach of Article 8. We therefore recommend that the Ministry of Justice should amend the Civil Procedure Rules to make failure to pre-notify an aggravating factor in assessing damages in a breach of Article 8. We further suggest that amendment to the Rules should stipulate that no entitlement to aggravated damages arises in cases where there is a public interest in the release of that private information.

Super-injunctions

94. On 12 October 2009, one of the members of our Committee, Paul Farrelly MP, tabled a number of Parliamentary questions, one of which concerned an injunction obtained by Trafigura, a company trading in oil, base metals and other items, preventing the publication of a report on the alleged dumping of toxic waste in the Ivory Coast. Trafigura’s solicitors, Carter-Ruck, on learning of Mr Farrelly’s question, informed the *Guardian* that it would be a breach of the injunction if the newspaper reported the question, but agreed to seek instructions from Trafigura on a variation of the order. The *Guardian* promptly published, initially online and then on the front page of its 13 October 2009 issue, the fact that it was unable to report a tabled Parliamentary question. The internal report Trafigura wanted to suppress was already widely available on the internet.

95. The injunction which both Carter-Ruck and *Guardian* lawyers believed prevented the reporting of Parliamentary proceedings was a so-called ‘super-injunction’. This is a court order which requires that, when an injunction is in place, its very existence may not be disclosed or published. The order in the Trafigura case was granted on 11 September, 2009 by a vacation duty judge, Mr Justice Maddison, at a private hearing of which the *Guardian* had just a few hours’ notice. It also applied to other ‘persons unknown’ and anyone who became aware of its existence. The injunction was drafted by Carter-Ruck and in this case a third level of secrecy was granted in that Trafigura and subsidiary’s identities as claimants were replaced by the random initials ‘RJW’ and ‘SJW’. The case never went to a full hearing, because the tabling of Parliamentary questions is protected by parliamentary privilege and due to the publicity which followed, not least on the internet, Trafigura and Carter-Ruck withdrew the injunction. The *Guardian* estimated, however, that it would have cost at least £300,000 to go to a hearing, at a time it was making redundancies.

96. It appears that the injunction and secondary court order were not specifically drafted with the aim of preventing the reporting of Parliamentary discussion, and as a result confusion has arisen over whether the injuncted matter could, indeed, be reported when it was referred to in Parliament.

97. The Lord Chief Justice, Lord Judge, took the unusual step of issuing a press release, stating:

“I am speaking entirely personally but I should need some very powerful persuasion indeed – and that, I suppose, is close to saying I simply cannot envisage – that it would be constitutionally possible, or proper, for a court to make an order which might prevent or hinder or limit discussion of any topic in Parliament. Or that any judge would intentionally formulate an injunction which would purport to have that effect.”¹⁰¹

We warmly welcome his comments.

98. Section 3 of the Parliamentary Papers Act 1840 provides that ‘any extract from or abstract of a ‘report, paper, votes, or proceedings’ of Parliament is immune from civil and criminal liability if published in good faith and ‘without malice’. The right of the press to report matters in parliament is also codified in statute in Schedule 1 of the Defamation Act 1996. This confers ‘qualified privilege’, which is again subject to the tests of the report being ‘fair and accurate, and published without malice’ and generally in the public interest. This clearly covers written questions such as that concerning *Trafigura*. In a debate on libel in Westminster Hall on 21 October 2009, Bridget Prentice, the Parliamentary Under-Secretary of State for Justice, confirmed that section 3 of the 1840 Act remained in force, and therefore that the *Guardian* was free to report the text of the question.

99. However, the Minister’s assurances were subsequently challenged in a submission to us from Carter-Ruck.¹⁰² While the firm accepted that Article 9 of the Bill of Rights provides that no court order could restrain debate in Parliament, it remained adamant that reporting of the question by the *Guardian*, which is subject to common law and statute rather than the Bill of Rights, was restrained under the injunction. Carter-Ruck told us:

“[...] at the time the interim Orders were made, none of the parties nor the Court had in contemplation the possibility of the matter being raised in the House of Commons. If they had, then the order may well have been formulated (as was done, it appears on the initiative of the Court of Appeal, in the *Spycatcher* litigation) to allow for such reporting. However, on the wording of the Order as it then stood, it was clear to us that, absent a variation of its terms, it would amount to a breach and therefore a contempt for the *Guardian* to publish, as it proposed, information about Mr Farrelly’s parliamentary question, referring to the existence of the injunction.

With regard to the Parliamentary Papers Act 1840, the *Guardian* did not contend that the information which it proposed to publish would be confined to material within the scope of Section 3 of the Act; even had it been, it would still beg the

¹⁰¹ Judiciary of England and Wales, *Statement of the Lord Chief Justice*, 20 October 2009, www.judiciary.gov.uk

¹⁰² Ev 461

question whether a newspaper which is subject to an injunction can claim to be acting '*bona fide*' within the definition of the Act if, rather than seek a variation, it chooses to publish material in breach of the injunction. Likewise, with regard to the Contempt of Court Act 1981, where a court has made an interim Order, restraining a newspaper from publishing material pending a full hearing, the question arises as to whether it may be considered 'conduct intended to impede or prejudice the administration of justice' for that newspaper, absent a variation of the Order, to publish such material."¹⁰³

100. The Trafigura affair is not the first occasion on which the clarity of the existing law has been called into question. In 1999, the Joint Committee on Parliamentary Privilege recommended: "that the statutory protection [afforded to the media by the Parliamentary Papers Act 1840] would be more transparent and accessible if it were included in a modern statute, whose language and style would be easier to understand than the 1840 Act. We recommend that the 1840 Act, as amended, should be replaced with a modern statute."¹⁰⁴

101. The free and fair reporting of proceedings in Parliament is a cornerstone of a democracy. In the UK, publication of fair extracts of reports of proceedings in Parliament made without malice are protected by the Parliamentary Papers Act 1840. They cannot be fettered by a court order. However, the confusion over this issue has caused us the very gravest concern that this freedom is being undermined. We therefore repeat previous recommendations from the Committee on Parliamentary Privilege that the Ministry of Justice replace the Parliamentary Papers Act 1840 with a clear and comprehensible modern statute.

102. These events involving Trafigura occurred after the conclusion of our oral evidence sessions. In a debate in Westminster Hall on 21 October 2009, Bridget Prentice MP, the Parliamentary Under-Secretary of State for Justice, said that the Ministry of Justice was examining the use of super-injunctions outside the areas of fraud and child protection with the judiciary and lawyers from major newspapers.¹⁰⁵ Notwithstanding the controversy already, Carter-Ruck had also sought to persuade the Speaker of the House of Commons that this debate should not proceed as the case was *sub judice* under the House's own rules. The Speaker, however, exercised his absolute discretion and allowed the debate. **We welcome the Speaker's determination to defend freedom of speech in Parliament, as well as the comments by the Lord Chief Justice on the Trafigura affair, and strongly urge that a way is found to limit the use of super-injunctions as far as is possible and to make clear that they are not intended to fetter the fundamental rights of the press to report the proceedings of Parliament. Given the importance of these issues, we hope that a clear statement regarding the way forward is made before the end of this Parliament.**

¹⁰³ Ev 462

¹⁰⁴ Joint Committee on Parliamentary Privilege, First Report of Session 1998–99, HL 43/HC 214, para 374

¹⁰⁵ HC Deb, 21 October 2009, col 294WH

Breach of confidence

103. The Human Rights Act has not superseded the law of confidence. The ECHR is designed to protect individuals, so corporate entities, public authorities and other organisations still rely on the law of confidence to protect private information.

104. Breach of confidence was developed by the courts following the publication of private etchings and pictures, made by Queen Victoria and Prince Albert of their family and friends, and disseminated within a small group.¹⁰⁶ The original components of an action, in which the burden of proof is on the claimant, were that the information in question was secret or confidential, that it was acquired in circumstances giving rise to a duty of confidence; and that it had been or would be used to the detriment of the confider.¹⁰⁷ Over time, however, the definition of confidential information has broadened.

105. The law on breach of confidence was considered by the House of Lords in 1990, in the case of the publication by Sunday newspapers of excerpts from ‘Spycatcher’, the memoirs of former MI5 employee Peter Wright. The Government of the day sought an injunction restraining publication of the book. In his judgment Lord Goff stated, as a general principle, that:

“a duty of confidence arises when confidential information comes to the knowledge of a person (the confidant) in circumstances where he has notice, or is held to have agreed, that the information is confidential, with the effect that it would be just in all the circumstances that he should be precluded from disclosing the information to others.”¹⁰⁸

106. The law requires the publisher to consider not only where the information has come from but also whether the information itself is in fact private. For instance, the owner of a personal diary dropped in the street and picked up by a passer-by has a reasonable expectation of privacy. However, in the case of ‘Spycatcher’ the memoirs had been published abroad and were also widely available in the United Kingdom, and Lord Goff noted that a claimant could no longer sue for breach of confidence when the information was so widely disseminated that it could no longer be said to be confidential. The application for an injunction failed.

107. In March 2009, Barclays Bank obtained an injunction requiring the removal from the *Guardian*’s website of seven leaked memoranda showing that Barclays had set up companies to take advantage of tax loopholes. The interim injunction was made over the phone by Mr Justice Ousey at 2.30am on the morning of Tuesday, 17th March, 2009 and was upheld after an immediate, two-day hearing by Mr Justice Blake in the High Court. The *Guardian* was also barred from publicising their whereabouts on the internet, and the absurdity was heightened when the peer Lord Oakeshott used Parliamentary privilege to reveal the where the sites could be found.¹⁰⁹ In that case, unlike *Trafigura*, however,

¹⁰⁶ *Prince Albert v Strange* [1849] EWHC Ch J20

¹⁰⁷ *Prince Albert v Strange* [1849] EWHC Ch J20, *Coco v A N Clark (Engineers) Ltd* (1969)

¹⁰⁸ *Attorney-General v Guardian Newspapers Ltd. (No. 2)* [1990] 1 AC 109

¹⁰⁹ HL Deb, 26 March 2009, col 773

Barclays' lawyers did not argue that the media was prevented from reporting the proceedings of Parliament.

108. A publication that is sued for breach of confidence has a defence if it can show that publication of private or confidential information was in the public interest.¹¹⁰ In such cases the judge must strike a balance between the claimant's right to confidence and the public interest the defendant claims will be served by publication.¹¹¹

109. When he appeared before us, Alan Rusbridger, editor of the *Guardian*, argued that publication of the memoranda was a clear matter of public interest:

“Barclays documents that we were sent we put on the web and were hit [with an injunction] [...] at two o'clock in the morning by a judge who told us to take them down. Now, that [publication] was [in our view] clearly in the public interest [...] because, if you look at the small print of the Budget, the Budget has closed down most of the loopholes that Barclays were using, so it was clearly in the public interest that those documents should have been published.”¹¹²

110. In the Barclays case, the judge decided that the bank's right to confidentiality outweighed the *Guardian*'s claim of public interest. Alan Rusbridger told us that he did not feel the need to appeal the case as, despite the fact that the court ruled against the *Guardian*, the information was in fact freely available on the internet:

“The documents are out; they were put on to a website called Wikileaks, and I am allowed to tell you that because it was mentioned in Parliament, but I think it is a very interesting case where the law has completely failed to catch up with the internet because there was this arcane discussion in the High Court about whether this was private or not and whether they could contain it in a room, whereas everybody was twittering and linking to it because it was already out there, but the court pretended it was not.”¹¹³

111. It is noteworthy, nonetheless, that the Barclays and Trafigura decisions over breach of confidence contrast with those of Mr Justice Eady's regarding privacy and removal of the Mosley video, although in each the information was widely available on the internet. In the Barclays and Trafigura cases, the 'public interest' arguments also appear to us stronger. It is understandable, therefore, that the media and the public are confused about the approach of different courts with respect to issuing injunctions.

112. The evidence we have heard shows the impact of the internet on the leaking of information has fundamentally altered the dissemination of information, and consequently breaches of confidence.

113. In particular, the Trafigura and Barclays cases raise issues over the use of injunctions for breach of confidence by companies which do not have Article 8 rights to defend, the ease with which they appear to be granted and the consistency of practice in the court system.

¹¹⁰ *Gartside v. Outram* (1857) 26 L.J. Ch. 113; *Initial Services Ltd, v. Puttrill* [1968] 1 Q.B. 396, *Beloff v. Pressdram Ltd.* [1973] 1 A.E.R. 241

¹¹¹ *Attorney-General v Guardian Newspapers Ltd. (No. 2)* [1990] 1 AC 109

¹¹² Q 866

¹¹³ Q 884

3 Libel and Press Freedom

114. In this section we discuss how the UK's libel laws operate in practice and the effect they have on press reporting. We consider important recent cases and developments since the 1996 Defamation Act, including the defence of 'responsible journalism', the Government's consultation on the issue of 'multiple publication' in the internet age and legislation to abolish criminal libel. We also examine the international context, including the controversy surrounding so-called 'libel tourism' or 'forum shopping'.

115. Throughout this discussion we remain mindful of the over-arching concerns about the costs of mounting and defending libel actions, and the 'chilling effect' this may have on press freedom. Such is the importance of these concerns, we specifically examine the subject of costs, including conditional fee arrangements and the 'offer of amends' procedure introduced by the 1996 Act, in the following section of this report.

116. We also recognise that the UK does not have a written constitution with a First Amendment protecting freedom of speech as the US does, nor in the foreseeable future is it likely to have one. Our recommendations in this section are therefore aimed at being practical and influencing the law as it stands in the UK.

The development of our libel laws

117. In an action for libel the claimant has to prove that the statement is defamatory, a term defined by Lord Atkin in 1936 thus: "A defamatory statement is one which injures the reputation of another by exposing him to hatred, contempt, or ridicule, or which tends to lower him in the esteem of right-thinking members of society."¹¹⁴ The claimant must also prove that the statement refers to him or her and that it was published to a third party. Significantly, the claimant does not have to prove the statement is false. The burden of proof now shifts to the defendant, who must prove that the defamation was justified by the facts – i.e. that it was substantially true – or else employ another defence, such as that it was fair comment or that the statements concerned attract privilege (see paragraphs 130 to 145).

118. A claimant – be it an individual or company – does not have to prove actual damage to reputation, nor financial loss. Some damage is presumed to have been suffered. It is, however, open to a claimant to seek 'special damages', in order to recover actual financial loss.

119. Libel actions are heard in the High Court, with libel being one of the few areas of civil litigation with the right to a jury trial. For many years libel in England and Wales could also be a criminal matter, but this had become extremely rare and in November 2009 criminal libel was removed from the statute books.

120. The law in this area has largely developed case by case and Parliament has been reluctant to legislate, but the Defamation Act 1952 made a number of changes, including

¹¹⁴ *Sim v Stretch* [1936] 2 All ER 1237, 1240, per Lord Atkin

an ‘offer of amends’ procedure where the defamatory statement was ‘unintentional’.¹¹⁵ An offer of amends procedure allows for a swift apology without trial. If the offer is not accepted, then the fact the offer was made may mitigate any damages. Aiming to encourage “swift and less costly disposal of defamation claims”,¹¹⁶ the Defamation Act 1996 extended the availability of the offer of amends procedure to all defamatory statements. It also introduced summary disposal of claim where judges could find ‘no realistic prospect of success’.¹¹⁷ The Act also created an ‘innocent publisher’ defence, giving protection to internet service providers.¹¹⁸

121. According to Ian Hislop, editor of *Private Eye*, the Defamation Act 1996, together with the Woolf reforms on civil litigation, have benefited the media:

“A lot of amendments were made about ten years ago [...] and a number of elements of the libel lottery were changed I think greatly to the good of the whole system, so it is possible to change things and to get them right and I would say I am less sued now for libel.”¹¹⁹

122. Damages in libel cases are much lower than in the past. Until the mid-1990s juries in libel trials were free to set the level of damages and this resulted in some very high payouts. In 1989, the wife of Peter Sutcliffe, the ‘Yorkshire Ripper’, was awarded £600,000 against *Private Eye*, though that figure was later reduced by the Court of Appeal, which described it as ‘so unreasonable as to be divorced from reality’. In 1995, the Court of Appeal held that juries in libel trials should be given approximate upper and lower limits for financial awards by judges during the summing up.¹²⁰ The highest award in recent years is £200,000, which was awarded in 2002 to two kindergarten teachers falsely accused by a local council of having sexually abused children. The judgment noted that the award was “now generally recognised to be the maximum amount for compensatory damages in libel proceedings”.¹²¹

123. Details of out-of-court settlements are frequently not disclosed but it is clear they can be higher than this. Robert Murat is reported to have received £600,000 from 11 newspapers over allegations that he had been involved in the disappearance of Madeleine McCann.¹²² It was reported that Madeleine McCann’s parents received a similar amount from Express Newspapers.

124. Libel claimants may recover exemplary damages where the court awards ‘punitive’ rather than ‘compensatory’ damages. These are rarely awarded since proof of guilty knowledge on the part of the defendant is required, coupled with the motive of making money out of the libels.

¹¹⁵ Defamation Act 1952, section 4

¹¹⁶ HC Deb 22 Feb 1996 c564

¹¹⁷ Defamation Act 1996, section 8(2)

¹¹⁸ *Ibid.*, section 1

¹¹⁹ Q 869

¹²⁰ *John v Mirror Group Newspapers* [1995] EWCA Civ 23

¹²¹ *Lillie v Newcastle City Council*

¹²² “Court ‘vindicates’ McCann suspect”, *BBC News Online*, news.bbc.co.uk

Bringing and defending a libel action in the UK

Early hearings on meaning

125. Establishing whether the meaning of a word or phrase is defamatory is frequently at the heart of the libel process. A statement can be defamatory in two ways. The ‘natural and ordinary’ meaning of the words may make it so, or it may be defamatory by innuendo, meaning that readers with special knowledge would interpret it that way. When bringing a case, the claimant is required to set out the words complained of and the defamatory meaning he or she believes they convey. If the defendant disputes this, the task of determining whether the words bore the meaning alleged by the claimant falls to a jury at trial, unless the parties have agreed to its determination by a judge.

126. Resolving the issue of meaning can take a long time and be expensive. Alan Rusbridger, editor of the *Guardian*, told us that one of the changes to the current framework that would be “top of his list” was “early ruling[s] on meaning which could be taken by judges not juries”.¹²³

127. In evidence to us Sir Anthony Clarke, the then Master of the Rolls, acknowledged that preliminary rulings on meanings reduced costs and noted that judges have case management powers to make such rulings:

“[...] the courts have powers to take individual issues and to decide them separately from the other issues and, as far as I am aware, it is not uncommon to have a preliminary issue on the question of meaning, and indeed I myself was involved, I seem to remember, in an appeal in relation to meaning where the only question was whether the meaning, which the claimant said the words had, was a meaning which was open to that, so yes.”¹²⁴

128. Rulings on meaning, however, may clearly not satisfy all defendants. We have received evidence,¹²⁵ for example, on the case of the science writer Simon Singh, who is being sued for libel by the British Chiropractic Association (BCA) over an article published in 2008, which was critical of treatments dispensed by BCA members. In a preliminary hearing on meaning in May 2009, Mr Justice Eady ruled that the wording could be held to imply the BCA was being consciously dishonest. Mr Singh denies he intended this and the Court of Appeal has since given him permission to contest the ruling – a lengthy process which has so far cost Mr Singh more than £100,000.¹²⁶

129. We have received limited evidence on hearings on meaning and the extent to which they are used. We agree, however, that any measures to provide more certainty at an earlier stage, and which cut the enormous costs of libel cases in the UK, should be pursued more vigorously. We urge the Government, therefore, to look closely at this aspect of procedure in its present review of the costs and operation of UK libel laws.

¹²³ Q 865

¹²⁴ Q 945

¹²⁵ Ev 482

¹²⁶ *British Chiropractors Association v Singh* [2009] EWCA Civ 1154

Defending libel actions – justification and the burden of proof

130. The defence of justification requires the defendant to prove that the words complained of were true or substantially true. Whether or not this is difficult, at law it is likely to be complex, time-consuming and expensive. It will frequently require a full trial as well as preliminary hearings on issues such as disclosure and evidence. A recent example was the case brought by Richard Desmond, proprietor of Express Newspapers, against Tom Bower, the author of a 2006 biography of Conrad Black, former proprietor of the Telegraph Media Group.¹²⁷ Mr Desmond's claim focused on passages of the book which described his relationship with Mr Black. Mr Bower pleaded justification and his plea was upheld, but only after a full jury trial lasting three weeks. Unusually, the Bower case featured two expensive appeals in mid-trial against rulings by the judge – Mr Justice Eady again – over admissibility of evidence. Each time, the author claimed key, relevant evidence about Mr Desmond's reputation was being excluded. On both occasions the Court of Appeal upheld Mr Bower's claim. It was also severely critical of Mr Justice Eady's rulings which – Lord Justice Hooper said during the second appeal – "would risk the possibility of a miscarriage of justice."¹²⁸

131. A particular concern we heard from media witnesses in the UK and lawyers and media representatives we met in America was the requirement that the defendant in a defamation case bears the burden of proving the truth of the allegations sued on. In oral evidence to us, Tom Crone, legal manager for News Group Newspapers, said:

"I must say, over the last 29 years I have found that to be a very, very onerous burden indeed for newspapers to shift, especially – and this is just human nature and perception – if you happen to be the *Sun* or the *News of the World*. They are the two newspapers I represent. I think it is wrong because I think the burden is too great, frankly."¹²⁹

132. Alan Rusbridger gave us two examples where the burden of proof had been difficult or impossible to discharge:

"The two cases most notably we have been involved [...] are Jonathan Aitken and Tesco. They knew what they had done, what was going on, and it was up to us to prove to the standards of [...] the civil court, what had been going on, so I think the burden of proof should certainly be switched."¹³⁰

133. This proposal is not new, and naturally meets the response that newspapers publishing allegations should have to hand good evidence that those allegations are correct. In 1999, in *Steel v McDonald*'s, the Court of Appeal rejected the argument that Article 10 of the ECHR required that the burden of proof should be reversed when a defence of justification had been entered, a finding that was upheld on appeal to the European Court of Human Rights. We discuss McDonald's and the more recent Tesco case, to which the

¹²⁷ [Tom Bowyer], PS 141 – Ordered by the Committee to be published, available on the Culture, Media and Sport Committee website, www.parliament.uk/cmscom, and in the Parliamentary Archives.

¹²⁸ *Desmond v Bower* [2009] EWCA Civ 667 and [2009] EWCA Civ 857

¹²⁹ Q 816

¹³⁰ Q 865

editor of the *Guardian* referred, in more detail in the section ‘Corporations and defamation’ below.

134. One significant difficulty in reversing the burden of proof in defamation cases is that it would often require claimants to prove a negative. A pertinent example is that of Kate and Gerry McCann, libelled repeatedly by the press, who would have been required, under a reversed burden, to prove that they had not allowed harm to come to their daughter.

135. We recognise the difficulties with the whole burden of proof being placed on the defendant but believe, on balance, that in the interests of natural justice, defendants should be required to prove the truth of their allegations. We are concerned, however, to see cases where that burden becomes overly onerous. We make some recommendations in this Report regarding the defence of ‘responsible journalism’ and the burden of proof on companies suing for defamation, which may level the playing field and assist publication in the public interest. We also urge the Government, however, to examine this aspect of the operation of the UK’s libel laws carefully, including how the courts might better require claimants to make reasonable disclosures of evidence, without increasing costs even further through expensive appeals.

136. The Bower case also highlights concerns which arise when judges exclude evidence which prevents a jury being presented with a rounded picture, or too narrow a view of the thrust of an article. This aspect of the operation of the libel laws also needs examination.

Fair comment

137. A comment or expression of opinion, based upon (true) facts, made in good faith and without malice can be protected from libel. It is distinct from justification because the defendant is commenting on facts rather than claiming the facts to be true. A claimant can show malice if the commentator did not genuinely hold the opinion expressed.

138. The current case involving the scientist and writer Simon Singh originally involved a comment piece by him.¹³¹ We have also received written evidence from Sense about Science, a charitable trust, that the law is stifling debate in the scientific and medical community about new drugs and treatments.¹³²

139. In evidence, Ben Goldacre also told us of his experience:

“I was recently sued by a vitamin consultant who was selling vitamin pills in South Africa – taking out full page adverts in national newspapers saying anti-AIDS drugs will kill you [...]. This was obviously very irresponsible and it was fairly cut-and-dried to my mind where the evidence stood on whether vitamin pills or anti-AIDS drugs were better for treating AIDS, but this was such an enormously long drawn-out process that eventually by the time he pulled out our costs were half a million pounds.”¹³³

¹³¹ Ev 483

¹³² *Ibid.*

¹³³ Q 332

140. In other jurisdictions, the defence of fair comment is called ‘comment’ or ‘honest comment’, and this is a better reflection of the actual defence because the question is not whether the comment was fair or true, merely that it was a comment made without malice based on some true facts.

141. Much of the recent publicity given to concerns of the medical and science community about the harmful effects of UK libel laws on their ability to comment has followed the court rulings to date in the Simon Singh case and media coverage of the cases of the British cardiologist Peter Wilmshurst and the Danish radiologist Henrik Thomson, who have faced action from overseas commercial interests.

142. We look forward, clearly, to the outcome of the important Simon Singh case. Even from the limited evidence we have received, we believe that the fears of the medical and science community are well-founded, particularly in the internet age and with the growth of ‘libel tourism’. We urge the Government, therefore, to take account of these concerns in a review of the country’s libel laws, in particular the issue of fair comment in academic peer-reviewed publications.

Privilege

143. The law recognises that there are circumstances in which it is in the public interest to permit greater freedom of speech. It is a defence to a libel claim if the publication took place on a privileged occasion. The privilege may be protected from a libel action either by absolute privilege, which is a complete bar to libel actions, or qualified privilege, which protects the statement so long as it was published without malice.

144. Qualified privilege exists ‘for the common convenience and welfare of society because the law accepts that there are occasions when persons should be at liberty to express themselves freely even when in doing so a third party is defamed’.¹³⁴ It covers fair and accurate reporting of Parliament, legal proceedings, organisations of the European Union and other matters set out in Schedule 1 of the Defamation Act 1996. It is also held to protect freedom of speech in specific circumstances under the common law ‘responsible journalism’ defence to a claim in libel.

145. In the case of qualified privilege, malice may consist in either awareness of or recklessness as to the untruth of the statement; a dominant improper motive in making a statement; or misuse of the occasion for which privilege exists.

The ‘responsible journalism’ defence

146. The ‘responsible journalism’ defence emerged during the case of *Reynolds v Times Newspapers*¹³⁵ in 1999, when the House of Lords held that journalists making statements that were subsequently found to be defamatory and untrue were protected in law if the story had been researched and presented professionally and the subject matter was in the public interest. The purpose of introducing this defence was to “enable the court to give

¹³⁴ *Toogood v Spyring* (1834) 1 Cr. M. & R. 181

¹³⁵ *Reynolds v Times Newspapers* [1999] 3 All ER 961

appropriate weight, in today's conditions, to the importance of freedom of expression by the media on all matters of public concern".¹³⁶

147. In his speech in *Reynolds*, Lord Nicholls set out 10 guidelines which, depending on the circumstances, the courts could use to determine whether the defence applied:¹³⁷

- The seriousness of the allegation. The more serious the charge, the more the public is misinformed and the individual harmed, if the allegation is not true.
- The nature of the information, and the extent to which the subject-matter is a matter of public concern.
- The source of the information. Some informants have no direct knowledge of the events. Some have their own axes to grind, or are being paid for their stories.
- The steps taken to verify the information.
- The status of the information. The allegation may have already been the subject of an investigation which commands respect.
- The urgency of the matter. News is often a perishable commodity.
- Whether comment was sought from the claimant. He may have information others do not possess or have not disclosed. An approach to the claimant will not always be necessary.
- Whether the article contained the gist of the claimant's side of the story.
- The tone of the article. A newspaper can raise queries or call for an investigation. It need not adopt allegations as statements of fact.
- The circumstances of the publication, including the timing.

148. Lord Nicholls stated that the list should not be seen as exhaustive, or as replacing the role of the jury (if the case was a jury trial) in establishing the facts. He expressed the hope that "over time, a valuable corpus of case law will be built up".¹³⁸

149. Seven years later, in *Jameel v Wall Street Journal*, the House of Lords had an opportunity to consider the effectiveness of the responsible journalism defence.¹³⁹ Lord Hoffmann commented on the difficulties of applying it in practice:

"In *Reynolds*, Lord Nicholls gave his well-known non-exhaustive list of ten matters which should in suitable cases be taken into account. They are not tests which the publication has to pass. In the hands of a judge hostile to the spirit of *Reynolds*, they can become ten hurdles at any of which the defence may fail. [...] that, in my opinion, is not what Lord Nicholls meant. As he said in *Bonnick* (at p309) the standard of conduct required of the newspaper must be applied in a practical and flexible manner. It must have regard to practical realities."¹⁴⁰

150. The law lords concluded that the lower courts had been interpreting the guidelines too strictly, and effectively broadened the defence by explicitly stating that the 'ten matters' were guidelines and not hurdles which had to be overcome in turn.¹⁴¹ In 2007, in the case

¹³⁶ *Reynolds v Times Newspapers* [1999] 3 All ER 961

¹³⁷ *Ibid.*

¹³⁸ *Ibid.*

¹³⁹ *Jameel and others v. Wall Street Journal Europe Sprl* [2006] UKHL 44

¹⁴⁰ *Ibid.*

¹⁴¹ *Ibid.*

of *Charman v Orion Publishing Group Ltd*,¹⁴² the *Reynolds* defence was successfully used to cover a book, when the Court of Appeal dismissed a libel suit brought by a former police officer over a book *Bent Coppers – The Inside Story of Scotland Yard’s Battle Against Police Corruption* by journalist, Graeme McLagan.

151. We have received evidence that despite the widening of the defence through the *Jameel* judgment, it is still difficult for the press to rely on it in practice. Marcus Partington of the Media Lawyers Association complained of an inflexibility amongst judges when applying what was intended to be a flexible test, fitted to circumstance:

“The ten tests that were introduced were supposed to be quite loose, but the feeling is that they will be potentially rigidly adhered to; so unless you feel that you have passed through each of the ten tests without fear of being attacked by the other side, you are wary about using the defence.”¹⁴³

152. Keith Mathieson of Reynolds Porter Chamberlain LLP, which normally takes cases for defendants, cited cost as a barrier to using the defence:

“It is quite an expensive defence to run in practice because it means enquiring into precisely how a story was put together, and that means going out interviewing people and getting witness statements and all that kind of thing.”¹⁴⁴

153. The costs involved in the defence mean that defendants have to weigh up the potential expenditure involved in fighting a case, and the further risk of possibly losing, against the inevitably lower cost of settling a case. Mark Stephens, of Stephens Finer Innocent, explained to us that this can be a particular consideration for NGOs and other not-for-profit organisations:

“The cost of a *Reynolds* defence is somewhere between £100,000 and £200,000, plus of course the risk of losing. You have got an adverse cost risk as well on top of that. That is the sort of sum of money which NGOs just cannot afford to spend. Although they have a very good defence – and invariably that is the advice we are given – they are not able to deploy it.”¹⁴⁵

154. We heard that, to be in a position to rely upon the responsible journalism defence, organisations must ensure that their staff are aware of the elements involved, which costs both time and money. Charmian Gooch of Global Witness told us that awareness of the defence is integral to the training of its staff: “Trying to incorporate *Reynolds* and an awareness of *Reynolds* in all the stages of the research, and thinking about a report, briefing document or a press release, every single point of publication, is crucial.”¹⁴⁶

¹⁴² *Charman v Orion Publishing Group Ltd*. [2007] EWCA Civ 972

¹⁴³ Q 44

¹⁴⁴ *Ibid.*

¹⁴⁵ Q 1041

¹⁴⁶ Q 1040

155. Alan Rusbridger told us that, while his paper was able to incorporate the requirements of the responsible journalism defence into its investigative journalism, he doubted that local papers would have the resources:

“We use *Reynolds* pretty extensively. There are three or four reporters who have learned to use it and if you asked them they would say they rely very heavily on the legal department, so it would not work if you were on the *Leicester Mercury* or the *East Anglian Daily Times* and you did not have that kind of legal department. You have to work extremely thoroughly in the way you phrase questions and it is a long, drawn out, rather arduous way of processing stories, but I do not think it is all bad. I think it has enabled us to print a lot of stories that we could not have published in the past in a different kind of voice, raising questions rather than asserting things, but we have got a lot of information in the public domain using *Reynolds*.¹⁴⁷

156. It is noteworthy, however, that the newspaper did not deploy the *Reynolds* defence in the libel suit launched by Tesco, to which we return later in this section.

157. The responsible journalism defence was never intended as a general shield to protect a free press. It will always be a defence of last resort, first because it will only be used by defendants who are unable to prove that their facts are correct, and second because it transfers scrutiny to the journalistic process. As Keith Mathieson told us, “it shifts the emphasis of the case from the truth or otherwise of the allegations that are being sued upon to the conduct of the journalist”.¹⁴⁸

158. Mr Partington warned of the distorting tendency of hindsight: “There is criticism afterwards: ‘Oh, well, you could have made that telephone call; or you should’ve looked at that’, rather than actually examining what the journalist did and being slightly looser about the ten tests.”¹⁴⁹ However Rod Christie-Miller, who normally acts for claimants, did not agree that judges applied the *Reynolds* guidelines too strictly:

“In fact, the case of *Jameel* in the House of Lords said the opposite, that it was a flexible test that should be applied depending on the circumstances of a particular case. It is a sad day for investigative journalism if (a) the story is untrue and (b) it was not even put together responsibly.”¹⁵⁰

159. The National Union of Journalists (NUJ) told us that it welcomed the development of the responsible journalism defence: “These standards are those the union expects from its members – checking information, affording a right to comment and so on. They also effectively set a “public interest” criterion that is also welcome.”¹⁵¹ Roy Greenslade agreed:

“I think the key to this is the word ‘responsible’. As journalists we wish to exercise the greatest amount of licence and freedom, but with freedom comes responsibility and it is about how we go about our job. Most of what the *Reynolds* judgment said was

¹⁴⁷ Q 897

¹⁴⁸ Q 44

¹⁴⁹ *Ibid.*

¹⁵⁰ Q 94

¹⁵¹ Ev 408

that we should do certain things properly and I think that that was important in the case of *George Galloway v The Daily Telegraph* where the *Telegraph* had failed to act responsibly and the reason I believe the judgment was made in Galloway's favour was because his counsel were able to show that the paper had behaved irresponsibly.”¹⁵²

160. Whether journalists on UK newspapers routinely check facts to the degree required to enable the use of the responsible journalism defence is another concern. On major investigations relating to matters of public interest, reporters, sub-editors and senior editorial staff may well do their utmost to verify facts, particularly when they know the subject has the resources to mount a libel action. However, fact-checking of the kind found at many American periodicals – a routine process, carried out independently of the reporters – is not the norm in the UK.¹⁵³

161. We appreciate the difficulties, and costs, to date in running a *Reynolds* defence have meant that it has not often been used in cases which have actually reached court. Nevertheless, we endorse the development of a ‘responsible journalism’ defence by the courts. We particularly welcome the House of Lords judgment in *Jameel* which emphasises the need for flexibility and, in our view, the realistic approach the courts must bring to consideration of the defence so that it appropriately protects the media’s freedom of expression. However, we are concerned that the defence remains costly and therefore inaccessible to publishers with poor financial resources. We will be making a number of recommendations on costs which we intend should ensure access to this defence in appropriate cases.

162. We are also concerned that, partly because of the lack of certainty of a *Reynolds* defence, many cases have to be settled before they come to court, and that as a result there are few opportunities for a body of case law based on Lord Hoffman’s judgment in *Jameel* to be developed. Indeed, it may take decades and we are of the view that the problem is more urgent than that, especially given the challenges facing smaller regional newspaper groups.

163. The desirability of affording greater protection to genuinely responsible journalism begs the question of whether the law should be amended to put the *Reynolds* defence, or an expanded version of it, on a statutory footing, perhaps through an amendment to the 1996 Defamation Act. However, there is a risk of unforeseen consequences. It could be maintained that *Reynolds/Jameel* applied more flexibly is sufficient and we are concerned that codifying the defence and the ‘public interest’ in law may in itself introduce rigidities or make for less accurate reporting. However it is our opinion that there is potential for a statutory responsible journalism defence to protect serious, investigative journalism and the important work undertaken by NGOs. We recommend that the Government launches a detailed consultation over potentially putting such a defence, currently available in common law, on a statutory footing. We welcome consultations already launched by the Ministry of Justice in the field of media law. Such a further exercise will provide an opportunity to gain more clarity and show

¹⁵² Q 416

¹⁵³ Qq 593, 897

the Government is serious about protecting responsible journalism and investigations by the media, authors and NGOs in the public interest.

Corporations and defamation

164. Under the law of England and Wales, trading companies which have reputations in this country may sue for defamation and recover general damages. Since 1993, however, following the case of *Derbyshire County Council v Times Newspaper Ltd*,¹⁵⁴ local authorities, trades unions and unincorporated bodies cannot. The UK position contrasts strongly with the US, where since the decision in *New York Times v Sullivan* in 1964, constitutional free speech protections have made it very difficult for companies – as ‘public figures’ under US law – to succeed in defamation cases.

165. The question of whether companies should continue to enjoy this right in the UK was raised in the case of *McDonald’s Restaurants v Morris & Steel*, commonly known as the McLibel case. In 1990, the fast-food chain sued two environmental protesters, Helen Steel and David Morris, over allegations made in leaflets distributed mainly outside McDonald’s restaurants. McDonald’s at the time was a company known to have frequent recourse to libel law. Ms Steel and Mr Morris conducted their own defence, winning in part, but only after nine years of legal proceedings. McDonald’s was awarded £40,000 in damages, which it did not claim.

166. This very unequal legal contest prompted concern, and in judgment the Court of Appeal observed that a submission that corporations should lose their right to sue for libel had ‘some substance’, though it said this would be a matter for Parliament to address.¹⁵⁵

167. Such a step has been taken elsewhere. In 2005, the federal Government in Australia passed legislation preventing corporations (other than not-for-profit organisations or small businesses of fewer than 10 people) from suing for defamation. This was in response to concerns that large companies could stifle legitimate public debate by initiating defamation actions.¹⁵⁶

168. A major, recent case in the UK was the action by Tesco against the *Guardian* in 2008, in which the supermarket sued for libel – and the editor personally for ‘malicious falsehood’ – after the newspaper claimed it was avoiding corporation tax through complex offshore property deals.

169. It turned out that Tesco’s dealings did aim to avoid tax, but a different one – stamp duty land tax – and for far less than alleged. Subsequent investigations by *Private Eye*, however, found that Tesco had offshore schemes to reduce corporation tax, too.

170. Before the article, Tesco declined to meet the reporters and gave limited written responses. In the circumstances, the newspaper misunderstood the purpose behind the

154 *Derbyshire County Council v Times Newspapers Ltd*. [1993] 2 W.L.R. 449

155 *Steel & Anor v McDonald’s Corporation & Anor* [1999] EWCA Civ 1144

156 Defamation Act 2005

deals, but the story's thrust – regarding tax avoidance – was correct. In May, the *Guardian* nonetheless issued an extensive apology and explanation of its inaccuracies.¹⁵⁷

171. Tesco, advised by Carter-Ruck, carried on, however, notwithstanding an 'offer of amends' from the *Guardian* (a subject we discuss more fully in the next section on 'Costs'). In July, in a two-day case management hearing before Mr Justice Eady in the High Court, Tesco tried to exclude the *Private Eye* evidence and keep the 'offer of amends' on the table, while it pursued the action. The judge ruled against them on both points and also struck out the action for 'malicious falsehood'.¹⁵⁸ Two months later, Tesco agreed to a further correction and apology, and a settlement was reached out-of-court. By then, the costs had become enormous, dwarfing any damages.¹⁵⁹

172. In this case, Mr Rusbridger argued – quoting the landmark American case *Sullivan v New York Times* – that the *Guardian* was guilty of 'erroneous statements honestly made', but was not afforded the same protections as in the US. Nor was it helped by Tesco's lack of disclosure, while it bore the whole burden of proof. "In all other jurisdictions I know of the burden of proof operates the other way, and quite well,"¹⁶⁰ he told us.

173. In evidence to us, Jonathan Coad of Swan Turton solicitors, on the other hand, did not support restricting or removing the right of companies to sue for libel.¹⁶¹ He told us:

"I think it is perfectly reasonable to say that there is a finite amount of damages that a large corporation should be allowed to recover. Let us take an example where a newspaper says, 'baby milk A is dangerous and you should not drink it and baby milk B is fine'. It would be extraordinary if there was no mechanism whereby a company could go in front of a judge and say, 'Well, actually, our baby milk is fine and, by the way, we have had to lay 500 people off and there is therefore a good reason for us to come in front of a judge and establish that that is not true.' It would be an extraordinary state of affairs, it seems to me."¹⁶²

174. The Lord Chancellor also agreed that companies needed to be able to sue for defamation to protect their reputations. He told us: "Bodies corporate do have reputations and on their reputations depend the livelihoods of, in large corporations, thousands of people and their share price, in which your pension fund or mine might be invested."¹⁶³

175. There are certainly practical difficulties to be reckoned with. Global Witness noted that it had experience of situations where repressive state authorities which were unable to sue made use of an individual as a 'front person' to act for them in defamation litigation.¹⁶⁴ Clearly corporations wishing to exploit libel laws to stifle criticism could use the same technique.

¹⁵⁷ "Corrections and clarifications", *The Guardian*, 3 May 2008

¹⁵⁸ *Tesco Stores Ltd. v Guardian News and Media Ltd.* [2008] EWHC 14 (QB)

¹⁵⁹ Q 860

¹⁶⁰ Q 868

¹⁶¹ Q 95

¹⁶² Q 96

¹⁶³ Q 1011

¹⁶⁴ Ev 239

176. There is no doubt that the effect on a company of losing its business reputation can be devastating, but it is also the case that companies often have means, which are not normally available to individuals, to counter falsehoods and unfounded criticism through publicity campaigns. Further, individuals at companies, large or small, who consider themselves defamed can also sue, funded by their employers, as they still can at local authorities in the UK.

177. It is clear that a mismatch of resources in a libel action, for example between a large corporation for which money may be no object and a small newspaper or NGO, has already led to a stifling effect on freedom of expression.

178. We hope that Government measures to reduce costs and to speed up libel litigation will help address the mismatch in resources between wealthy corporations and impecunious defendants, along with our recommendations to widen and strengthen the application of the responsible journalism defence. Given the reaffirmation by the House of Lords in *Jameel* of the rights of companies to sue in defamation, the law could only be changed by statute, if Parliament felt it desirable to address potential abuses of libel laws by big corporations. One possible way of addressing the issue might be to introduce a new category of tort entitled “corporate defamation” which would require a corporation to prove actual damage to its business before an action could be brought. Alternatively, corporations could be forced to rely on the existing tort of malicious falsehood where damage needs to be shown and malice or recklessness proved. We also consider that it would be fairer to reverse the general burden of proof in such cases. Given the seriousness of this issue, we recommend that the Government examines closely the law as it now stands, looking also at how it operates in Australia, and consults widely on the possibility and desirability of introducing such changes in the UK through an amendment to the Defamation Act 1996.

Jurisdiction

179. We now turn to consider matters relating to jurisdiction and allegations that the UK courts are being used inappropriately by so-called ‘libel tourists’ or ‘forum shoppers’ – claimants who search for the most favourable rather than the most appropriate country in which to pursue a case.

180. Some procedures are in place to prevent those with no good reason for doing so from pursuing claims in UK courts. If the defendant is outside England or Wales, the court would normally consider whether it is the correct forum when the claimant applies to serve the claim outside the jurisdiction, or whether to rule the case out as *forum non conveniens*.¹⁶⁵ The grounds on which permission can be granted are contained in a practice direction to the court, as follows:¹⁶⁶

¹⁶⁵ Rule 6.36, Civil Procedure Rules

¹⁶⁶ Practice direction 3B, para 3.1

The claimant may serve a claim form out of the jurisdiction with the permission of the court under rule 6.36 where –

- (1) A claim is made for a remedy against a person domiciled within the jurisdiction.
- (2) A claim is made for an injunction ordering the defendant to do or refrain from doing an act within the jurisdiction.
- (3) A claim is made against a person ('the defendant') on whom the claim form has been or will be served (otherwise than in reliance on this paragraph) and –
 - (a) there is between the claimant and the defendant a real issue which it is reasonable for the court to try; and
 - (b) the claimant wishes to serve the claim form on another person who is a necessary or proper party to that claim.
- (4) A claim is an additional claim under Part 20 and the person to be served is a necessary or proper party to the claim or additional claim.

181. The practice direction, as can be seen, is very broad, contains no guidance on the extent of publication in the UK and places wide discretion in the hands of the judge considering the application.

182. The decision on whether to grant permission for a claim to be served outside the jurisdiction is initially made by a High Court Master (a District Judge sitting in the High Court). The decision can be appealed to a High Court judge.

183. In addition to seeking permission under one or more of the grounds under Rule 6.36, a claimant is required to show both publication in the jurisdiction and that a 'real and substantial' tort occurred.¹⁶⁷ A claim can be limited to publication in the UK and the reputation of the individual in the UK.¹⁶⁸

184. A court can also refuse to hear a case under the doctrine of *forum non conveniens* – which requires the court consider whether a case could be more suitably tried, for the interests of the parties and the ends of justice, by the courts of another country.¹⁶⁹

185. The leading case on jurisdiction in defamation cases is *Berezovsky v Michaels*,¹⁷⁰ decided by the House of Lords in May 2000. *Forbes* magazine published an article describing two Russian businessmen as 'criminals on an outrageous scale'. Two thousand copies of the article were published in the UK, as against nearly 800,000 in North America.¹⁷¹ *Forbes* submitted that the House of Lords should require the case to be held either in Russia, of which the claimants were nationals and presumably where they had the most widespread reputation, or in America, where the principal publication had taken place. The House of Lords disagreed. Lord Steyn described the process which led him to decide that the claim could be considered by the UK courts:

¹⁶⁷ *Kroch v. Rossell* (1937) 1 All E.R. 725.

¹⁶⁸ Q 1032

¹⁶⁹ *Spiliada Maritime Corporation v Cansulex Ltd.* [1987] A.C. 460.

¹⁷⁰ [2000] 2 All E.R. 986

¹⁷¹ Ev 421

“[Firstly] only 19 copies were distributed in Russia. Secondly, and most importantly, on the evidence adduced by Forbes about the judicial system in Russia, it is clear that a judgment in favour of the plaintiffs in Russia will not be seen to redress the damage to the reputations of the plaintiffs in England. Russia cannot therefore realistically be treated as an appropriate forum where the ends of justice can be achieved. In the alternative counsel for Forbes argued that the United States is a more appropriate jurisdiction for the trial of the action. There was a large distribution of the magazine in the United States. It is a jurisdiction where libel actions can be effectively and justly tried. On the other hand, the connections of both plaintiffs with the United States are minimal. They cannot realistically claim to have reputations which need protection in the United States. It is therefore not an appropriate forum.”¹⁷²

186. The then Master of the Rolls, Sir Anthony Clarke, explained to us in his evidence how the rules surrounding jurisdiction were meant to work:

“I think the approach [...] is that, if there has been a significant publication within the jurisdiction, then, in the first class of case anyway, the courts have ordinarily taken the view that, if the claimant has found the defendant here, he ought to be entitled to claim about an unlawful publication here, but, if it is a very insignificant part of a worldwide publication, then the courts will say, ‘No, this case ought to be tried elsewhere.’”¹⁷³

187. Despite this, we have received repeated submissions suggesting that, because of the combined effects of the rules on jurisdiction and of global publication on the internet, what are said to be blatantly inappropriate cases, involving foreigners suing foreigners, are reaching UK courts. Witnesses have told us, further, that defendants in such cases, who find themselves obliged to fight actions in a foreign country under foreign law, are often placed at a disadvantage, to the detriment of free expression.¹⁷⁴

188. A number of cases have been brought to our attention where concerns have been expressed over the appropriateness of the High Court as a forum. They include a Ukrainian businessman, Rinat Akhmetov, who sued a Ukrainian language website, *Obozrevatel*, which is based in the Ukraine for £50,000, on the basis that he had a business reputation in the UK and the offending article had been viewed in Britain,¹⁷⁵ and the action brought by Iceland’s Kaupthing Bank, which won an apology and damages from *Ekstra Bladet*, a Danish newspaper. Kaupthing had argued that a number of the paper’s articles in both Danish and English were downloaded and read in England and Wales.¹⁷⁶

189. Some of the most trenchant criticism has come from media organisations in the United States.¹⁷⁷ In a joint submission to the inquiry, a number of international

¹⁷² *Berezovsky v. Michaels and Others; Glouchkov v. Michaels and Others* (Consolidated Appeals)

¹⁷³ Q 955

¹⁷⁴ Such as Ev 2, Ev 8, Q 498

¹⁷⁵ English Pen and Index on Censorship, *Free Speech is not for sale: the impact of English libel law on freedom of expression*, Case Studies, November 2009

¹⁷⁶ *Ibid.*

¹⁷⁷ Section 11 of the Irish Defamation Act 2009 introduces a single publication rule, subject to the court’s discretion

newspapers, internet services and publishing organisations, including the *New York Times* and Bloomberg, expressed the following criticism of the English court in *Lewis v King*:

“The Court of Appeal has permitted American boxing promoter Don King to sue a US attorney for defamation over anti-Semitic allegations made on a Californian website – an unhappy decision which followed the green light that *Berezovsky* gave to forum shoppers. It is difficult to understand why Americans who fall out with each other in America should be permitted to take up the time of UK courts with their slanging matches, rather than resolve them under their own law.”¹⁷⁸

190. The submission went on to note:

“Several major US papers are now in receivership, and the drying up of the advertising market with consequent loss of journalistic jobs means there is little money available for improving media law in Britain. Leading US newspapers are actively considering abandoning the supply of the 200-odd copies they make available for sale in London – mainly to Americans who want full details of their local news and sport. They do not make profits out of these minimal and casual sales and they can no longer risk losing millions of dollars in a libel action which they would never face under US law.”¹⁷⁹

191. Lawyers who usually act for media organisations in this country also expressed concern. Mr Mathieson told us:

“I [...] think the existing case law has become too restrictive. There are cases in which [cases can be struck out]; for example, if there is no evidence that a website received any significant number of hits from this jurisdiction, then the courts in such cases have said that the action should not be allowed to proceed: but there have been many other cases in which only 30 or 40 instances of publication have taken place within this jurisdiction which have been considered to be sufficient to allow the case to proceed.”¹⁸⁰

192. Mr Partington summed up the changes to the jurisdictional rules he thought necessary to protect media organisations and authors from inappropriate claims:

“I think there needs to be much greater scrutiny about whether the person is connected to this country, properly connected to this country; secondly, I think there needs to be a much greater scrutiny of the extent of publication in this country; and, thirdly, I think there needs to be a greater scrutiny of whether there is a more appropriate forum for the issue to be dealt in.”¹⁸¹

193. However, we heard from Loreena McKennitt, a Canadian musician and singer, of her frustration at being branded a libel tourist by the press. In 2005, Ms McKennitt sued for

¹⁷⁸ *Lewis & Oths v King* [2004] EWCA Civ1329; Ev 240

¹⁷⁹ Ev 237

¹⁸⁰ Q 52

¹⁸¹ Q 56

invasion of her privacy over a book written by a Canadian friend, but published in England:

“It is ironic to note that it is the media which has coined the term ‘libel tourism’ in order to frame with ridicule all matters of libel as nothing more than recreational activities by the ‘rich and famous’ from abroad. Although so called ‘libel and privacy tourism’ has been decried as a threat to democracy and media freedom, they are false decoys thrown up by the media to distract from the true effects of international internet access. Shopping for a favourable jurisdiction is far more likely to originate from members of the media seeking to avoid any limitation on their activity (such as a publication order or a judgment), regardless of how lawful and justified the restriction may be or how damaging the false or intrusive revelation is to justice, security or innocent bystanders.”¹⁸²

194. Equally, though, we also heard evidence that some law firms such as Carter-Ruck and Schilling have been promoting their expertise in ‘reputation management’,¹⁸³ encouraging law suits in London.

The international context

195. The UK’s reputation as a country which protects free speech and freedom of expression is being damaged by concern over libel tourism. In the United States, there has been much debate about the alleged chilling effect of UK libel laws on American writers and journalists. During our visit to Washington DC, Albany and New York we met writers and journalists as well as lawyers and legislators who were concerned about this. Much of this concern can be traced to the case of Rachel Ehrenfeld.

196. In 2003, Dr Ehrenfeld, an author based in New York, published in the US a book entitled *Funding Evil: How Terrorism is Financed and How to Stop It*. A deal to publish in Britain was cancelled following a threat to sue for libel by Khalid Bin Mahfouz, a banker of Saudi origin but now with Irish citizenship. Even though no British edition appeared, Mr Bin Mahfouz brought a libel claim in the UK. Publication in England and Wales consisted of 23 copies of the book ordered over the internet and some passages on a website that had been accessed. Dr Ehrenfeld refused to travel to England to defend herself in the High Court and in 2005 a default judgment was entered against her and she was ordered to pay £30,000 damages together with £100,000 legal costs.

197. Dr Ehrenfeld unsuccessfully sought an order from the American federal courts preventing Mr Bin Mahfouz from enforcing the judgment in the United States. Instead the court invited him to undertake not to pursue execution of the judgment, but he refused.

198. In April 2008, however, the New York State legislature, responding to the Ehrenfeld case, passed the Libel Terrorism Protection Act. The Act prevents the enforcement in America of libel judgments obtained in other jurisdictions against New York-based writers, unless a New York court holds that the judgment satisfies the free speech and free press provisions under federal law of the New York State Constitution.

¹⁸² Ev 438

¹⁸³ Ev 291

199. Dr Ehrenfeld told us she believed that if she had to be sued over the book, then as an American citizen publishing a book in America, she should have been sued in America, where she would have been happy to defend her work. She said she had been deterred from defending herself in the High Court in London by several factors, including the cost and the difference in the disclosure rules and burden of proof.

200. Other US states have followed the lead given by New York State. Laws similar to the Libel Terrorism Protection Act have been passed in Illinois, Florida and California and a bill has been introduced in the Hawaiian legislature.¹⁸⁴ Nor has legislative action been limited to individual states. A Bill mirroring the provisions in the New York State Act was passed by the House of Representatives, and may be taken up in the Senate. A Bill which set out to deter claimants from suing American authors in foreign courts by permitting American defendants to counter-sue in the United States courts under certain circumstances and, in addition, allowing the jury to award treble damages, has been abandoned, however.

201. That the United States feels it must take action to protect its citizens from UK judgments in this way has caused dismay in the British legal world. Tony Jaffa told us: "I find it really very distressing that they should think of our laws as terrorism. Just think what that implies. If I were a Parliamentarian I would be absolutely shocked to think that the United States regards our law in that light."¹⁸⁵

202. It is not only in the United States that concern is felt about the libel tourism in the UK courts. The United Nations Human Rights Committee (UNHRC), in its sixth periodic report into human rights in the UK, strongly criticised the working of the libel laws:¹⁸⁶

"The Committee is concerned that the State party's practical application of the law of libel has served to discourage critical media reporting on matters of serious public interest, adversely affecting the ability of scholars and journalists to publish their work, including through the phenomenon known as "libel tourism." The advent of the internet and the international distribution of foreign media also create the danger that a State party's unduly restrictive libel law will affect freedom of expression worldwide on matters of valid public interest. (art. 19)." ¹⁸⁷

203. The international media have also expressed wider concerns about the alleged intimacy between the UK's specialist libel judges and lawyers practising in the field. The memorandum to our inquiry submitted by media organisations including the Association of American Publishers noted the following:

"To foreign observers the English libel industry is most unusual. Its legal costs are by far the highest in Europe. There are only two main libel chambers – 5 Raymond Buildings and 1 Brick Court – whose barristers do most of the defamation work. In recent years it has been from these chambers all the libel judges have been recruited –

¹⁸⁴ Hawaii State Legislature, *A Bill for an Act relating to judgments*, HB 130 HD 1

¹⁸⁵ Q 60

¹⁸⁶ United Nations Human Rights Committee, Sixth Periodic Report of the United Kingdom on the implementation of the International Covenant on Civil and Political Rights (ICCPR), July 2008

¹⁸⁷ Article 19 of the Universal Declaration of Human Rights

there are four of them at present, two from each Chambers. It is quite surprising to foreign eyes, who have a different experience, that whoever allocates High Court judges does not think that judges bred in any other disciplines – e.g. public law, for example, which gives some training in freedom of speech – are qualified in or capable of handling trials for libel. The result is that the only judges available in England for libel trials are steeped in the arcane world of common law libel, which has developed without much respect for rights of freedom of speech.”¹⁸⁸

204. However, when pressed by us on such matters and in particular on developments in the US, the Lord Chancellor said he was not aware that the Government had made any representations on either the pending or the passed legislation in the United States.¹⁸⁹ He argued that it would not be appropriate to do so:

“The American Congress, subject to the other states of that realm, is sovereign in these areas. We could do the same here, if we wished, to make [foreign] judgments unenforceable [...] in this country. I do not have any particular comment on that.”¹⁹⁰

205. Whatever the constitutional situation, or diplomatic niceties, we believe that it is more than an embarrassment to our system that legislators in the US should feel the need to take retaliatory steps to protect freedom of speech from what they view as unreasonable attack by judgments in UK courts. The Bills presented in Congress, allowing for triple damages, were reminiscent of the 1970 Racketeer Influenced and Corrupt Organisations Act, which was originally aimed at tackling organised crime. As such, they clearly demonstrated the depth of hostility to how UK courts are treating ‘libel tourism’. It is very regrettable, therefore, that the Government has not sought to discuss the situation with their US counterparts in Washington, or influential states such as New York and California. We urge it to do so as soon as possible.

206. When we put the media’s concerns about libel tourism to the Lord Chancellor, he told us that he did not believe that libel tourism was a real issue in the UK, saying: “I have yet to be convinced that there is a significant problem. I am not ruling it out; I just want to see what the evidence is.”¹⁹¹ Since then, however, he has set up a ‘Working Group on Libel’ with the media, lawyers and academics, with the remit ‘to consider whether the law of libel, including the law relating to libel tourism, in England and Wales needs reform’.¹⁹²

207. We welcome the Lord Chancellor’s establishment of the Working Group on Libel and the inclusion of ‘libel tourism’ in its remit. We also agree with him that it is important to have an evidence base for decision-making. During the course of our inquiry we asked for information on the number of cases challenged on the grounds of jurisdiction and the success rate of such challenges. We have been provided with no such information and it was not clear who would be responsible for collecting it.

¹⁸⁸ Ev 236

¹⁸⁹ Q 995

¹⁹⁰ Q 991

¹⁹¹ Q 988

¹⁹² HC Deb, 27 January 2010, col 58WS

Without reliable data it is difficult to see how the Government can monitor the implementation of Rule 6.36 of the Civil Procedure Rules.

208. We recommend that the Ministry of Justice and the Courts Service should as a priority agree a basis for the collection of statistics relating to jurisdictional matters, including claims admitted and denied, successful and unsuccessful appeals made to High Court judges and cases handled by an individual judge. We further recommend that such information be collated for the period since the House of Lords judgment in the *Berezovsky* case in May 2000 and is published to inform debate and policy options in this area of growing concern.

209. Of the cases identified to us as causing concern, a striking aspect is the low levels of distribution in this country that can be involved. In *Berezovsky* it was 2,000 copies, against 800,000 in North America. In the Ehrenfeld case, it was 23 copies of the book and some internet ‘hits’. In another case, decided in 2008, Alexis Mardas, an associate of the Beatles, was held to be entitled to sue the *New York Times* in England over allegations in a story contained in a newspaper of which 177 copies had been sold in England and Wales.¹⁹³ A notable feature here was that the High Court Master refused to admit the action as an abuse of process, but Mr Justice Eady overruled him on appeal, ordering the *New York Times* to pay the £65,000 costs of both hearings.¹⁹⁴

210. The growth of the internet seems likely to augment this trend. News International Limited stated in evidence to us: “With electronic internet publication across borders [...] actions are brought in the UK at considerable expense to taxpayers even though there has been minimal publication in this jurisdiction.”¹⁹⁵

211. It has been suggested to us that a simple mechanism to limit libel tourism would be to create a threshold of the number of publications needed for a case to be heard in the UK. Mark Stephens suggested to us that fewer than 1,000 copies should be treated as *de minimis* by the courts and that in such cases jurisdiction should be declined:

“That has two effects: one is that a thousand is a fairly minimal number in terms of dealing with somebody’s reputation; it is likely to have had a much more significant circulation in another jurisdiction, which would be perhaps more appropriate to sue in; and as a consequence of that we are not cluttering our courts up with small peticioning claims, rather than the bigger claims which are more appropriately dealt with within the jurisdiction of this court.”¹⁹⁶

212. A test of at least 750 print copies in England and Wales and more than two per cent of worldwide circulation was also proposed by a collective submission on behalf of, *inter alia*, the Association of American Publishers, US news agencies, NGOs, the *Los Angeles Times*

¹⁹³ *Mardas v The News York Times* [2008] EWHC 3135 (QB)

¹⁹⁴ *Ibid.*; Ev 236

¹⁹⁵ Ev 411

¹⁹⁶ Q 1030

and *New York Times*. They also proposed that an article posted on a foreign internet site would have to have been actively promoted here.¹⁹⁷

213. Although such limits are attractive in their simplicity, any figure would necessarily be an arbitrary one. A *de minimis* rule of 1,000 copies would ignore the fact that publication to only one person can destroy a claimant's reputation. Equally, there could be relatively wide publication, of over 1,000 copies, and there could still be a more appropriate forum for the case to be heard than the courts in the UK.

214. In cases where neither party is domiciled nor has a place of business in the UK, we believe the claimant should face additional hurdles before jurisdiction is accepted by our courts. On balance, we believe there is sufficient evidence to show that the reputation of the UK is being damaged by overly flexible jurisdictional rules and their application by individual High Court judges, as exemplified by Mr Justice Eady in the Mardas and *New York Times* case.

215. We recommend that the Ministry of Justice and the Civil Justice Council consider how the Civil Procedure Rules could be amended to introduce additional hurdles for claimants in cases where the UK is not the primary domicile or place of business of the claimant or defendant. We believe that the courts should be directed to rule that claimants should take their case to the most appropriate jurisdiction (ie the primary domicile or place of business of the claimant or defendant or where the most cases of libel are alleged to have been carried out).

The internet and the 'repeat publication' rule

216. Under English and Welsh law each sale of a newspaper, book or other print medium constitutes a separate publication. If a newspaper contains a libel, then each individual publication or sale of that paper is a potential cause for legal action. This is the so-called 'repeat publication rule', which stems from a court decision in 1849. The Duke of Brunswick sent his manservant to purchase a back issue of the *Weekly Dispatch*, which he believed had libelled him some 17 years previously. The court ruled that this sale constituted a fresh publication so that the Duke was able to successfully sue for libel.¹⁹⁸ While the Duke would no longer be able to rely on a purchase he had engineered as a 'publication', as this would constitute consent to dissemination of the information and an abuse of the process of the court,¹⁹⁹ it remains the position that each time a newspaper, book or article is accessed a fresh publication, and a potential cause of action, occurs.

217. In contrast, most American states apply the 'single publication rule' in defamation cases, meaning that there can only be one cause of action emanating from a publication, no matter how many copies were produced or downloaded, or where and when they were distributed.²⁰⁰

¹⁹⁷ Ev 237

¹⁹⁸ *Duke of Brunswick v Harmer* [1849] 14 QB 154

¹⁹⁹ See, for example, *Carrie v Tolkein* [2009] EWHC 29 (QB)

²⁰⁰ Uniform Single Publications Act in 1952: held to apply to internet archives in *Firth v State of New York* (2002) NY int 88

218. Until recent times, publishers and authors here enjoyed a measure of protection from the effects of the repeat publication rule thanks to the statute of limitations, which requires claimants to sue within a year of publication. Thus, for example, a year after the publication date of an article in a newspaper, the paper could not normally be sued. The development of the internet, where articles can remain accessible for many years, has changed this. Each time an article is accessed, even if it is more than a year since it was first posted online, that is a new publication and so is potentially capable of attracting a libel action.

219. In 2002, the UK courts confirmed that the multiple publication rule applies to internet archives.²⁰¹ Times Newspapers challenged the decision in the European Court of Human Rights but lost.²⁰² It is noteworthy that *The Times* lost because of its failure to ‘tag’ the offending article with a qualifying statement which, in the view of the court, would have removed the ‘sting’ from the libel.

220. The difficulties caused by the expansion of the internet were acknowledged by the Law Commission in 2002, in the following terms:

“We recommend a review of the way in which each download from an online archive gives rise to a fresh cause of action, and causes the limitation period to begin anew. We have argued previously that the present limitation period of one year may cause hardship to claimants, who have little time to prepare a case. However, it is potentially unfair to defendants to allow actions to be brought against archive-holders many years after the original publication. After a lapse of time, it may be difficult to mount an effective defence because records and witnesses are no longer available. Online archives have a social utility, and it would not be desirable to hinder their development.”²⁰³

221. But the internet can also have a chilling effect on organisations worried about being sued in foreign jurisdictions. Article 19, a non-governmental organisation which campaigns for freedom of speech, warned us of the danger of creating “a risk of a “lowest common denominator” approach to the freedom of expression of those who publish on the internet”.²⁰⁴ Of particular concern is the possibility of being sued in relation to material contained in internet archives. Material that is often many years old can be contained in an online archive, leading to the possibility of a publication being sued many years after an article was first published.

222. The Court of Appeal has previously considered and rejected an application that it should introduce a single publication rule into domestic law, a decision which was not appealed to the House of Lords.²⁰⁵

223. We heard from Mr Partington of the Media Lawyers Association of the practical difficulties faced by newspapers in defending libel actions based on stories from some time ago:

²⁰¹ *Loutchansky v The Times Newspaper* [2002] 1 All ER 652

²⁰² *Times Newspapers (No. 1 & 2) v United Kingdom* (2009) (Apps 3002/03 and 23676/03)

²⁰³ Law Commission, *Defamation and the internet*, Scoping Study, 2002, para. 1.14

²⁰⁴ Ev 288

²⁰⁵ *Lord Steyn Berezovsky & Glouchkov v Michaels & Oths.*

“What actually happens in truth is that people will complain about something that is published on-line, and because of the difficulty of defending it, because of years later, the natural instinct is to just remove it whether it is true or not; which I think we all lose out on in that sense because the public loses information, and accessed information, which could well be true; but it is safer and easier for media organisations to just say, ‘Okay, I’ll take that down’, because they might not be in a position to defend it, so we all lose out, I think.”²⁰⁶

224. A further problem is the limited ability of the originators of articles to control them once they have been placed on the internet. Even if the originator has agreed to remove an article, it can still have a life on the internet with third party sites and bloggers carrying references to it.

225. Mark Thomson, then of Carter-Ruck, explained that this causes problems both for the publisher of the original article, who will be worried about ongoing liability, and for the complainant:

“[...] even though a newspaper might have apologised and said someone is not a car thief, the allegation is repeated, Google keeps putting it on their search engines and it is still out there, whereas the person who has won his action and has been vindicated is then faced with effectively the same article appearing.”²⁰⁷

226. The Media Lawyers Association suggested to us that there should be consideration of the introduction of a single publication rule for articles on the internet, removing the ability to sue some years after the event.²⁰⁸ Mr Mathieson of Reynolds, Porter, Chamberlain solicitors suggested to us that the simplest change would be to introduce a statute of limitations in line with that for printed articles, meaning that a complainant would need to sue to within one year of the article first appearing on the internet.²⁰⁹

227. However, Mr Thomson suggested that such changes would be unfair to those whose reputations can be harmed by material on the internet many years after its first appearance:

“[...] in my view the internet changes the game a lot because once it is online it gets repeated. Google makes all articles and everyone’s previous articles available [...]. I think the law as it is should stay because of the power of the internet, otherwise archive defamatory allegations will remain available.”²¹⁰

228. Since we took evidence on the issues raised by the multiple publication rule and the internet, the Ministry of Justice has published a consultation paper on the issue, *Defamation and the internet: the multiple publication rule*.²¹¹ The consultation, which ended on 16 December 2009, sought views on the retention of the multiple publication

²⁰⁶ Q 21

²⁰⁷ Q 97

²⁰⁸ Q 19, Ev 7–8

²⁰⁹ Qq 25–6

²¹⁰ *Ibid.*

²¹¹ Ministry of Justice, *Defamation and the internet: the multiple publication rule*, Consultation paper CP20/09, 16 September 2009

rule, raised the possibility of its replacement by a single publication rule and asks what the consequences would be. The consultation also asked what limitation period for defamation actions would be most appropriate; whether the test should be ‘date of publication’ or ‘date of knowledge’; and whether qualified privilege should be being extended to electronic archives.

229. It is clear that a balance must be struck between allowing individuals to protect their reputations and ensuring that newspapers and other organisations are not forced to remove from the internet legitimate articles merely because the passage of time means that it would be difficult and costly to defend them. We welcome the Lord Chancellor’s consultation and look forward to his conclusions. As a general consideration, we believe it would be perverse if any recommendations increased the uncertainty faced by publishers under the UK’s already restrictive libel laws.

230. In order to balance these competing concerns, we recommend that the Government should introduce a one year limitation period on actions brought in respect of publications on the internet. The limitation period should be capable of being extended if the claimant can satisfy the courts that he or she could not reasonably have been aware of the existence of the publication. After the expiry of the one year limitation period, and subject to any extension, the claimant could be debarred from recovering damages in respect of the publication. The claimant would, however, be entitled to obtain a court order to correct a defamatory statement. Correction of false statements is the primary reason for bringing a defamation claim. Our proposal would enable newspapers to be financially protected in some degree from claims against which the passage of time may make establishing a defence difficult.

231. We have also received evidence that electronic archives should be protected by ‘qualified privilege’. This issue is explored by the consultation, with a one year limitation period suggested, unless the publisher has not amended or flagged the online version in response to a complaint. We agree. This would take into account views expressed by the ECtHR in *Times Newspapers v UK*, regarding the increasing importance of online archives for education and research in modern times.

Criminal libel

232. Criminal libel stemmed from a time when Government was anxious to defend both itself and the rich and powerful from criticism by the media and the public. If those prosecuted under criminal libel sought to use the defence of justification they had to prove not only that a statement was true, but also that its publication was for the public benefit. Defendants could thus be convicted even when they could prove they had told the truth. The maximum sentence available was two years in prison. Criminal libel was removed from the statute books of England and Wales in November 2009 by the Coroners and Justice Act, though it remains an offence in Scotland.

233. Before the passage of the Act, we received eloquent evidence on this matter. In a written submission to this inquiry Article 19 stated that criminal libel was simply not required to protect reputations where civil defamation laws existed, and that imprisonment and a criminal record were disproportionate as punishment for defamation. The submission concluded:

[...] criminal defamation laws inherently fail to strike an appropriate balance between reputations and freedom of expression. Criminal defamation laws are a major obstacle to freedom of expression in many parts of the world. The key problem with criminal defamation is that a breach may lead to a custodial sentence or another form of severe criminal sanction, such as a suspension of the right to practise journalism. The stigma of a criminal conviction can harm a journalist's career long after the penalty has formally been discharged. The threat of such sanctions casts a wide shadow as journalists and others steer well clear of the prohibited zone to avoid any risk of conviction. This can lead to serious problems of self-censorship, stifling legitimate criticism of Government and public officials.”²¹²

234. Mark Stephens, of Finer Stephens Innocent solicitors, told us that, while the criminal libel laws were effectively moribund in the UK, the legitimacy they gave to similar laws in other countries was worrying:

“I am very often asked to be a trial observer or, indeed, to go and monitor the human rights standards of other countries, and invariably, particularly in the Commonwealth, it is said back to me, ‘Yes, but you’ve got criminal libel – why shouldn’t we?’ This is a particular problem in Southeast Asia. I think the quicker we do away with these laws – which we all know have fallen into desuetude and are not likely to be resurrected – we are able then to stand up and encourage others to make reforms.”²¹³

235. The offence of criminal libel is untenable in a modern, democratic society. We therefore welcome the Government’s decision, 27 years after it was advocated by the Law Commission, to repeal the law of criminal libel. We hope this will encourage other legislatures, including the Scottish Parliament, to demonstrate their own commitment to freedom of expression by doing the same.

²¹² Ev 422–423

²¹³ Q 1037

4 Costs

Introduction

236. Defamation has traditionally been labelled a ‘rich man’s tort’ as libel cases are notoriously expensive and public funding, through legal aid, is not available. Parliament sought to address this through the Access to Justice Act 1999, which extended to defamation proceedings so-called “no win, no fee” agreements, or Conditional Fee Agreements (CFAs), enabling those who would otherwise have been unable to fund the substantial costs involved in defamation claims to bring proceedings. This means that if a party enters into a CFA and wins the case, he or she can recover from their opponent a “success fee”, an uplift of up to 100% on top of the solicitor’s basic costs. The winning party is also able to recover the premium for taking out After The Event (ATE) insurance, insurance which covers their potential liability for an opponent’s costs.

237. The cost of litigation has a direct bearing both on the freedom of expression enjoyed by the press and on the standards of the press. We are aware that there are cases where people wronged by the media are deterred from seeking legal remedy by the combination of cost and risk. We have also heard evidence that journalists and editors sometimes refrain from publishing information for fear of legal action, even where they are sure of their facts, because the costs and risks are too high, and that some wealthy individuals and organisations exploit this fear to intimidate the press. For instance Jeff Edwards, former Chief Crime Correspondent of the *Daily Mirror*, told us that the newspaper would not publish a story relating to the Russian oligarch Roman Abramovich, even though it was corroborated, as “we do not mess with Abramovich, he is too powerful, he is too litigious”.²¹⁴

238. As discussed at paragraph 130, Richard Desmond brought a defamation case against the journalist Tom Bower. Following its failure Mr Desmond was left with a bill reported to be in the region of £1.25 million.²¹⁵ Indeed, it is not just in defamation cases that costs are high, and for most people prohibitively so. Max Mosley, a wealthy man, gave us an account of his privacy action against the *News of the World*, in which he was left out of pocket despite winning his case and £60,000 in damages:

“In round figures my costs were slightly more than £500,000. The costs that the *News of the World* had to pay, the so-called taxed costs, were £420,000. There were £60,000 damages and then there were other bits and pieces of expenses that I had to meet myself. I was left with a bill of something of the order of £30,000 altogether. To me it was worth it but to an awful lot of people they would say, ‘If in addition to getting everything repeated again, exactly that which I wish to keep private, I am going to have to pay a big bill, I will not do it.’ That of course is exactly what the newspaper’s calculation is [...].”²¹⁶

²¹⁴ Q 333

²¹⁵ “Newspaper magnate Desmond’s £1.25m bill for lost libel case”, *The Independent*, 24 July 2009

²¹⁶ Q 123

239. Paul Dacre described to us the outcome of a libel case in which Martyn Jones MP, using a CFA, sued the *Mail on Sunday*:

“The Mail on Sunday believed it had rock solid witnesses and decided to fight the case. In the event they lost and they were ordered to pay £5,000 in damages, a relatively footling sum. The MP’s lawyers claimed costs of £387,855 solicitors’ costs of £68,000 plus success fees, and the barrister’s fees as well. Anyway, the total with VAT and ATE insurance came to £520,000. Everything had been doubled up with the success fees and that was for damages being awarded of £5,000.”²¹⁷

240. Mr Dacre went on to ask: “Can it really be right for a QC in a libel case to be paid £7,000 for a day in court whilst the same QC, prosecuting or defending a serious case at the Old Bailey, may receive less than £600 a day – less than a tenth?”²¹⁸

241. Marcus Partington, Chairman of the Media Lawyers Association, said:

“Some of the people [...] who act for claimants, they charge £500/£575/£650 an hour; if you then double that with a 100% success fee you are over £1,000 an hour; you then add VAT on top and you are talking about a huge figure per hour. On top of that the premiums for ATE insurance run at roughly £68,000 per £100,000 worth of cover. The claimant does not pay for that insurance; they incur the premium but they then claim it back from the defendant. The vast majority of cases against the media are won by claimants.”²¹⁹

242. The price in terms of freedom of expression can be high. The NGO Article 19, in its submission, wrote:

“Costs in defamation cases in the UK have now reached what may, without exaggeration, be called crisis proportions, particularly from the perspective of NGOs. Costs can be crippling, even if one is ultimately successful in winning a case. The pure ‘harassment’ value of defamation cases has been recognised in many countries, where rich and powerful individuals bring cases which have no chance of success, simply to deter potential critics.”²²⁰

243. Alan Rusbridger of the *Guardian* summed up the concerns of many journalists when he told us:

“It is becoming staggeringly expensive to do the kind of journalism that I guess most members of this Committee would believe in, and I think it is a given in journalism that mistakes are made despite the best attempts to get things right, and the attempts we now have to make in advance to try and prevent mistakes being made can cost tens and tens and tens of thousands of pounds, and if mistakes are made the forms of libel defence that are theoretically available to try and settle cases quickly can still end up costing hundreds of thousands of pounds, so I think all this is a great

²¹⁷ Q 496

²¹⁸ Paul Dacre’s speech to the Society of Editors, Press Gazette, 9 November 2008

²¹⁹ Q 1

²²⁰ Ev 422

discouragement to the forms of investigative journalism about things that I think everybody would agree are public interest.”²²¹

244. The matter of costs is subject to some regulation, under rules 43–48 of the Civil Procedure Rules (CPR), the Practice Direction on Costs and by case law. Costs are normally awarded to the ‘winner’ in a case, but courts have discretion to vary this, for example to penalise parties whose conduct in litigation they consider unreasonable, or because a successful party has lost on some of the issues raised in the case. Courts must also take into account any payment into court or settlement offers previously notified to the court.

245. In England and Wales, after a court has ruled that one party’s costs are payable by another, if the parties are unable to agree the amount, the court will ‘assess’ the costs – in other words determine the amount to be paid. This can be a complex matter, taking into account such factors as the conduct of the parties, the sums involved and the skill, effort and knowledge involved. The then Master of the Rolls, Sir Anthony Clarke, explained to us that the process can also add to costs, as “the cost of a detailed assessment can itself be very great”.²²²

246. As with our libel law, in the matter of costs the position in England and Wales stands in contrast to that in many other countries. While, as a general rule, litigants in England and Wales expect to recover virtually all their costs from an unsuccessful opponent, in many other countries there is no such expectation. In Germany, for example, there are statutory limits on the amounts a successful litigant can recover from an opponent. In France, while the unsuccessful party will generally pay court costs, he or she will only ever have to pay a proportion of the legal costs incurred by the winning party.²²³ In the US, each party to a civil litigation normally bears his or her own costs, though the US courts have some discretion to vary this.²²⁴

247. We have also received evidence that access to justice is much more expensive in UK courts than in other jurisdictions. Global Witness cited a number of case studies and stated that:

“The UK system is characterised by disproportionately high costs and damages which may be affordable by media empires, but not by non-profit organisations. Standards for freedom of expression have already fallen below those protected in countries such as the United States. Furthermore, penalties provided for contravention of libel law in the UK are already tougher than in other European countries, as demonstrated by the recent study conducted by Oxford University *A Comparative Study of Costs in Defamation Proceedings Across Europe* (December 2008).”²²⁵

²²¹ Q 857

²²² Q 940

²²³ *Review of Civil Litigation Costs: Preliminary Report*, Lord Justice Jackson, Chapter 56, para 1.1

²²⁴ *Ibid.*, Chapter 60, para 1.2

²²⁵ Ev 238

248. We examined this Oxford study, which was commissioned by Associated Newspapers and which compares the costs of defamation litigation in 12 European countries. Though comparisons between countries with very different legal systems (Ireland, Malta, Bulgaria) must be treated with some caution, the study leaves no room for doubt that England and Wales is an extremely expensive place to litigate in defamation cases:

“Even in non-CFA cases (where there is no success fee or insurance) England and Wales was up to four times more expensive than the next most costly jurisdiction, Ireland. Ireland was close to ten times more expensive than Italy, the third most expensive jurisdiction.”²²⁶

When the costs of CFAs were factored in, the differences became even greater.

Attempts to control costs

249. Successive Governments have tried to curb litigation costs, without much success. One recent attempt followed Lord Woolf’s 1996 report, *Access to Justice*, which recommended measures to make it easier to settle cases early and to allow cases to be brought to trial more quickly. More than a decade on, there is little sign that these measures have had any real impact on costs at all. Lord Woolf himself has acknowledged: “Costs other than those that were fixed not only remain obstinately high but in many instances have risen and remain an impediment to justice.”²²⁷

250. Another relevant measure was the introduction in 1995 of CFAs, which have had a large role in this inquiry’s consideration of costs. CFAs enable lawyers to be paid on a ‘no win, no fee’ basis. Initially available only for cases involving personal injury, insolvency and applications to the European Court of Human Rights, they were meant to provide access to justice for those too rich to qualify for legal aid yet too poor to pay for litigation themselves.²²⁸ The Conditional Fee Agreements Commencement Order 1995 allows a lawyer who wins a CFA case to charge a ‘success fee’ (also known as ‘uplift’) of up to 100% of his or her normal fee, though in the early days clients rarely paid that much.

251. At the end of 1990s, in response to pressure on the legal aid system and demands for further reforms to tackle litigation costs, the Government introduced the Access to Justice Bill. During debate on Second Reading on 17 March 1998, Rt Hon Geoff Hoon MP, then Minister of State in the Lord Chancellor’s Department, explained the Government’s concerns:

“The existing legal aid scheme fails almost everyone. It certainly fails the great majority of people who pay for it through their taxes, because they are not financially eligible for it. They cannot go to law for fear of the considerable legal costs that they might face. By extending the availability of conditional fees, we create the

²²⁶ Oxford University, “A Comparative Study of Costs in Defamation Proceedings Across Europe”, December 2008

²²⁷ “Civil justice system: why we are doing well but can do better”, *The Times*, 11 June 2009

²²⁸ Through section 58 of the Courts and Legal Services Act 1990

opportunity for everyone, rich and poor alike, to go to court regardless of their financial position.”²²⁹

252. Crucially, the Access to Justice Act extended the scope of CFAs to defamation and other publication proceedings, and it made success fees recoverable from the losing party. Also made recoverable were ATE insurance premiums. These changes dramatically altered the culture and balance of defamation proceedings, effectively enabling largely risk-free litigation for a CFA-funded party (usually a claimant), while at the same time substantially increasing the financial exposure of the opponent.

253. As the evidence cited above from Messrs Mosley, Dacre, Partington and others demonstrates, these measures, whatever their virtues, have not slowed the rise in litigation costs and may have accelerated it, raising at the same time new problems in relation to press freedom.

Other inquiries

254. We are not alone in our concern. While we have been conducting this inquiry, both the Government and the judiciary have been looking into the matter. Lord Justice Jackson has recently concluded an examination of the costs of civil litigation generally and the high costs of defamation actions in particular. The Ministry of Justice, meanwhile, has published a number of consultations with proposals for change in this area.

255. In January 2009, the Master of the Rolls appointed Lord Justice Jackson to review of the rules and principles governing the costs of civil litigation, with the following terms of reference:²³⁰

- Establish how present costs rules operate and how they impact on the behaviour of both parties and lawyers.
- Establish the effect case management procedures have on costs and consider whether changes in process and/or procedure could bring about more proportionate costs.
- Have regard to previous and current research into costs and funding issues; for example any further Government research into Conditional Fee Agreements – ‘No win, No fee’, following the scoping study.
- Seek the views of judges, practitioners, Government, court users and other interested parties through both informal consultation and a series of public seminars.
- Compare the costs regime for England and Wales with those operating in other jurisdictions.
- Prepare a report setting out recommendations with supporting evidence by 31 December 2009.

256. In oral evidence to us, Lord Justice Jackson asked the Committee not to treat defamation costs independently of their wider context:

229 HC Deb, 17 March 1998, col 1092

230 *Review of Civil Litigation Costs: Preliminary Report*, Lord Justice Jackson, Introduction, para 2.1

"It is very important to look at the problems of costs holistically. There are serious issues concerning the costs of defamation proceedings and there are very serious issues concerning the costs of the whole of civil litigation, which is why the Master of the Rolls has taken me out of sitting for a year in order to address them, and I do endorse the point which Sir Anthony Clarke [the Master of the Rolls] has made that we must deal with this problem in principle and across the board and, if I may respectfully suggest it to Members of this House, not embark on piecemeal reform for one tiny part of the civil litigation terrain which may perhaps have a slightly more vocal presentation than others."²³¹

257. Despite this view, during the course of our inquiry the Ministry of Justice has published two consultation papers which seek to address issues specifically around defamation costs.²³² In its first consultation it explained why the Government believed that reform of defamation costs was urgently needed and could not wait for the conclusion of a wide-ranging review: "Excessive costs may force defendants to settle unmeritorious claims, which in turn threatens a more risk averse approach to reporting and some argue is a risk to freedom of expression."²³³

258. While the media has been vocal in expressing its concerns,²³⁴ some of the lawyers who represent mainly claimants have naturally argued that there is no real problem with costs, that current measures to control the costs were sufficient and that the fees charged by firms represent a reasonable reward for risks taken.²³⁵

259. Mark Thomson, then of Carter-Ruck, suggested that a swift apology was the best remedy to the problem of high costs:

"The reason why there are expensive litigations in my personal experience is because of the way the defendants, who determine the issues in the case, run the case. Most cases [...] settle very quickly with an apology, modest damages and modest costs. It is when the defendants decide to defend cases that the costs escalate on both sides and probably at equal levels."²³⁶

260. Mr Thomson noted in this context that at Carter-Ruck success fees were normally graded over time, so the full 100% would be chargeable only if a case ran its full course.

261. However Tony Jaffa, who acts for regional newspapers, made the case that it was wrong to compel defendants to settle on costs grounds alone:

"I think the correct question is: if people have a legitimate claim then the relevant newspaper should apologise. If they do not have a legitimate claim – if there is an

²³¹ Q 919

²³² Ministry of Justice, *Controlling costs in defamation proceedings*, consultation paper CP4/09, 24 February 2009; Ministry of Justice, *Controlling costs in defamation proceedings: reducing conditional fee agreement success fees*, consultation paper CP1/2010, 19 January 2010

²³³ *Controlling costs in defamation proceedings*, para 14

²³⁴ Ev 26, Qq 10–11, Q 18.

²³⁵ Qq 66–69, 72–73.

²³⁶ Q 65

issue, whatever the defence might be – then the press should be entitled to defend themselves. At the moment, no regional paper can do that.”²³⁷

262. The evidence we have heard leaves us in no doubt that there are problems which urgently need to be addressed in order to enable defamation litigation costs to be controlled more effectively. We find the suggestion that the problem confronting defendants, including the media, who wish to control their costs can be solved by settling cases more promptly to be an extraordinary one. If a defendant is in the right, he should not be forced into a settlement which entails him sacrificing justice on the grounds of cost.

263. We are aware that machinery exists for defendants to protect their position as to costs by making a payment into court. It does not appear to us that this machinery effectively protects a defendant, who genuinely attempts to settle a claim at an early stage, against a determined and deep-pocketed litigant. This is another issue which needs to be addressed by the Ministry of Justice.

Costs Capping

264. A mechanism exists by which judges, in advance of a trial, can impose a limit on the amount that the successful party will be able recover from the losing party. Costs capping orders are governed by Rules 44.18 to 44.20 of the CPR. Section 23A of the Costs Practice Direction states, however, that: “The court will make a costs capping order only in exceptional circumstances.”

265. It has been suggested, both to us and in the responses to the Ministry of Justice’s first consultation paper,²³⁸ that the courts’ attitude to costs capping is too conservative. This reflects the approach taken by the Civil Procedure Rules Committee (CPRC). As Lord Justice Jackson explained: “The Rule Committee when drafting the new costs capping rules has adopted a conservative approach, in the knowledge that there was about to be a fundamental review of costs.”²³⁹

266. Keith Mathieson, a lawyer with Reynolds Porter Chamberlain, told us:

“I think the way in which the courts approach the question of costs capping makes it extremely difficult to make out a case for a costs cap. You have got to show that costs are being incurred at a disproportionate rate; and you have got to show that it will not be possible to control those costs retrospectively. Those are pretty hard tests to fulfil. There have been very few cases in which costs capping orders have actually been made for that reason.”²⁴⁰

²³⁷ Q 4

²³⁸ Ministry of Justice, *Civil Procedure Rules: Costs Capping Orders: Response to consultation carried out by the Ministry of Justice on behalf of the Civil Procedure Rule Committee*, 23 February 2009

²³⁹ *Review of Civil Litigation Costs: Preliminary Report*, Chapter 45, para 7.1

²⁴⁰ Q 3

267. The ‘exceptionality’ test has also been criticised as too conservative by the courts.²⁴¹ Following the publication of Lord Justice Jackson’s preliminary report, the CPRC has therefore agreed to re-examine the operation of the ‘exceptionality’ test.²⁴²

268. In oral evidence to us Lord Justice Jackson suggested that in defamation cases costs capping was not used more frequently due to the difficulty in predicting the likely final cost of a case: “The risks may be particularly high in relation to defamation because, as Mr Justice Eady pointed out [...], defamation cases, perhaps more than other civil litigation cases, have a habit of taking unexpected and unforeseen turns.”²⁴³

269. The then Master of the Rolls, Sir Anthony Clarke, also urged that costs capping should not be seen as the only or best approach to cost control:

“If you then focus on the costs capping process, that itself involves identifying what the costs are likely to be and one way of doing that is to conduct something close to a detailed assessment in advance. Now, if you do that, you are then spending a lot of money assessing costs which have not yet been incurred in circumstances where (a) everybody knows that 95% or more of the cases are going to settle, so there will never be a judgment, and (b) even where there is a judgment, the vast majority of costs issues are resolved as well, so there will never be a detailed assessment, but, if you are going to have a costs capping exercise in every case, it has to be very carefully monitored. You would have to have, to my mind at least, a very robust approach so that you did not spend too much money on assessing the costs in advance because that would be another example of the kind of satellite litigation which one is trying to avoid.”²⁴⁴

270. Instead Lord Justice Jackson’s report suggests a range of more sophisticated measures to keep costs under control. These include a far more hands-on role for the courts and giving the courts more discretion as to the level of costs payable by a claimant if they lose their case (known as “qualified one way costs shifting”).²⁴⁵

271. Initially the approach of the Ministry of Justice to mandatory costs capping in defamation proceedings, or at least mandatory consideration of the need for a costs cap, was favourable ‘given the pressures towards disproportionate costs’ in such cases.²⁴⁶ The Ministry said this would enhance access to justice: “A costs capping order would preclude one party putting undue pressure on the other to settle by incurring ever-increasing costs.”²⁴⁷ The consultation accepted that such a course of action would add to the overall costs of proceedings but suggested that preparation and attendance at a one-day costs capping hearing might add only £3,000 costs to either side.²⁴⁸

²⁴¹ *Peacock v MGN* [2009] EWHC 769 (QB)

²⁴² *Controlling costs in defamation proceedings*, para 12

²⁴³ Q 940

²⁴⁴ *Ibid.*

²⁴⁵ *Review of Civil Litigation Costs: Final Report*, Lord Justice Jackson, December 2009, Recommendations

²⁴⁶ *Controlling costs in defamation proceedings*, para 26

²⁴⁷ *Ibid.*, para 28

²⁴⁸ *Ibid.*, para 32

272. However, following consultation, the Ministry of Justice has decided not to alter the current cost capping regime in defamation cases. In particular, the Ministry noted the advice of the CPRC, which echoed concerns raised by several parties responding to the consultation over the expense of costs capping as well as its potential for generating further litigation. Instead, the CPRC proposed a mandatory costs budgeting pilot for all defamation and malicious falsehood proceedings. Costs budgeting aims to ensure the court can manage the costs of litigation in a way that is proportional to both the value of the claim and the reputational issues at stake. The Ministry of Justice described the process adopted in the pilot, as follows:

“The parties will prepare, exchange and lodge with the court before each hearing costs estimates for the whole proceedings. The parties will be required to monitor costs against the budget and to update each other on the position. The court may also call regular costs management conferences (by telephone where possible). At each hearing the court will consider and record its approval or disapproval of each party’s budget, after representations where necessary. The court will also take account of the additional costs of each procedural step when giving case management directions. On any later costs assessment the court will only approve as reasonable and proportionate, costs claimed which fall within the last approved budget and not approve costs incurred outside the budget.”²⁴⁹

273. The Ministry of Justice went on to say it hoped that the pilot would involve close supervision of hourly costs which it believes are key to controlling costs in this area.

274. Mandatory universal costs capping, if implemented in isolation, is too crude an instrument to introduce greater discipline while preserving flexibility and access to justice. We therefore welcome the costs budgeting pilot which has the potential to impose greater discipline on those incurring costs. Without such discipline, no cost control methods are likely to succeed. We also welcome Lord Justice Jackson’s proposal that there should be a more interventionist approach to controlling costs by the courts. Nevertheless, we recommend that costs capping should remain as a remedy to be used in those cases where parties cannot agree a way to make costs budgeting work.

Offer of Amends

275. Sections 2 to 4 of the Defamation Act 1996 provide a statutory scheme for resolving defamation cases through the offer of amends procedure, allowing a party to acknowledge it has made a mistake and settle a claim without the need for a court case.

276. Where the offer of amends is accepted, the parties can reach a settlement on the steps to be taken to fulfil the offer and the level of compensation and costs to be paid by the defendant. If the parties cannot agree on these matters, the court will determine the compensation and costs payable, liability having already been resolved.

277. When a claimant chooses to reject an offer to make amends, the defendant has a statutory defence to defamation proceedings under section 4(2) of the Defamation Act 1996. This defence can only be overcome if the claimant can prove that the defendant knew

²⁴⁹ *Controlling costs in defamation proceedings*, para 4

or had reason to believe that the statement complained of was both false and defamatory, i.e. that the publication was motivated by malice.

278. In theory, this procedure should operate to limit costs in defamation, though it applies only where liability is accepted by the defendant. Also, as discussed in paragraphs 168 to 172 above, the recent case of *Tesco Stores Limited v Guardian* showed that even where an offer of amends is made, substantial costs can still be incurred.

279. The offer of amends procedure was intended to provide a simple and effective way of acknowledging a mistake, and putting it right at minimal cost to both parties by means of an apology, payment of moderate compensation and suitable costs. Whatever the rights and wrongs of the individual case, headline figures for costs such as those incurred by the *Guardian* in the *Tesco* case simply undermine Parliament's purpose in introducing the offer of amends procedure.

Hourly rates

280. The hourly rates charged by solicitors and barristers clearly underpin the costs issue. Actual fee levels are confidential, but the Ministry of Justice has stated that some specialist claimant solicitors regularly charge £400 to £600 per hour,²⁵⁰ figures confirmed in Lord Justice Jackson's preliminary report.

281. Rates at this level are clearly in excess of the 'guideline recoverable hourly rates' recommended by the Advisory Committee on Civil Costs:²⁵¹

	Band A	Band B	Band C	Band D
London 1	402	291	222	136
London 2	312	238	193	124
London 3	225–263	169–225	162	119
National 1	213	189	158	116
National 2/3	198	174	144	109

- Band A: post 8 yrs post-qualification experience
- Band B: post 4 yrs post-qualification experience (solicitors or legal executives)
- Band C: other qualified solicitors/legal executives
- Band D: trainee solicitors

As we have seen, the excess widens further if a CFA success fee is involved. The Lord Chancellor, in oral evidence to us, expressed his disapproval: "I have no comment to make about the level of fees for defendants, but I think that the level of fees for plaintiffs' lawyers

²⁵⁰ *Controlling costs in defamation proceedings*, para 15

²⁵¹ *Review of Civil Litigation Costs: Preliminary Report*, Chapter 8, para 3.3, Table 8.21

is too high.”²⁵² Carter-Ruck has stated in evidence to this Committee that its ‘base rate’ is “£400 per hour”.²⁵³

282. The Ministry has asked the Advisory Committee on Civil Costs to consider appropriate maximum or fixed recoverable hourly rates in defamation proceedings. In its response to its consultation *Controlling Costs in Defamation Proceedings* the Ministry noted:

“Having taken written and oral evidence from claimant solicitors and defendants, and seen a summary of the responses to Question 1 of the consultation paper, the ACCC concluded that they could not recommend an appropriate rate. They gave a number of reasons. A key difficulty was that they could identify no economic or financial basis on which to set a rate that departed from the Guideline Hourly Rates. They were also concerned that setting a fixed rate would lead to pressure to set similar discrete rates for other areas of which would undermine the Guideline Hourly Rates and create a complex and fragmented system. They instead recommended expressly applying the Guideline Hourly Rates to all assessments in publication proceedings (including detailed costs assessments).”²⁵⁴

283. The Ministry of Justice decided, therefore, not to pursue the proposal for maximum or fixed costs at the moment, but may return to the issue following the publication of Lord Justice Jackson’s recommendations on the issue.²⁵⁵

284. In his final report, Lord Justice Jackson proposes that a “Costs Council” should be created, which would be either a free-standing body or an adjunct to the Civil Justice Council, an advisory body which has responsibility for overseeing and co-ordinating the modernisation of the civil justice system.²⁵⁶ This Council would set guideline hourly rates not only for summary but also for detailed assessment, and would report to the Master of the Rolls and, as appropriate, the Lord Chancellor.

285. Within the context of more active case management by the courts, we can see merit in the proposal that there should be some limitation on the maximum hourly rates that can be recovered from the losing party in defamation proceedings. This should have a significant impact on costs across the board. While we note the difficulties identified by the Advisory Committee on Civil Costs, we agree with the Ministry of Justice that it should reconsider this issue now that Lord Justice Jackson’s final report has been published.

²⁵² Q 999

²⁵³ Ev 452

²⁵⁴ *Controlling costs in defamation proceedings*, paras 8 and 9

²⁵⁵ Ministry of Justice, *Controlling costs in defamation proceedings: Ministry of Justice response to consultation document*, para 10

²⁵⁶ *Review of Civil Litigation Costs: Final Report*, Chapter 6, Part 1, Paras 2.15 to 2.16

Conditional Fee Agreements

286. As we observed above, the provisions of the Access to Justice Act 1999 in relation to CFAs have had some undesirable consequences. Lord Justice Jackson put the matter as follows:

“There can be no doubt that the decision taken by Parliament and implemented by the Rule Committee to make success fees and ATE premiums recoverable has (a) promoted access to justice for claimants and (b) massively increased the costs burden upon defendants. Claimants can now litigate at no cost and at no personal risk. If successful, they retain the entirety of the damages awarded or agreed. If unsuccessful, they walk away with no liability.”²⁵⁷

287. Potential costs for defendants increase sharply because of two factors: the success fees, which may double the sum owed to a successful claimant’s lawyers, and the ATE insurance premiums, which, we were told by Mr Partington, can be as high as £68,000 for £100,000 worth of cover. Both are normally recoverable from the losing side.

288. As Ian Hislop, editor of *Private Eye*, put it to us, the prospect of defending an action entailing financial risk on such a scale can be intimidating to editors:

“If someone comes and says, ‘We are suing you, and not only that, we have a CFA, which means we can just make it up. It will be any figure that comes into our head, double it, double it again, and you pay all of it,’ that makes you think twice about running a piece.”²⁵⁸

289. Tony Jaffa spoke in similar terms:

“I went on record about 15 or 18 months ago in the *Evening Standard* saying that I cannot see any regional newspaper ever defending a claim in the foreseeable future. That is not because they are poor journalists; not because they publish poor stories; it is entirely due to a small regional newspaper facing costs based on somewhere between £400–£600 an hour times a 100% success fee, plus the ATE premium, plus VAT and so on and so on. That is what it is all about.”²⁵⁹

290. Since CFAs are not means-tested, there is nothing to prevent wealthy individuals making use of them, and a number have. We have heard allegations, particularly from media groups, that rich claimants have exploited the CFA system, with its pattern of escalating costs, to force the press into settling claims.

291. We should note here that although it is much less common for a defendant to use a CFA, the option exists. David Price, of David Price Solicitors and Advocates, told us in a submission that his firm does a good deal of work for defendants in defamation and privacy cases, and most of those clients would otherwise have no representation.²⁶⁰ CFAs, however, are overwhelmingly a resource for claimants and are likely to remain so, not least

²⁵⁷ *Review of Civil Litigation Costs: Preliminary Report*, Chapter 47, Paras 4.2 to 4.3

²⁵⁸ Q 862

²⁵⁹ Q 924

²⁶⁰ Ev 454

because most lawyers dislike risk and it has long been the case that most cases in publication proceedings are won by claimants.

292. Although some have suggested that CFAs should be means-tested, in practice, given the high costs involved, this would be likely to result in access to justice being limited to the extremely poor and the super rich. The complexities involved also do not lend themselves to a simple or proportionate solution. We therefore do not support the introduction of means-testing for CFAs.

293. No-one has seriously suggested to us that CFAs should no longer be part of the civil litigation system. However the problems associated with them – disproportionate cost, unfairness to defendants and intimidatory power over publishers – raise two main questions. Does the upper limit for success fees have to be set as high as 100%? And, is it right that success fees and ATE premiums are normally recoverable in full from a losing party?

294. In the matter of success fees, the argument is made that they need to be high to compensate for the risks run by lawyers: they need relatively high fees in cases they win to balance the fees that are unpaid in cases they lose. This view is not, however, supported by the data available on the outcomes of cases of this kind. This data suggests that CFA-funded parties win the vast majority of their cases.²⁶¹ The system is therefore tantamount to “always win, double the fee”.

295. This high success rate is no doubt in part the fruit of careful selection. Indeed common sense and the economic incentives would point to the inevitability of cherry-picking. Mr Thomson spoke to us of the rigorous vetting of cases which took place by Carter-Ruck’s CFA committee, saying: “They seem to reject a lot of potential cases when they assess the risk.”²⁶² Jeremy Clarke-Williams, of Russell, Jones & Walker Solicitors, explained his firm’s approach:

“I think it should be pointed out as well that, of course, when the Conditional Fee Agreement is entered into by a firm of solicitors it can represent a very considerable investment by that firm because you are agreeing to act on a ‘no win, no fee’. In my firm we have a very rigorous risk assessment procedure at the outset to decide whether or not we are prepared to take on a case on a CFA. So it is not surprising that the cases we do take on CFAs are ones we expect to win.”²⁶³

296. The practice in this country is also out of step with that of comparable jurisdictions. In Australia, where costs rules are otherwise very similar to those in England and Wales, success fees are capped at 25% of the solicitor’s costs and are not recoverable from the losing party but treated as a matter between the solicitor and his or her client.²⁶⁴ In Canada, which generally adopts the UK approach and awards costs to the ‘winner’, success fees

²⁶¹ *Review of Civil Litigation Costs: Preliminary Report*, Chapter 47 and Appendix 17, *Controlling Costs in Defamation Proceedings: Reducing Conditional Fee Agreement Success Fees*, para 11

²⁶² Q 88

²⁶³ Q 72

²⁶⁴ *Review of Civil Litigation Costs: Preliminary Report*, Chapter 58, para 2.7

associated with ‘no win, no fee’ litigation are not normally recoverable, as they are not in Scotland.²⁶⁵

297. It should be noted however that David Price told us that he was prepared to take substantial risks with marginal cases, and that he relied on success fees to cover his losses.²⁶⁶

298. Lord Justice Jackson told us that the calculation of victories against defeats was not a simple one:

“There is a clear body of evidence which suggests that, overall, success fees may be bringing too great a benefit to the claimant side, but one has to approach this evidence with caution because claimant solicitors have made the point to me that, when a single case is lost, the costs, if that action has gone all the way to trial, for example, may be enormous and they may need the success fees on a substantial number of won cases in order to cover all their outlay on the lost cases.”²⁶⁷

299. We asked Lord Justice Jackson for his estimate of the number of cases which needed to be won by a lawyer in order to cover the cost of a lost case. He was not able to provide us with an answer: “I do not know, without the detailed research which, sadly, does not exist, precisely how many won cases one needs in order to cover one substantial lost case, but I do not think one should adopt too simplistic an approach to this.”²⁶⁸

300. In its latest consultation on the costs of defamation proceedings, the Ministry of Justice seeks views on the appropriate level for success fees, suggesting that they should be capped at 10%.²⁶⁹ The evidence base used both by Lord Justice Jackson and by the Ministry is data relating to 154 libel and privacy cases against the media, provided by the Media Lawyers Association.²⁷⁰

301. There is also the question of whether the cost of success fees and ATE premiums should be borne solely by the loser in a case. It would be possible to make success fees and ATE premiums irrecoverable from the losing party, meaning that the costs associated with them would be borne by the party engaging in the CFA irrespective of whether he or she won or lost.

302. Making such premiums irrecoverable might bring some benefits. Market forces could cause prices in both categories to fall, as it would be in parties’ interests to shop around for low success fees and ATE premiums. However, moving the entire responsibility for success fees and ATE premiums to the CFA-funded party could also have unwelcome consequences. There could be an impact on access to justice, as parties face the risk of financial loss whether they win or lose a case, something which CFAs were introduced to address. Other jurisdictions, however, do not enable a party to contemplate essentially “risk-free” litigation by shifting the costs burden entirely. Giving each party an incentive to

²⁶⁵ *Review of Civil Litigation Costs: Preliminary Report*, Chapter 61, paras 3.4–3.5

²⁶⁶ Ev 27

²⁶⁷ Q 929

²⁶⁸ Q 929

²⁶⁹ *Controlling Costs in Defamation Proceedings: Reducing Conditional Fee Agreement Success Fees*, para 22

²⁷⁰ *Ibid.*

keep his or her costs relatively low must logically be an important part of controlling litigation costs overall.

303. A step was taken in this direction recently when certain limits were placed on the recoverability of ATE premiums. From 1 October 2009,²⁷¹ any party funded by a CFA, if it seeks to recover the premium or success fee, must inform the other party of its funding arrangements, including any staging of any insurance premiums, either with the letter before claim or within seven days of insurance being taken out.²⁷² Further, in publication proceedings, if an offer of settlement is made by a party within 42 days of being notified that the other party is CFA-funded, the ATE insurance premium is again not recoverable.²⁷³

304. We have also been concerned during the course of our inquiry to discover that while it is usual for a CFA-funded party to take out ATE insurance, there is often no risk that they will pay the premium, whether they win or lose their case. The website of Temple Legal Protection Limited, a leading provider of such insurance, states:

“Who pays the premium if the case is lost?

Temple always provides self-insured policies meaning that part of the cover provided is the premium. Consequently, if your client is unsuccessful and there is a claim on the policy, the cost of the premium forms part of the claim so that your client does not have to pay.”²⁷⁴

305. In his report, Lord Justice Jackson recommends a package of proposals which he hopes will address the current disparities in the CFA system without impeding access to justice. He suggests that both success fees and ATE insurance premiums should be irrecoverable from the losing party. That being the case, he also makes two recommendations designed to protect access to justice for claimants. Firstly, that damages should be increased by 10%, to take account of the additional costs faced by CFA-funded claimants. Secondly, he recommends the introduction of one-way qualified costs shifting. This would allow the courts to take into consideration the seriousness of the subject matter of the libel or breach of privacy, and the financial resources and conduct during proceedings of all the parties, when making a costs order against the claimant in the event that they lose their case.

306. We welcome steps taken so far to limit recoverability of After The Event insurance premiums in publication proceedings. However, we agree with Lord Justice Jackson that ATE premiums should become wholly irrecoverable. The fact that it is possible for insurance companies to offer ATE insurance at no cost to the policy holder, whether they win or lose their case, is extraordinary and discredits the principle on which ATE insurance is based. We recommend that the Ministry of Justice should implement his recommendations in this respect.

²⁷¹ Civil Procedure (Amendment) Rules 2009

²⁷² Civil Procedure Rules, Rule 44.15

²⁷³ *Ibid.*, Rule 44.12B

²⁷⁴ Temple Legal Protection, *ATE Insurance*, www.temple-legal.co.uk

307. All the evidence we have heard leads us to conclude that costs in CFA cases are too high. We also believe that CFA cases are rarely lost, thereby undermining the reasons for the introduction of the present scheme. However it is vital to the maintenance of press standards that access to justice for those who have been defamed is preserved. We do not agree with the Ministry of Justice that the maximum level of success fees should be capped at 10%, nor do we believe that success fees should become wholly irrecoverable from the losing party. However we would support the recoverability of such fees from the losing party being limited to 10% of costs leaving the balance to be agreed between solicitor and client. This would address the key issue and seems to us to provide a reasonable balance, protecting access to justice, adequately compensating solicitors for the risks taken, giving claimants and their lawyers, in particular, a strong incentive to control costs and ensuring that costs to a losing party are proportionate.

308. This is by no means the first time that attempts have been made to control the costs of civil litigation. The Government must ensure that this time measures are effective. Equally, it will be important that the impact of such measures in practice is systematically monitored so that any necessary adjustments can be made.

309. Lawyers must also play their part. Just as the press must be accountable for what it writes, lawyers must be accountable for the way in which cases are run, and that includes costs. The current costs system, especially the operation of CFAs, offers little incentive for either lawyers or their clients to control costs, rather the contrary. It also leads to claims being settled where they lack merit. We hope that the combined effect of our recommendations, the Ministry of Justice consultations and the conclusions of Lord Justice Jackson, will provide the impetus for a fairer and more balanced approach to costs in publication proceedings.

5 Press standards

Introduction

310. Press standards are a matter of perennial public debate, and one which this Committee and its predecessors have periodically addressed. In recent times some new elements have been added to the arguments. Long-term changes in reading and advertising patterns are challenging the viability of the printed newspaper, something which we are investigating in our concurrent inquiry into *The future for local and regional media*. The global economic recession is also putting new pressures on the industry. Meanwhile, Nick Davies, in his 2008 book, *Flat Earth News*, charged the industry with neglecting ethics in the drive to cut costs and prop up sales. And the case of the McCanns raised questions about editorial standards and the industry's willingness to enforce them.

311. Discussion of standards often turns on the question of whether they are in decline, but that is too subjective a judgment to admit to a meaningful answer here. It is more fruitful to ask whether press standards meet current public expectations. This, too, can be difficult to measure: for example, the undisputed decline in the circulations of national newspapers might be taken as evidence of public disapproval of their contents, but it has several other causes too and the relative importance of disapproval is impossible to gauge. However, we do have the evidence of opinion polls, and they indicate that public trust in journalists is at a worryingly low level.

312. The Committee on Standards in Public Life's most recent report on public attitudes to the press, published in 2008, surveyed over 2,000 people. It found that 89% thought that tabloid newspapers were more interested in getting a story than telling the truth; 19% thought this was true of broadsheet papers.²⁷⁵ The survey also found that the people surveyed thought tabloid journalists were least likely of the 17 professions covered in the survey to be trusted to tell the truth.²⁷⁶

313. In a 2008 YouGov poll, journalists were the least trusted of 23 professions, and, troublingly, trust in journalists had fallen the most overall of all groups.²⁷⁷ In research commissioned by the Media Standards Trust for its report *A more accountable press*, 70% of respondents disagreed with the statement: 'We can trust newspaper editors to ensure that their journalists act in the public interest'.²⁷⁸

Financial pressures

314. The industry was under economic pressure even before the recession. In the past five years, the circulation of the ten major national daily newspapers has fallen by more than 13 per cent:

²⁷⁵ Committee on Standards in Public Life, *Survey of public attitudes towards conduct in public life 2008*, para 7.5

²⁷⁶ *Ibid.*, para 2.1

²⁷⁷ YouGov poll, commissioned by British Journalism Review, 27–28 March 2008

²⁷⁸ Media Standards Trust, *A More Accountable Press: Part 1*, p 7

Newspaper average net UK circulation figures May to October 2004 and 2009

	May 2004 to October 2004	May 2009 to October 2009	Change	% change
Sun	3,345,195	3,063,667	-281,528	-8.42%
Daily Mail	2,419,612	2,177,600	-242,012	-10.00%
Daily Mirror	1,812,942	1,321,044	-491,898	-27.13%
Daily Express	945,575	721,111	-224,464	-23.74%
Daily Star	889,505	865,388	-24,117	-2.71%
Daily Telegraph	905,889	812,906	-92,983	-10.26%
The Times	654,913	580,324	-74,589	-11.39%
Financial Times	428,643	406,185	-22,458	-5.24%
Guardian	377,589	323,393	-54,196	-14.35%
Independent	263,020	192,383	-70,637	-26.86%
Total	12,042,883	10,464,001	-1,578,882	-13.11%

Source: Audit Bureau of Circulation (ABC)

315. To make matters worse, traditional staple income generators such as classified advertising and the advertising of property, cars and holidays have been migrating from print to specialised internet sites. And despite considerable investment and ongoing costs, the press has failed so far to make online news services profitable. The traditional business model supporting print journalism appears to be failing in many cases, prompting consolidation, job losses and other cost-cutting measures. Recession has accelerated this process.

316. Professor Brian Cathcart, adviser to this Committee, describes the current situation as the industry's 'worst crisis in 150 years' and Tim Bowdler, former Chairman of the Press Standards Board of Finance (PressBof), has been quoted as saying that they are 'extraordinarily challenging times' for the industry.²⁷⁹

317. Jeff Edwards, the former crime correspondent of the *Daily Mirror*, described to us a long-term change at the paper:

"I can only speak about the organisation I was with for the last 20 years, which was the Daily Mirror, but during that period I have seen the staff shrink year on year, and when I left in December it was probably about 50% of the strength it was when I joined in the late 1980s."²⁸⁰

318. Speaking more generally about the industry, he added:

"Its back is to the wall at the moment. We have seen shocking cuts and economies being made wholesale. Especially in the tributary system through the regional and

279 "Extraordinarily challenging times" at Johnston Press as share price tumbles", *Press Gazette*, 25 November 2008

280 Q 304

local paper system, we have seen huge job losses. I think that, inevitably, the overall effect will be a poorer standard of journalism.”²⁸¹

319. Nick Davies argued that, while newspapers have been cutting costs by reducing the number of journalists they employ, they have not generally cut the volume of journalism they publish, “because the more pages you print, the more advertising you carry and therefore the more money you can earn”.²⁸² In consequence, journalists no longer had time to do their job properly,²⁸³ and could not check facts and research stories as thoroughly as they should. Mr Davies suggested that fewer original stories were published and more was recycled from news agencies, press releases and articles in other publications, a process he calls ‘churnalism’.

320. His views received support from the NUJ²⁸⁴ and the Media Standards Trust²⁸⁵ in their written submissions to us. The Media Standards Trust makes a direct correlation between the financial pressures faced by the industry and the quality of editorial content:

“Newspaper publishing has always been a competitive industry, but the current financial and structural crises are unique and are placing intense pressure on the press to capture the public attention. The need for more sensationalism and more scoops can have undesirable consequences for standards.”²⁸⁶

321. Roy Greenslade, Professor of Journalism at City University, argued that news was being generated from behind desks rather than by active reporting in the field and described the modern newsroom as a “factory of words rather than an industry which is dedicated to telling the truth”.²⁸⁷

322. One witness who defended the industry against such charges was the crime and security editor of *The Times*, Sean O’Neill, who said the industry was more conscientious now and journalism ‘a more professional business’²⁸⁸ than in the past. He told us that there was still the opportunity to undertake serious journalism:

“You just have to look at some of the agendas over the last year to see [...] that people do have the time to get out there and still dig into a story. If you look at my own paper’s coverage of the Eddie Gilfoyle alleged miscarriage of justice case, one of our reporters spent months and months on that. He has had plenty of time to work on that. Ian Cobain at the *Guardian*, in the work he has done on alleged British complicity in torture, took months and months to pursue one topic. I myself have a

²⁸¹ Q 304

²⁸² Q 402

²⁸³ *Ibid.*

²⁸⁴ Ev 407–410

²⁸⁵ Ev 441–444

²⁸⁶ *A More Accountable Press: Part 1*, para 5

²⁸⁷ Q 409

²⁸⁸ Q 311

3,000 word piece in The Times today which has taken weeks and weeks to do. There is time. Absolutely. If you have the right story, you will get time to do it.”²⁸⁹

323. Problems of standards may not only be to do with the rise of ‘churnalism’. Ben Goldacre, of the *Guardian*, told us that, in the case of health and science reporting, sometimes an editorial decision is made that the article should be written by a journalist with no specialist knowledge. He did not believe it was pressure on journalists to produce results in a short timeframe which led to inaccuracies, but rather the lack of subject knowledge:

“One of the stories I have covered, for example, the media’s MMR hoax – as I believe it will come to be known, effectively – is not an example of people being hurried. It is also quite a good example of how, even though there are people in newspapers who are well trained (for example, specialist health and science correspondents who are often very good at what they do), commonly when a story becomes a big political hot potato, it is taken out of the hands of the specialists and put into the hands of journalists. In the case of MMR that was very clear. There is study from the Cardiff University School of Journalism from 2003 which shows that of all the science stories in 2002, which is when the coverage of MMR peaked, the stories about MMR were half as likely to be written about by science and health correspondents as stories about GM or cloning. I think that is very problematic because, suddenly, the people who normally would be writing about a funny thing that happened to the au pair on the way to a dinner party were giving people advice about epidemiology and immunology, which is plainly never going to work.”²⁹⁰

324. **T**here is still a great deal of good, responsible journalism in the British press. However, the picture painted for us of corners being cut and of fewer journalists struggling to do more work is cause for concern. If the press is to command the trust and respect of the public, the public needs to know that the press is committed to high standards even in difficult times.

325. While we have no absolute proof of the link between financial pressures and declining press standards, we are concerned at the evidence we have heard that one may be contributing to the other. Such a state of affairs is in no-one’s interest. If press standards decline, then public confidence in the press is likely to be diminished even further, leading to declining sales and worsening still further the finances of the industry.

Newspaper headlines

326. The relationship between newspaper headlines and the content of the article has prompted much discussion during our inquiry. Jonathan Coad, of Swan Turton solicitors, gave us the example of an article in the *Daily Star* about Peaches Geldof. The front-page headline was: ‘Peaches: spend night with me for £5,000’, implying that she was offering sexual favours for payment, but the article inside merely asserted that she was receiving fees

²⁸⁹ Q 306

²⁹⁰ Q 309

to attend celebrity events.²⁹¹ The PCC adjudicated on the case and described the misleading headline as ‘sloppy journalism’.²⁹² When the newspaper declined to publish a retraction and apology on the front page (where the headline had appeared), Ms Geldof brought proceedings for libel. The newspaper apologised in the High Court and agreed to pay costs and substantial damages.²⁹³

327. Newspaper headlines are normally written by sub-editors and not the author of the article. Both Jeff Edwards and Ben Goldacre told us that they were not consulted on the headlines that were attached to their articles, and were conscious of the risks that ensued.²⁹⁴ Mr Edwards told us that the only time he had been sued for libel it had been as a result of the headline rather than the story content: “My copy was not libellous but the headline was.”²⁹⁵

328. Gerry McCann told us about his experience of misleading headlines:

“I know that Clarence [Mitchell, the McCanns’ media spokesman] has had apologies from journalists and there has been, ‘I wrote this but the headline was done by the news desk.’ There is clearly pressure on the journalists on the ground who are being funded on expenses and are under pressure to produce copy. There is pressure from the news desk to write a headline which does not necessarily reflect the factual content available for the story.”²⁹⁶

329. The PCC provides some guidance on headline-writing in its Editors’ Codebook, a guide for editors as to how the PCC interprets its Code of Practice. The guidance however, in the section on crime reporting and court stories, is limited to one example of a misleading headline.²⁹⁷

330. Current defamation law does not draw a clear distinction between the headline and article, but tends to assess both together. We heard conflicting evidence as to whether there should be more focus on headlines. Jeremy Clarke-Williams, of solicitors Russell, Jones and Walker, suggested that in the age of the internet more and more people read the headline but not the story itself, making the accuracy of the headline more important. He told us that his clients were often frustrated to find they were unable to pursue a case even where the headline was clearly inaccurate:

“They cannot understand why a headline which is patently defamatory and untrue does not give them a cause of action simply because you can pick through the rest of the article and find a correction to it. If you asked the man in the street, the man on

²⁹¹ Q 112

²⁹² Press Complaints Commission, *Peaches Geldof v Daily Star – Press Complaints Commission Report 78*, 4 February 2009

²⁹³ “Peaches Geldof wins damages over prostitute claims”, BBC news online, 12 January 2010, www.news.bbc.co.uk

²⁹⁴ Q 308

²⁹⁵ Q 325

²⁹⁶ Q 178

²⁹⁷ The Editors’ Codebook, p 20, 2nd Edition, www.editorscode.org.uk

the Clapham omnibus, they would say, ‘Yes, that is something which one ought to be allowed to bring a claim on’, because it is what strikes the viewer in the eye.”²⁹⁸

331. Mr Coad told us: “The reality is that millions of people see the front page who do not buy the newspapers, that is all they get and at the moment neither the law nor the PCC provides an adequate remedy for that.”²⁹⁹ But Mark Thomson, then of Carter-Ruck, warned of the difficulties of suing on the basis of just a headline, believing that it was reasonable that a defamation case should be based on the whole of a newspaper article: “I think it is presumed that viewers read the whole article [...]. It would get quite technical to just sue on a headline. Everyone knows newspapers sex up the headline to sell newspapers.”³⁰⁰

332. Misleading headlines can cause harm and are poor journalism, but we recognise the difficulty the courts must face in drawing distinctions between messages conveyed in headlines and in articles and weighing their relative impact. We feel the PCC, for its part, could more do to address the problem of headlines than offer brief guidance in its Editors’ Codebook. We recommend that the PCC Code itself should be amended to include a clause making clear that headlines must accurately reflect the content of the articles they accompany.

²⁹⁸ Q 101

²⁹⁹ Q 102

³⁰⁰ Q 102

The case of the McCanns

The events

333. On 3 May 2007, just before her fourth birthday, Madeleine McCann went missing from her family's holiday apartment in Praia da Luz, Portugal. British-born Robert Murat, who lived locally, was named as an 'arguido' (a suspect in Portuguese law) on 15 May 2007, and Kate and Gerry McCann were named as arguidos on 7 September 2007. The arguido status was lifted from all three on 21 July 2008.

334. The case, which remains unsolved, attracted media attention of an intensity rarely seen. The activities of the McCann family, of Mr Murat and of the Portuguese police were subjected to the closest scrutiny. Numerous alleged sightings were reported across Europe and in North Africa. Many appeals were made, and several milestones in time, such as one month and 100 days from the disappearance, were marked in the media. The coverage, notable from the outset by its speculative character, became increasingly so once the McCanns were named arguidos, often implying, with little or no qualification, and certainly no evidence, that the couple bore some responsibility for their daughter's disappearance.

335. On 19 March 2008, about 11 months after Madeleine's disappearance, Express Group Newspapers became the first of several groups and titles to apologise for publishing repeated falsehoods in their coverage of the case, and to pay substantial damages to the victims.

336. The McCanns had sued Express Group for libel in relation to 110 articles which appeared in the *Daily Express*, the *Daily Star*, the *Sunday Express* and the *Star on Sunday* between September 2007 and February 2008. The McCanns' solicitor, Adam Tudor, told the High Court:

“The general theme of the articles was to suggest that Mr and Mrs McCann were responsible for the death of Madeleine or that there were strong or reasonable grounds for so suspecting and that they had then disposed of her body; and that they had then conspired to cover up their actions, including by creating ‘diversions’ to divert the police’s attention away from evidence which would expose their guilt [...] Many of these articles were published on the front page of the newspapers and on their websites, accompanied by sensationalist headlines.”³⁰¹

337. Express Group Newspapers apologised for publishing “extremely serious, yet baseless, allegations concerning Mr and Mrs McCann over a sustained period of what will already have been an enormously distressing time for them, and at a time when they have been trying to focus on finding their daughter”,³⁰² and agreed to pay a reported £550,000 in damages to the Madeleine Fund (set up to publicise and fund the search for Madeleine McCann). Following the apology and statement of regret in open court, the *Daily Express*,

³⁰¹ Q 213

³⁰² *Gerry McCann and Kate McCann v Express Newspapers Statement in Open Court 08/0278, 19 March 2009*

Daily Star, *Sunday Express* and *Sunday Star* also published front page apologies to the McCanns.

338. Besides the McCanns, the group of friends with whom they had been on holiday, referred to as the ‘Tapas Seven’,³⁰³ were also the subjects of libellous reports over a number of months, as were Mr Murat and two associates.³⁰⁴ Here is a summary of court actions and complaints resulting from the case:

- The McCanns sued the *Daily Express*, *Sunday Express*, *Daily Star* and *Star on Sunday* over 110 articles published over five months and received apologies and a reported £550,000 damages.
- They complained to Associated Newspapers about 67 articles that appeared in the *Daily Mail* and *Evening Standard* (then owned by Associated) over five months, and over 18 articles on the *Standard*’s ‘This is London’ website. This complaint was settled by private agreement.
- The McCanns also took legal action against the *News of the World* for asserting that it had permission to publish extracts from Kate McCann’s diaries when it did not. They received an apology.
- The Tapas Seven sued the *Daily Star* and *Daily Express* over approximately 20 articles and received apologies and a reported £375,000 damages.
- Robert Murat and associates sued the *Sun*, *Daily Express*, *Sunday Express*, *Daily Star*, *Daily Mail*, *Evening Standard*, *Metro*, *Daily Mirror*, *Sunday Mirror* and *News of the World* over almost 100 articles described as seriously defamatory. They received apologies and a reported £600,000 damages.
- Mr Murat also received apologies from *The Scotsman* and Sky News website.

339. The publication of serious falsehoods seems to have been even more widespread than this list suggests. Gerry McCann told us: “Undoubtedly, we could have sued all the newspaper groups.”³⁰⁵ Peter Hill, editor of the *Daily Express*, agreed: “I was surprised that the McCanns at that time sued only the *Daily Express* for libel [...] they would have been able to sue and still could sue any newspaper at all.”³⁰⁶

What went wrong?

340. For a number of reasons, it was always likely that this case would have prominence in the news media: the McCanns were an attractive family; the case was a distressing mystery, with few clues, and took place in a holiday location; and some of the most important phases of the story were in the summer, when the supply of rival news was relatively thin.

³⁰³ Jane Tanner, Dr Russell O’Brien, Fiona Payne, David Payne, Matthew Oldfield, Rachael Oldfield and Dianne Webster

³⁰⁴ Sergey Malinka and Michaela Walczuch

³⁰⁵ Q 213

³⁰⁶ Q 604

341. Kate and Gerry McCann were also determined to keep the case in the public eye across Europe, with a view to increasing the chance that Madeleine would be found. They and their supporters issued appeals, gave press conferences and interviews, released photographs and posters and took part in well-publicised events as part of a strategy to give the case a high media profile. The couple sought and received professional advice on how to handle their relations with the media.

342. The intensity of the coverage was also a reflection of a very unusual level of public demand for information. In consequence, newspapers which printed prominent Madeleine McCann stories, almost whatever their content, could expect to see their sales rise. Clarence Mitchell speculated to us that running a Madeleine McCann story increased newspaper sales by 40,000 or 50,000 copies a day.³⁰⁷ Gerry McCann told us: "Madeleine, I believe, was made a commodity and profits were to be made."³⁰⁸

343. This phenomenon was also commented on by press industry witnesses. Peter Hill told us: "It certainly increased the circulation of the *Daily Express* by many thousands on those days without a doubt."³⁰⁹ Paul Dacre, editor of the *Daily Mail*, commented:

"I do not remember a story for some time now that actually increased circulation like the McCann story. I remember the furious rows we used to have in our office at time because other papers, opposition papers possibly, were putting the McCanns on the front page and you could see the next week their circulation had gone up that day and there were great recriminations about whether we should engage in that and carry those kinds of stories."³¹⁰

344. In this context London newsdesks were extremely eager to secure competitive daily stories on the case. Jeff Edwards told us:

"I know from talking to colleagues, not just colleagues at the *Daily Mirror* but colleagues across the business who were out there, that there was intolerable pressure brought to bear on some of them to produce results at any cost."³¹¹

345. He added:

"Essentially reporters, I know, will have been congregating in Portugal over breakfast, and saying, 'What the hell are we going to do today to resolve the situation?' Thus a huge amount of recycling of information, and I have no doubt that some of what went on strayed beyond the boundaries of what was acceptable and some newspapers paid the price for that."³¹²

³⁰⁷ Q 201

³⁰⁸ Q 171

³⁰⁹ Q 620

³¹⁰ Q 561

³¹¹ Q 307

³¹² *Ibid.*

346. When we put this to Peter Hill, he was adamant that he had not initiated that sort of pressure, telling us: "This is not the way that anyone works as far as I know."³¹³

347. There seems to be no dispute that British journalists, accustomed to being updated on an inquiry by official sources, were frustrated by the position of the Portuguese police, who were by law prevented from commenting publicly. In the absence of official information, journalists turned to less authoritative sources.

348. Peter Hill told us he thought the Portuguese police were partly to blame for inaccuracies in reporting:

"The Portuguese police were unable, because of the legal restrictions in Portugal, to make any official comment on the case. What happened was that they resorted to leaking things to the Portuguese press. We did our best to check up on these things but of course it was not very easy to do so."³¹⁴

349. Gerry McCann told us:

"The worst stories that were printed in this country were based on articles that had been directly published within Portugal. Often what we found was that they had been embellished and a single line that was very deep in an article within a Portuguese newspaper, usually from an unsourced source, was front page and exaggerated to the extent where we had ridiculous headlines and stories."³¹⁵

350. Clarence Mitchell said he saw this happening in Praia de Luz day after day:

"They would get the Portuguese press each morning translated for them, with mistranslations occasionally occurring in that as well. Then, no matter what rubbish, frankly, was appearing in the Portuguese press from whatever source, they would then come to me and I would either deny it or try and correct it or say, 'We are just not talking about this today.' That was effectively a balancing of the story and there was no further effort to pursue any independent journalism as we might recognise it."³¹⁶

351. Undue pressure on journalists, wherever and whenever it occurs, must tend to increase the risk of distortion, inaccuracy and unfairness in reporting. **Of course, it is impossible to say for certain that untrue articles were written in the McCann case as a result of pressure from editors and news desks.** It is, however, clear that the press acted as a pack, ceaselessly hunting out fresh angles where new information was scarce. **Portugal was also a foreign jurisdiction, where contempt of court laws were unclear, and no consideration was given to how reporting might prejudice any future trial.** It is our belief that competitive and commercial factors contributed to abysmal standards in the gathering and publishing of news about the McCann case.

³¹³ Q 626

³¹⁴ Q 614

³¹⁵ Q 173

³¹⁶ Q 181

352. That public demand for such news was exceptionally high is no excuse for such a lowering of standards. Nor could the efforts of the McCanns to attract publicity for their campaign to find their daughter conceivably justify or excuse the publication of inaccurate articles about them.

353. While the lack of official information clearly made reporting more difficult, we do not accept that it provided an excuse or justification for inaccurate, defamatory reporting. Further, when newspapers are obliged to rely on anonymous sources and second-hand information, they owe it to their readers to make very clear that they are doing so, just as they owe it to their readers clearly to distinguish speculation from fact.

The role of the PCC

354. Two days after the disappearance of Madeleine McCann, the Press Complaints Commission contacted the British Embassy in Lisbon and asked the consular service to inform the McCanns that the PCC's services were available to them. Gerry McCann told us that he did not recollect receiving such a message and that if he had "it certainly was lost in the furore of the other information I was bombarded with at the time".³¹⁷

355. On 13 July 2007, two months later, Gerry McCann met Sir Christopher Meyer, the then PCC Chairman. The meeting was by chance; Mr McCann had visited Lady Meyer, who runs a charity concerned with missing and abducted children. Sir Christopher took the opportunity to explain how the PCC could help the McCanns and pass on some PCC literature.³¹⁸ Sir Christopher held one further brief meeting with the McCanns on 29 February 2008 during which he 'repeated that the PCC stood ready to help, if need be'.³¹⁹

356. The PCC was able to provide some help, and Gerry McCann expressed to us his gratitude for this:

"Aspects with the PCC have been helpful in terms of protecting privacy particularly for our twins, which was a major concern for us. They were continuing to be photographed and we wanted that stopped. Very quickly that was taken up by the press and broadcasters within the UK. We are thankful for that. There was also help in removing photographers from outside our drive after what we felt was a very over long period, when news had really gone quite quiet and we were still being subjected to camera lenses up against our car with the twins in the back, which was inappropriate."³²⁰

357. The McCanns did not, however, make a formal complaint to the PCC about newspaper reporting, of the sort which would have prompted a formal inquiry. Mr McCann told us that an informal conversation he had held with Sir Christopher suggested

³¹⁷ Q 199

³¹⁸ Q 369

³¹⁹ Ev 107

³²⁰ Q 188

that legal action would be the best way to deal with the libels,³²¹ and that “the advice from both the PCC and our legal advisers was that the PCC was not the route.”³²²

358. The McCanns’ lawyer, Adam Tudor, explained the advice he had given to the couple:

“We had a conversation about the PCC when Kate and Gerry first came to Carter-Ruck. It was quite a short conversation. The PCC is perceived, to a considerable extent still correctly, as being wholly media-friendly. It lacks teeth. It cannot award damages. It cannot force apologies. As soon as there is any dispute of fact between the newspaper and the victim of the libel, the PCC backs off and says, ‘This needs to go to law.’”³²³

359. Mr McCann also told us that it was a cause of concern to him that the editor of the *Daily Express*, which he regarded as the worst offender, was on the board of the PCC.³²⁴

360. Had the McCanns at any time made a formal complaint about press coverage to the PCC, the PCC would have been obliged to investigate it. Paul Dacre told us of his disappointment that they had not done so: “I deeply regret that the McCanns, if they felt they were being portrayed in such an inaccurate way, did not immediately lodge a complaint with the PCC.”³²⁵ This sentiment was not shared by Sir Christopher, who told us:

“It seems to me perfectly normal that if you feel that you are defamed or libelled and you want damages for that, punitive damages for that, you obviously go to court, but there is a whole range of other things that we could have done and could do for the McCanns which are of a quite different nature. The McCanns are an interesting case of people who chose both ways; they went to the courts on the matter of defamation and they came to us for the protection of their children and their family from the media scrums when they returned to the United Kingdom. It seems to me a perfectly normal way of proceeding.”³²⁶

361. The PCC did not publicly criticise the actions of Express Group newspapers until the conclusion of the McCanns’ legal case against them. Sir Christopher denied that this was too little, too late:

“You are looking at this with 20:20 hindsight, forgive me for saying it, but what is obvious now was not obvious at the time. On 19 March [2008] when the judgement became public I rose from my sickbed, stuffed myself with paracetamol, staggered out to a radio car and on the PM programme castigated Peter Hill and Richard Desmond for a bad day for British journalism. There was no question of us remaining silent; I said it was a bad day for British journalism, that Peter Hill should

³²¹ Qq 189–91

³²² Q 188

³²³ Q 195

³²⁴ Q 194

³²⁵ Q 561

³²⁶ Q 343

consider his position and that Mr Desmond should make a greater effort to ensure higher journalistic standards across all his publications.”³²⁷

362. The PCC, in written evidence to our inquiry, cited a number of reasons for not taking action in the McCann case on its own account:

“The PCC does not generally launch inquiries into matters without the say-so of the principals involved. To have done so in this case would not only have been an impertinence to the McCanns in the light of our previous contact, it would have risked looking like a cynical attempt to exploit the publicity surrounding the case. Without the involvement and instructions of the McCanns, it would also have been very unlikely to have achieved much.”³²⁸

The PCC is not supposed to investigate every example of alleged malpractice by the press. Breaches of the laws of libel, copyright, data protection, contempt of court and so on in relation to published material should be considered by the courts.”³²⁹

363. We asked Gerry McCann whether he would have found it impertinent of the PCC to invoke their own inquiry. He told us: “I would not have found it impertinent. I certainly would have been open to dialogue if it was felt to be within the remit of the PCC.”³³⁰

364. **The PCC Code of Conduct states in paragraph 1a that ‘the Press must take care not to publish inaccurate, misleading or distorted information, including pictures’.** In paragraph 1c, it states that ‘the Press, while free to be partisan, must distinguish clearly between comment, conjecture and fact.’ We believe it was obvious as early as May 2007 that a number of newspapers were ignoring these requirements, yet the PCC remained silent. That silence continued even though the coverage remained a matter of public concern through the summer and autumn of that year. It was only in March 2008, after the Express Group settled in the McCanns’ libel case, that the PCC spoke out. By then, as we have seen, hundreds of false and damaging articles about the McCanns and others had been published across a large number of titles. This was an important test of the industry’s ability to regulate itself, and it failed that test.

365. While we understand Mr Dacre’s regret that the McCanns did not make a formal complaint to the PCC, we do not believe that justifies the PCC’s failure to take more forceful action than it did. Under its Articles of Association, the PCC has the power to launch an inquiry in the absence of a complaint; such provisions were in our view made for important cases such as this. Nor does the McCanns’ decision to sue for libel justify inaction: they did not sue until early in 2008.

Lessons learned?

366. We received many submissions from newspapers and press organisations suggesting to us that the McCann case was unique. The case was described as “atypical”³³¹ by the

³²⁷ Q 379

³²⁸ Ev 107

³²⁹ *Ibid.*

³³⁰ Q 188

Newspaper Publishers' Association and PressBof, as "rare if not unique"³³² by News International, as "unique" and "unprecedented"³³³ by the Express Group and as "highly unusual"³³⁴ by the *Guardian*.

367. This rarity was presented, broadly, as grounds for making no changes to newspapers' procedures or to the PCC Code. The Society of Editors suggested to us that it would be "wrong to undermine a system that is clearly working by reference to the tiny number of cases each year that raise special issues."³³⁵

368. It is far from clear that the McCann coverage was really so freakish. On the evidence we have heard, the press reporting of the suicides in and around Bridgend (discussed in paragraphs 381 to 398 below) bears similarities in the intensity of the coverage and the repeated breaching of the PCC Code. Further, we found strong echoes of the McCann case in a report by the Press Council, *Press at the Prison Gates*, on the coverage of the Strangeways riot of 1990.³³⁶ Here was another instance of a dramatic story, a great public hunger for news and a limited supply of reliable information, where much of the press went badly astray. As that report observed, in the absence of a ready supply of hard information, "newspapers fell into the serious ethical error of presenting speculation and unconfirmed reports as fact".³³⁷

369. We also raised another example of a high profile story after the McCanns: the case of Josef Fritzl, the Austrian sex abuser, who imprisoned and fathered children by his daughter Elisabeth. In March 2009, just before Fritzl's trial, the *Daily Mail* published the name of the new location to which she and her children had moved. Since we raised this, the village's name has been removed from the newspaper's website.³³⁸

370. We suggested to Peter Hill that reporting on the McCanns held similarities with the repeated publication in the *Daily Express* of conspiracy stories, also since proved to be false, about the death of Diana, Princess of Wales. He replied:

"The inquest on Princess Diana, for me, was pretty much the end of the matter. I think you will find that after the inquest we published hardly any, if any, reports or stories, about Princess Diana. Up to that time it was a similar situation but not as intense a situation as the McCanns. Our readers were absolutely avid for news about the death of Princess Diana because there certainly was a theory that Princess Diana might have been murdered."³³⁹

371. We have heard no evidence to suggest that newspapers have taken action on their own account to ensure that the mistakes of the McCann coverage are not repeated in future,

³³¹ Ev 109

³³² Ev 410

³³³ Ev 159

³³⁴ Ev 184

³³⁵ Ev 418, para 2

³³⁶ Press Council, *Press at the Prison Gates: A report by the Press Council*, booklet number 8, January 1991

³³⁷ *Ibid.*, p 25

³³⁸ Qq 576–78, Ev 157

³³⁹ Q 654

much less that editors and journalists responsible for the publication of so many falsehoods have been asked to account for their decisions, or have faced disciplinary action.

372. When we asked Peter Hill whether anyone at the *Daily Express* was reprimanded or sacked because of the McCann coverage, he replied: "I have reprimanded myself because I was responsible."³⁴⁰ Asked whether he offered to resign, he said: "Certainly not. If editors had to resign every time there was a libel action against them, there would be no editors."³⁴¹

373. The newspaper industry's assertion that the McCann case is a one-off event shows that it is in denial about the scale and gravity of what went wrong, and about the need to learn from those mistakes.

374. In any other industry suffering such a collective breakdown – as for example in the banking sector now – any regulator worth its salt would have instigated an enquiry. The press, indeed, would have been clamouring for it to do so. It is an indictment on the PCC's record, that it signally failed to do so.

375. The industry's words and actions suggest a desire to bury the affair without confronting its serious implications – a kind of avoidance which newspapers would criticise mercilessly, and rightly, if it occurred in any other part of society. The PCC, by failing to take firm action, let slip an opportunity to prevent or at least mitigate some of the most damaging aspects of this episode, and in doing so lent credence to the view that it lacks teeth and is slow to challenge the newspaper industry.

376. We return to the role and structure of the PCC at paragraph 497.

Suicide reporting in the media

377. In June 2006, following the submission of evidence to the Editors' Code of Practice Committee by Samaritans and other groups, the PCC inserted clause 5-ii into its Code of Practice:

Clause 5. Intrusion into grief or shock

- i) In cases involving personal grief or shock, enquiries and approaches must be made with sympathy and discretion and publication handled sensitively. This should not restrict the right to report legal proceedings, such as inquests.
- ii) When reporting suicide, care should be taken to avoid excessive detail about the method used.³⁴²

378. This change was to address the risk that media coverage might prompt copycat suicides, as the then Code Committee Chairman, Les Hinton, explained:

³⁴⁰ Q 644

³⁴¹ Q 645

³⁴² Press Complaints Commission Code of Practice

"For example, while it might be perfectly proper to report that the suicide was caused by an overdose of paracetamol, it would probably be excessive to state the number of tablets used. We have consulted with the industry on this and it has been accepted. The new rule, in effect, codifies a practice already currently followed by many editors."³⁴³

379. We have heard criticism that the PCC Code contains only a single clause on suicide reporting,³⁴⁴ and that the Code does not go far enough. In their submission to us PAPYRUS, the charity for prevention of suicide in the young, told us that they wanted to prohibit any reporting of the method of suicide, not just 'excessive detail', as they did not believe journalists were qualified to judge what was excessive.³⁴⁵ However, Antony Langan of Samaritans told us that when the Code was properly applied by the press, he had found reporting to be appropriate.³⁴⁶

380. We have sympathy with the views of PAPYRUS but consider that a complete ban on the reporting of the method of suicide would have a negative impact on the freedom of the press. For reasons which we detail below, we do not believe that the guidance contained in the PCC Code on suicide reporting should be altered, but rather that the PCC needs to enforce compliance with the Code as it stands.

The case of Bridgend

381. Between January 2007 and August 2008 there were more than 20 suicides in and around Bridgend, South Wales, involving people aged under 27. Again, the media coverage was intensive. This time numerous complaints were made to the PCC about the accuracy of reporting, the extensive and repeated use of the victims' photographs, the headlines, the descriptions given of the suicide methods used and the various attempts to link the suicides in a 'death cult' or something of the kind.³⁴⁷

382. In February 2008, the Member of Parliament for Bridgend, Madeleine Moon, collated details of 15 relatives of suicide victims who did not want any further press coverage and asked for an end to the repeated publication of photographs of those who had died.³⁴⁸ Ms Moon also made a complaint to the PCC about a *Sunday Times* magazine article, featuring a large picture of a noose under the title 'Death Valleys'. The PCC did not uphold this complaint, stating that since much of the extensive coverage had identified hanging as a common feature of the deaths the use of the noose did not constitute excessive detail. The PCC acknowledged that the pictures would be 'an upsetting and stark reminder to the families about how their relatives had died'.³⁴⁹

343 "Editors introduce rule on suicide reporting", Press Complaints Commission press notice, 29 June 2006

344 Such as Q 228

345 Ev 445

346 Q 268

347 "Two more hangings rock death cult town", *Daily Express*, 16 February 2008

348 PCC newsletter, November 2008, www.pcc.org.uk

349 Press Complaints Commission, *Moon v Sunday Times – Press Complaints Commission Report 78*, 17 November 2008

383. On 20 February 2008, Sir Christopher Meyer, then Chairman of the PCC, wrote to Madeleine Moon offering to attend a meeting in Bridgend, if this would be of assistance. In May 2008, three months after the initial complaint to the PCC, Sir Christopher and other PCC representatives visited Bridgend to talk to local people and communicated to the press the wishes of those who requested the coverage to stop. When asked in an interview if the PCC had been too late, Sir Christopher conceded that the PCC ‘should have been down there earlier’.³⁵⁰

384. As part of our inquiry, we heard evidence in private from Mr Langan of Samaritans and from Tim Fuller, the father of one of the young people who took their own lives. We wish to thank them, and especially Mr Fuller, for his willingness to discuss such events with us.

385. Mr Langan told us of the practical difficulties of applying the PCC Code, and how the experience of reporting in Bridgend had shown that a number of issues were not catered for by it:

“One of the things that Bridgend threw up is within the remit of the PCC a lot of things fall outside that Code. There were particular issues around the re-publication and duplication of photographs [...]. When we looked at the regular re-publication of 10 or 20 photographs of people of a certain age then other people of that age would see perhaps a pattern of normalisation and that was equally dangerous. The current Code does not address that. We think the guidance note behind that could do with some work but we see the Code of Conduct as a working document. We want to keep working with the PCC and the Code Committee to extend that remit so it is actually going to go further.”³⁵¹

386. Mr Fuller described to us the impact that press reporting had when his daughter took her own life in February 2008 and in the months afterwards. He did not feel that he could visit her house because the press were gathered outside it,³⁵² indeed he was advised by the police and the coroner not to go there, and he was not aware that he could have used the services of the PCC to ask reporters to leave.

“It was at the end of that session with the police when that was wrapped up and I was ready to go home the police and the Coroner let me know that they had released the details of the name and address of my daughter and advised that unless I could handle it not to go anywhere near the address because there were cameras and press and all sorts there.”³⁵³

387. The knowledge that the press would be printing a story about his daughter also put pressure on Mr Fuller at a distressing time:

“I found I was frantically making phone calls to people that perhaps I would not speak to for two or three days. Maybe if they put the news on and they have children

³⁵⁰ “Britain’s Teen Suicides”, *BBC Radio 4*, 12 September 2008

³⁵¹ Q 228

³⁵² Q 277

³⁵³ *Ibid.*

they would pick the papers up the next morning and they would see all this information. I felt I wanted to let them know myself rather than seeing it first-hand in the media. I was put under pressure there. It took away from me the opportunity to let people know what had happened.”³⁵⁴

388. Due to the linking of a number of suicides, press interest in Mr Fuller’s daughter’s death did not go away. He found particularly distressing the constant re-listing of the names of all of the young suicide victims³⁵⁵ and the unauthorised use of photographs of his daughter which he had not seen before.³⁵⁶

389. Although Mr Fuller did not attend the PCC meeting in Bridgend in May 2008, he explained to us that the invitation to do so opened a dialogue with them which led him to make a complaint against the *Daily Express* about their coverage of his daughter’s death.³⁵⁷ In the time immediately after her suicide, the only contact he had was with the police liaison team and the coroner in Bridgend.

390. It is clear to us that an ordinary person who suddenly finds himself and his family the focus of media attention in circumstances such as those detailed to us by Mr Fuller would be ill-prepared to deal with it. The PCC can perform a vital role in assisting such people, yet Mr Fuller was unaware of this for a full three months after his daughter’s death.

391. In oral evidence to us the then PCC Chairman, Sir Christopher Meyer said the PCC felt frustration that its message was not getting through:

“One of our painting the Forth Bridge tasks is constantly to remind police forces around the country that they really must, in situations of suicide or murder or whatever, tell families how to deal with the press [...]. When we go on our missions outside London we always invite to the events or to a lunch or whatever the local coroner or the local coroners, depending on how many there are, as well as the local judges. A number of times we have found that the system has not worked properly and a coroner has said ‘I did not know about that’, so we send them all the stuff and say ‘Please make sure that you and your staff know about this.’ It is a permanent struggle to be perfectly frank.”³⁵⁸

392. We recommend that the PCC should not wait for people who find themselves suddenly thrust into the media glare in traumatic circumstances to come to it, but should take more steps to ensure that such people are aware of its services. This could perhaps most easily be achieved through dedicated and compulsory training of coroners and police family liaison officers about ways in which the PCC can help and through providing them with standard leaflets which can be offered to those with whom they come into contact.

³⁵⁴ Q 277

³⁵⁵ Q 282

³⁵⁶ Q 284

³⁵⁷ Q 290

³⁵⁸ Q 393

393. Following the resolution of Mr Fuller's complaint by the PCC, the *Daily Express* apologised to Mr Fuller and withdrew the offending articles. The apology took the form of a letter to the PCC, which was passed to Mr Fuller. The paper did not accept that its reporting broke the Code by giving excessive detail of suicide method, something which Mr Fuller contests:

"In the article, and in the response as well, from the *Daily Express* they say that they did not give specific details of the method used and they are allowed to say that she was found hanging and that was the nature of her death. They said they gave no more details about how that happened but within the article they quoted the mother of the previous victim who actually described that they found him hanging and he had used his dressing gown cord and they found him hanging from the framework of a built-in wardrobe they were having constructed which to me is quite specific."³⁵⁹

394. Mr Fuller went on to say:

"I do not know whether [my daughter] would have read that information printed beforehand but [my daughter] too used a dressing gown cord so we just have this thought. I do believe that some of these youngsters were influenced by the publicity, not of the minute detail but the method. A big question has been asked why all bar one of the victims used hanging as their form of death."³⁶⁰

395. The coverage of suicide in the media is one of the most sensitive areas that falls into the PCC's remit. We note the good work the PCC did in Bridgend from May 2008, although we believe the PCC should have acted sooner and more proactively.

396. The PCC Code provides suitable guidance on suicide reporting, but in our view the PCC should be tougher in ensuring that journalists abide by it. The experience of Bridgend shows the damage that can be caused if irresponsible reporting is allowed to continue unchecked; the PCC needs to monitor the conduct of the journalists and the standard of coverage in such cases.

397. During our inquiry, regarding the reporting of personal tragedies, we also asked how the press – local newspapers, in particular – moderated their websites, when asking readers to comment on stories. Certain comments of which we have been made aware have been sick and obscene.³⁶¹ The PCC told us, though, that it did not consider this a major issue.³⁶²

398. The Editor's Codebook refers to complaints about newspaper websites, making clear that editors are responsible for "any user-generated material that they have decided to leave online, having been made aware of it, or received a complaint."³⁶³ We believe this does not go far enough, with respect to moderating comment on stories about personal tragedies, in particular. The Codebook should be amended to include a

³⁵⁹ Q 281

³⁶⁰ *Ibid.*

³⁶¹ Q 224

³⁶² Q 397

³⁶³ The Editors Codebook, March 2009, p 64

specific responsibility to moderate websites and take down offensive comments, without the need for a prior complaint. We also believe the PCC should be proactive in monitoring adherence, which could easily be done by periodic sampling of newspaper websites, to maintain standards.

Phone-hacking and blagging

399. In July 2007, we published our Report *Self-regulation of the press*,³⁶⁴ addressing concerns about methods used by reporters and photographers. We were prompted principally by the conviction of Clive Goodman, royal editor of the *News of the World*, and Glenn Mulcaire, a private investigator employed by the paper, over phone-hacking.

400. Mr Mulcaire and Mr Goodman were convicted of unlawfully intercepting telephone voicemail messages received by three members of staff at Buckingham Palace. Mr Mulcaire was also convicted of unlawfully intercepting the voicemail messages of five other individuals: Max Clifford, Simon Hughes MP, Andrew Skylett, Elle MacPherson and Gordon Taylor. Both men were jailed.

401. The *News of the World* assured the Committee that Mr Goodman acted alone in this conspiracy, and that no one else at the paper authorised or was aware of Mr Mulcaire's illegal activities.³⁶⁵ It also told us – and the PCC – that its own investigations had shown Goodman's to be an isolated case. Our evidence session with Les Hinton, then chief executive of the newspaper's owner, News International, concluded thus:

“Chairman: You carried out a full, rigorous internal inquiry, and you are absolutely convinced that Clive Goodman was the only person who knew what was going on?

Mr Hinton: Yes, we have and I believe he was the only person, but that investigation, under the new editor, continues.”³⁶⁶

402. Our 2007 inquiry also considered evidence from the then Information Commissioner, Richard Thomas, that a large number of journalists had purchased information from a private investigator who was known to have obtained information through illegal means, proof of which had been obtained through an investigation called Operation Motorman, which took place in parallel with police investigation, Operation Glade.

Fresh allegations

403. In July 2009, the *Guardian* newspaper reported that News Group Newspapers, the division of News International to which the *News of the World* belongs, had paid more than £1m in damages and costs to settle invasion of privacy cases brought by three people connected to the world of professional football who said they were victims of voicemail message interceptions conducted on the newspaper's behalf by Glenn Mulcaire.

364 Culture, Media and Sport Committee, Seventh Report of Session 2006–07, *Self-regulation of the press*, HC 375

365 *Ibid.*, para 21

366 *Ibid.*, Q 95

404. One of the three was Gordon Taylor, chief executive of the Professional Footballers' Association, whose phone messages Glenn Mulcaire had been convicted of unlawfully intercepting; another was Mr Taylor's legal adviser, Jo Armstrong. The third person, a lawyer, has not been named. Nothing about these cases had previously been in the public domain because of gagging clauses in the financial settlements. Such was the level of secrecy, indeed, that the newspaper group also asked the court to seal the case files. Politicians, as well as many celebrities, were targeted by Mr Mulcaire's activities, which were far more extensive than previously publicly known.³⁶⁷

405. These allegations cast some doubt on testimony given to us, and to the PCC, by News International executives in 2007.³⁶⁸ We therefore reopened hearings to pursue this matter and heard oral evidence from representatives of the *Guardian*, the Press Complaints Commission, the Information Commissioner and the Metropolitan Police as well as from current and former News International executives. We also received written evidence from the Director of Public Prosecutions, and heard evidence, too, from Mark Lewis, the solicitor who acted for Mr Taylor and Ms Armstrong.

406. At our hearing on 14 July, Nick Davies, who wrote the *Guardian* story, presented us with a number of documents. Two stood out: a contract between Glenn Mulcaire and the *News of the World* and a transcript of voicemail messages recorded by Mulcaire. Both were seized by police at the time of his arrest in 2006.

407. We invited Mr Goodman and Mr Mulcaire to appear, but both were unwilling to do so. The *News of the World*'s chief reporter Neville Thurlbeck, who was implicated in the voicemail transcript, would only give evidence in private. In each case, we considered employing powers of summons, but for reasons of time and practicality, decided it would not be fruitful. We considered that Mr Goodman and Mr Mulcaire were unlikely to answer questions, because of settlements with the newspaper. Mr Thurlbeck had also been depicted as an unreliable witness in the Mosley case. Gordon Taylor's solicitors, meanwhile, said any co-operation would depend on the newspaper group releasing him from confidentiality undertakings. Finally, we also asked Rebekah Brooks, News International's new chief executive to appear, to resolve inconsistencies in its evidence. She also declined. So as not to delay publication further, however, we decided not use compulsion and comment further on the Group's evidence below.

The Miskiw contract

408. On 4 February 2005, Glenn Mulcaire, using the pseudonym Paul Williams, and Greg Miskiw, then Assistant News Editor of the *News of the World*, signed a contract in the following terms:

“The *News of the World* undertakes not to publish any information/pictures supplied by Paul Williams in connection with XXXXX [sic, redacted by the *Guardian*] PFA chief executive Gordon Taylor. The *News of the World* agrees to pay a minimum sum of £7,000.00 on publication of the story based on information provided by Mr

³⁶⁷ “Murdoch papers paid £1m to gag phone-hacking victims”, *Guardian Online*, 8 July 2009, www.guardian.co.uk

³⁶⁸ Culture, Media and Sport Committee, Seventh Report of Session 2006–07, *Self-regulation of the press*, Q 95

Williams. The figure will be renegotiable on the basis of prominence given to the story.”³⁶⁹

409. This was a holding contract of a kind intended to guarantee exclusivity, while ensuring that the story’s source would be appropriately rewarded when publication occurred. Colin Myler, editor of the *News of the World*, told us: ‘The contract or the piece of paper that he received under the name of Paul Williams is very common, very common practice in newspapers and indeed broadcasting, I would say.’³⁷⁰

410. For such a contract to be in a false name was certainly less common.³⁷¹ Tom Crone, the newspaper’s in-house lawyer, told us that he later questioned Miskiw about this:

“He told me that Glenn Mulcaire had come to him with a view to selling a story as an independent project – that is, independent of any work that he did under the general retainer he had with us. His story was based on information he had gained, as I think he is a member of the PFA having been a professional footballer; he had gained it in that context and he was concerned that if his real name was attached to the story he would obviously upset his PFA colleagues *et cetera* if that ever came out. Therefore he wanted to contract under an alias, and ‘Paul Williams’ was the alias he supplied.”³⁷²

411. Whether or not Mr Mulcaire had accessed Mr Taylor’s voicemails at the time of the contract, or needed to do so to get his story, there is no doubt that he had the ability to do so. At the sentencing hearing in January 2007, the prosecution stated that Mr Mulcaire first accessed voicemails – those of a member of the Buckingham Palace staff – in February 2005,³⁷³ the same month as the Miskiw contract.

The ‘for Neville’ email

412. On 29 June 2005, five months later, a reporter at the *News of the World*, Ross Hindley, sent an email to Glenn Mulcaire which opened with the words: “This is the transcript for Neville.”³⁷⁴ There followed a transcription of 35 voicemail messages. In 13 cases the recipient of message was ‘GT’, Gordon Taylor, and in 17 cases the recipient was ‘JA’, Jo Armstrong. No witness has sought to deny that these messages had been intercepted by Glenn Mulcaire, or that they had been transcribed by Mr Hindley.

413. Mr Crone said that he was not aware of the email until April 2008, during the course of the legal action brought by Gordon Taylor.³⁷⁵ Once he knew, he set himself the task, with Mr Myler’s knowledge, of investigating their background.³⁷⁶

369 www.guardian.co.uk

370 Q 1421

371 Qq 1378-82

372 Q 1349

373 Sentencing Hearing, p17

374 Ev 457

375 Q 1340

376 Q 1342

414. He asked the *News of the World's* IT Department to find out who else had received the email and was told that 'there was no trace of it having gone anywhere else'.³⁷⁷ He also questioned the reporter:

"He had very little recollection of it [...]. He does not particularly remember this job in any detail; he does not remember who asked him to do it; and he does not remember any follow-up from it. He saw the email and he accepts that he sent the transcript where the email says he sent it."³⁷⁸

415. We were unable to question the reporter, however. Mr Crone told us that Mr Hindley was in Peru: "He is on a holiday. He is going around the world. He is 20 years old."³⁷⁹ "[...] about this time he had only just become a reporter; prior to that actually I think he had been a messenger and he was being trained up as a reporter,"³⁸⁰ he added. We return to the veracity of this below.

416. The message above the transcript said it was 'for Neville'. In June 2005, there was only one Neville on the staff:³⁸¹ Neville Thurlbeck, the chief reporter. Mr Crone told us he asked Mr Hindley whether he had given him the transcript. "He said, 'I can't remember.' He said, 'Perhaps I gave it to Neville, but I can't remember.'"³⁸² Mr Crone said he also asked Mr Thurlbeck if he remembered receiving the transcript: 'His position is that he has never seen that email, nor had any knowledge of it.'³⁸³

The door-knock

417. On Saturday 2 July 2005, three days after the 'for Neville' transcript was sent, Mr Thurlbeck knocked on the door of a person living in the north-west of England in connection with a possible news story relating to Gordon Taylor.³⁸⁴

418. This story was based at least in part on the contents of the voicemail interception transcripts, Mr Crone told us.³⁸⁵ Mark Lewis, the solicitor who acted for Mr Taylor in his successful action against News Group, went further, saying:

"I think it incredibly unlikely to have been obtained any other way, because it was not a true story, it was a misunderstanding of a message which had been left on the phone, so how you would misunderstand a message left on a phone in any other way is completely beyond me [...] In order to misunderstand it, they would have had to hear it."³⁸⁶

³⁷⁷ Q 1342

³⁷⁸ *Ibid.*

³⁷⁹ Qq 1368-9

³⁸⁰ Q 1342

³⁸¹ Ev 467

³⁸² Q 1366

³⁸³ Q 1344

³⁸⁴ *Ibid.*

³⁸⁵ Q 1346

³⁸⁶ Qq 2101-2

419. Mr Lewis told us that the development of the story was sufficiently advanced for there to have been a draft of an article, which he had seen.³⁸⁷ Given that it was a Saturday, and that the paper's chief reporter was involved, it seems reasonable to infer that the intention of the *News of the World* was to publish the next day.

420. No article ever appeared, however. Mr Crone explained why:

"I came back [from holiday] the following week and one of the legal complaints that was on my desk by about Wednesday, I think, was a complaint from one of the story's subjects. I went and made enquiries of Neville Thurlbeck actually, because I knew that he was the reporter on the story; and I was told that it was based on a source and he had gone up and had a conversation with the person whose door he knocked on; there were stringent denials; the legal letter that was in front of me contained stringent denials. I went and spoke to the editor, Andy Coulson. I said, 'It seems to be based on a source, but if it's true the source is probably never going to come forward'; and Andy Coulson told me to 'Forget it. Tell them that we won't be running the story', and that was the end of it."³⁸⁸

421. It was not the end of Mr Mulcaire's interest in Gordon Taylor, however. One of the charges to which he pleaded guilty in November 2007 was of unlawfully intercepting Mr Taylor's voicemail messages between February and June of 2006, some six months after the door-knock had taken place.

422. Mark Lewis also told us that, during his conversations with the Metropolitan Police at the time of the Gordon Taylor case, a Detective Sergeant Maberly had put the number of people affected by the phone tapping at 6,000. Mr Lewis went on to say that 'it was not clear to me whether that was 6,000 phones which had been hacked, or 6,000 people including the people who had left messages'.³⁸⁹ Assistant Commissioner Yates, however, referred to only a handful of victims,³⁹⁰ while Detective Chief Superintendent Williams told us that: "I suppose the honest answer is we do not know".³⁹¹ Subsequently, in answer to a Freedom of Information request, the Metropolitan Police confirmed that there were 91 individuals whose pin numbers were recorded in the material which they had seized. This does not however prove that only 91 individuals were targeted; how many of those pin numbers were accurate, and the number of individuals with default pin settings which might not be individually recorded, is not known. The request came from the *Guardian*, which also reported being told by three mobile phone companies that they had traced over 100 customers, from numbers passed to them by the police, whose voicemails had been called.³⁹² We comment further on the police evidence, and recent changes to it, in paragraphs 456 to 472 below.

³⁸⁷ Q 2097

³⁸⁸ Q 1351

³⁸⁹ Q 2069

³⁹⁰ "Statement by Baroness Buscombe, Chairman of the Press Complaints Commission, on new evidence in the phone message hacking episode", *Press Complaints Commission*, www.pcc.org.uk

³⁹¹ Q 1982

³⁹² "NoW pair hacked into 100 mobile accounts", *The Guardian*, 2 February 2010

423. It is likely that the number of victims of illegal phone-hacking by Glenn Mulcaire will never be known. Nevertheless, there is no doubt that there were a significant number of people whose voice messages were intercepted, most of whom would appear to have been of little interest to the Royal correspondent of the *News of the World*. This adds weight to suspicions that it was not just Clive Goodman who knew about these activities.

Who knew about the phone-hacking?

424. Mr Crone told us that, when he questioned Mr Thurlbeck about the source of the Gordon Taylor story, he at first said he had been briefed by Miskiw, and asked to confront one of the story's subjects.³⁹³

425. Mr Thurlbeck then revised his account of events, as Mr Miskiw had by then just left the newspaper:

“Neville Thurlbeck told me that his refreshed memory told him that in fact the briefing that he received was from the London news desk [...]. I went to speak to the relevant person at the London news desk, who told me that he had no knowledge of the email and he had never seen it.”³⁹⁴

426. In summary, Mr Crone’s investigation, he said, had established that nobody remembered the ‘for Neville’ email, apart from Mr Hindley, who could not remember what he did with it.

427. In spite of the allegations contained in the *Guardian*, the *News of the World* has continued to assert that Clive Goodman acted alone. Les Hinton, the former Executive Chairman of News International, told us: “There was never any evidence delivered to me that suggested that the conduct of Clive Goodman spread beyond him.”³⁹⁵

428. However, there is nothing to connect Mr Goodman with Gordon Taylor and the ‘for Neville’ transcript. The transcription took place in June 2005, and at his sentencing hearing Mr Goodman’s counsel told the judge that his client was not aware of Mr Mulcaire’s voicemail accessing until late 2005.³⁹⁶ Neither was Mr Goodman accused in the later interception of Gordon Taylor’s voicemail.

429. There has been speculation that the then editor of the *News of the World*, Andy Coulson, must have known what was going on. In his evidence to us, however, Nick Davies said: “I have never seen a piece of paper that directly links Andy Coulson to any of the activity that we are discussing of either kind.”³⁹⁷

³⁹³ Q 1344

³⁹⁴ Qq 1344–5

³⁹⁵ Q 2106

³⁹⁶ Sentencing hearing, p 70

³⁹⁷ Q 1291

430. Mr Coulson told us that during his time as editor he “never condoned the use of phone-hacking and nor do I have any recollection of incidences where phone-hacking took place”.³⁹⁸ He added:

“What we had with the Clive Goodman case was a reporter who deceived the managing editor’s office and, in turn, deceived me. I have thought long and hard about this (I did when I left): what could I have done to have stopped this from happening? But if a rogue reporter decides to behave in that fashion I am not sure that there is an awful lot more I could have done.”³⁹⁹

431. Mr Coulson also said he had “never read a Gordon Taylor story, to the best of my recollection”⁴⁰⁰ although, as we have been told, it was Mr Coulson who spiked the story (see paragraph 420).⁴⁰¹

432. We turn now to the ‘full, rigorous internal enquiry’, which News International told us in March 2007 that it had conducted.⁴⁰² There were, from evidence we have received, two internal reviews, one before and one after Colin Myler arrived as editor in January 2007.

433. Firstly, solicitors Burton Copeland were brought in by the *News of the World* in 2006 to ‘liaise’ with the police. They were also given free rein to ask as many questions they liked, but found no evidence to implicate any other staff in phone-hacking, we were told. By Mr Coulson’s admission, however, they were tasked “with the primary purpose, I have to say, of trying to find out what happened in relation to Clive.”⁴⁰³

434. A separate review was carried out by News International in May 2007 of emails still on IT systems of Mr Goodman and five senior newspaper employees, including Mr Coulson, the timing of which coincided with the unfair dismissal claims. It is this review to which Mr Myler referred during this enquiry when he said he had looked at over 2,500 emails to see if there was any wider involvement in the phone-hacking.⁴⁰⁴

435. The conclusions of Lawrence Abramson, managing partner of a further firm of solicitors, Harbottle & Lewis, make interesting reading:

“I can confirm that we did not find anything in those emails which appeared to us to be reasonable evidence that Clive Goodman’s illegal actions were known about and supported by both or either of Andy Coulson, the Editor, and Neil Wallis, the Deputy Editor, and/or that Ian Edmondson, the News Editor, and others were carrying out similar illegal procedures.”⁴⁰⁵

³⁹⁸ Q 1550

³⁹⁹ Q 1554

⁴⁰⁰ Q 1591

⁴⁰¹ Q 1351

⁴⁰² HC 375 2006–07, Q 95

⁴⁰³ Q 1558

⁴⁰⁴ Q 1405, Ev 464–7; Press Complaints Commission, *PCC report on phone message tapping allegations*, 9 November 2009, p 9

⁴⁰⁵ Ev 467

436. We have not seen any documents relating to the unfair dismissal claims, nor whether they included allegations that senior staff, including the News Editor, knew of the phone-hacking.

437. We have found no evidence, however, of systematic questioning of Messrs Thurlbeck or Hindley, or any full review of their emails. Mr Crone told us he certainly had not done so. The newspaper, indeed, says it only learned of the ‘for Neville’ email when it was produced by Gordon Taylor’s lawyers in April 2008. The other key document, though – the Miskiw contract – was known about at the time of the trial.

438. We also followed up evidence about Mr Hindley, the ‘junior reporter’. The *News of the World* has now confirmed that he is in fact 28 and the nephew of former editor Phil Hall. He joined full-time in 2005, having worked on local newspapers. Searches show he also contributed to his future employer for five years previously and from September, 2006, wrote as Ross Hall, adopting his mother’s maiden name. The paper blamed its errors on “provocative questioning and interrupting of Mr Crone”.⁴⁰⁶

439. We have seen no evidence that Andy Coulson knew that phone-hacking was taking place. However, that such hacking took place reveals a serious management failure for which as editor he bore ultimate responsibility, and we believe that he was correct to accept this and resign.

440. Evidence we have seen makes it inconceivable that no-one else at the *News of the World*, bar Clive Goodman, knew about the phone-hacking. It is unlikely, for instance, that Ross Hindley (later Hall) did not know the source of the material he was transcribing and was not acting on instruction from superiors. We cannot believe that the newspaper’s newsroom was so out of control for this to be the case.

441. The idea that Clive Goodman was a “rogue reporter” acting alone is also directly contradicted by the Judge who presided at the Goodman and Mulcaire trial. In his summing up, Mr Justice Gross, the presiding judge, said of Glenn Mulcaire: “As to Counts 16 to 20 [relating to the phone-hacking of Max Clifford, Simon Hughes MP, Andrew Skylett, Elle Macpherson and Gordon Taylor], you had not dealt with Goodman but with others at News International.”⁴⁰⁷

442. Despite this, there was no further investigation of who those “others” might be and we are concerned at the readiness of all of those involved: News International, the police and the PCC to leave Mr Goodman as the sole scapegoat without carrying out a full investigation at the time. The newspaper’s enquiries were far from ‘full’ or ‘rigorous’, as we – and the PCC – had been assured. Throughout our inquiry, too, we have been struck by the collective amnesia afflicting witnesses from the *News of the World*.

406 Ev 469

407 Sentencing Hearing, p 179

The Goodman and Mulcaire settlements

443. In the course of our inquiry, we established that payments were made to both Clive Goodman and Glenn Mulcaire in settlement of actions brought by them in relation to unfair dismissal, despite the fact that both had been convicted of criminal offences. In the case of Clive Goodman we were told by News International that, as the statutory dismissal process had not been correctly followed, he had been unfairly dismissed. It is open to an employer to argue to an Employment Tribunal, however, that the outcome would have been the same even if procedures had been correctly followed, and therefore the failure to do so did not prejudice the dismissal. Despite this, based on advice from Jon Chapman, News International's Director of Legal Affairs, News International decided to settle the case:

“In all contentious employment cases in the News International group, a recommendation as to whether to defend or to try to settle is made by me to relevant senior management, based primarily on cost (to settle or legal and other costs to defend), the very significant internal time and resource required to deal with a defence, likelihood of success and publicity the matter may attract. I applied this analysis to the Goodman claim and recommended to Les Hinton, our then Executive Chairman, that we explore settlement on reasonable terms. After some discussion with Mr Goodman’s lawyers, a proposed settlement was reached which was approved by Les Hinton and Daniel Cloke, our Director of Human Resources.”⁴⁰⁸

444. In the case of Glenn Mulcaire, as a contractor his contract was terminated by News International in January 2007. Mr Mulcaire launched a case in April 2007 stating that he in fact had full employment rights, and therefore the correct statutory procedures had not been followed. Mr Chapman stated: “we took the view that there was a significant risk a tribunal might find he had employment rights. A similar analysis to that carried out for Mr Goodman’s claim was then followed and a similar internal procedure was followed in relation to potential settlement.”⁴⁰⁹

445. Both were paid notice, legal costs and a compensatory award. The group declined to confirm the amounts, but said the awards were below the £60,600 statutory limit. Had it resisted at a tribunal, and lost, given the convictions, we have also received legal advice that it could have gained a substantial reduction in any award.

446. Mr Hinton also declined to confirm any confidentiality clauses or the terms of any indemnity given to Mr Mulcaire regarding future civil claims: “I am not going to discuss the terms of the agreement”,⁴¹⁰ adding “[...] I cannot remember the detail and, in any event, I have been told by News International not to discuss it.”⁴¹¹

447. Initial confirmation of the settlements came from Tom Crone and Colin Myler. It took, however, persistent questioning, and Mr Crone in particular was reluctant to be drawn. Regarding the payment to Mr Goodman, indeed, he openly contradicted himself: “I

⁴⁰⁸ Ev 464

⁴⁰⁹ *Ibid.*

⁴¹⁰ Q 2198

⁴¹¹ Q 2202

am certainly not aware of it” he told us on two occasions.⁴¹² When pressed, citing misunderstanding, he then said: “I am not absolutely certain, but I have a feeling that there may have been a payment of some sort.”⁴¹³ To Mr Myler, on the other hand, Mr Goodman’s pay-off appeared to come as a genuine surprise.⁴¹⁴

448. Afterwards Mr Myler wrote to confirm both pay-offs, adding that “the terms [...] are subject to mutual and legally binding confidentiality obligations.”⁴¹⁵ In the letter, he also contradicted his own evidence: “I and Tom Crone were broadly aware of the claims and the fact that they were settled, but not of the terms of the settlement.”⁴¹⁶

449. The *News of the World* and its parent companies did not initially volunteer the existence of pay-offs to Clive Goodman and Glenn Mulcaire, and their evidence has been contradictory. We do not know the amounts, or terms, but we are left with a strong impression that silence has been bought.

450. The newspaper’s approach in this instance also differed markedly, we note, from that adopted towards sports reporter Matt Driscoll, to whom a tribunal awarded nearly £800,000 – possibly the biggest amount in the industry to date – in November 2009 for unfair dismissal after persistent bullying by then editor Andy Coulson. The newspaper strongly resisted that particular claim.

The Taylor settlement

451. The *News of the World* also settled out-of-court the civil claims for breach of confidence and privacy brought by Gordon Taylor, Jo Armstrong and one other. The settlements and payments were authorised by James Murdoch, executive chairman of News International, “following discussions with Colin Myler and Tom Crone.”⁴¹⁷

452. Mark Lewis said the newspaper resisted the claim, but changed its stance when confronted with the ‘for Neville’ email and ‘Miskiw contract’: “[...] initially the *News of the World*’s defence was, ‘This did not happen’. This defence was subsequently amended to say, ‘Yes it did’ and the settlement came about shortly after”.⁴¹⁸

453. One of our concerns in re-examining these issues was whether we – and the PCC – were misled in 2007 and whether, following the Taylor case, News International should have corrected the record. Confidentiality, it told us, prevented this and had been requested first by Mr Taylor: “It was raised by him before it was raised by us, but we fell in with it,”⁴¹⁹ Mr Crone said.

412 Qq 1411, 1416

413 Q 1537

414 *Ibid.*

415 Ev 321

416 *Ibid.*

417 Ev 465

418 Q 2069

419 Q 1336

454. Mr Lewis, however, said that was inaccurate. He made a distinction between confidentiality regarding information in the story, which Mr Taylor had asked for, and about an agreement *per se*. This was at News International's instigation: "That is very different from stopping the existence of a settlement getting out [...]. That was not suggested by Gordon Taylor or by me on behalf of Gordon Taylor."⁴²⁰

455. **Gordon Taylor was cited in one of the charges over which Glenn Mulcaire was convicted in 2007. In the civil action, however, the *News of the World* nonetheless initially resisted the claim, and on a false basis. We consider there was nothing to prevent the newspaper group drafting its confidentiality agreement to allow the PCC and this Committee to be informed of these events, so as to avoid, at the very least, the appearance of having misled us both. We also believe that confidentiality in the Taylor case, and the size of the settlement and sealing of the files, reflected a desire to avoid further embarrassing publicity to the *News of the World*.**

The actions of the police

456. The criminal investigation started with the Anti-Terrorist Branch – now the Counter Terrorism Command – of the Metropolitan police in 2005. The Miskiw contract, and the 'for Neville' email, were in its possession from August 2006, and both were communicated in due course to the Crown Prosecution Service (CPS). Neither saw grounds in either document to take action. Consequently neither Mr Miskiw nor Mr Thurlbeck nor Mr Hindley was interviewed by the police, nor was any executive of the *News of the World*.

457. Mr Crone told us that as soon as News Group became aware of the existence of the two documents, in April 2008, when they were produced by lawyers acting for Gordon Taylor, the company settled.⁴²¹

458. We asked the Metropolitan Police why it was, given that the contents of these documents caused News Group to make a legal settlement forthwith, the police had not investigated them at the time they took possession of them. Assistant Commissioner Yates told us that the investigative strategy in respect of Glenn Mulcaire, which was endorsed by the CPS, was 'based on the premise of "to prosecute the most substantive offence"'.⁴²² Further, he stressed the novelty and the technical and legal difficulties of securing convictions under the relevant Act, the Regulation of Investigatory Powers Act, and he spoke of the need to protect the victims of unlawful interceptions from unwanted public exposure.⁴²³

459. Mr Yates explained to us the police's rationale in dealing with the large amount of evidence it had seized:

"Our job, as ever, is to follow the evidence and to make considered decisions based upon our experience which ensures limited resources are used both wisely and effectively and, supported by senior counsel, including the DPP, the collective belief

⁴²⁰ Q 2084

⁴²¹ Q 1329

⁴²² Q 1890

⁴²³ *Ibid.*

is that there were then and there remain now insufficient grounds or evidence to arrest or interview anyone else and . . . no additional evidence has come to light since.”⁴²⁴

460. We specifically asked why the police had not pursued the matter of the ‘for Neville’ email. Mr Yates said that this had been considered, but went on:

“There are a number of factors around it, some practical issues. Firstly, the email itself was dated, I think, 29 July 2005 and we took possession of it in August 2006, so it was already a minimum of 14 months old, that email, that is the minimum and we do not know when it was actually compiled or sent. We know from the phone company records that they are not kept for that period of time, so there was no data available behind that email. There was nothing to say that Neville, whoever Neville may be, had seen the document and, even if the person, Neville, had read the email, that is not an offence. It is no offence of conspiracy, it is no offence of phone-hacking, it is no offence of any sort at all.”⁴²⁵

461. Mr Yates offered two reasons why Neville Thurlbeck was not interviewed. The first was that “there is no clear evidence as to who Neville was or who is Neville. It is supposition to suggest Neville Thurlbeck or indeed any other Neville within the *News of the World* or any other Neville in the journalist community.”⁴²⁶ Nor was there evidence in any of the other material seized from Mr Mulcaire to suggest a link.⁴²⁷

462. The second reason related to whether there would have been any point in attempting to question Mr Thurlbeck. Mr Yates told us:

“I would say it is 99.9% certain that, if we were to question Neville Thurlbeck on this matter, he would make no comment. That was the position of every other journalist we spoke to during this inquiry. It was the position of Mulcaire, it was the position of Goodman and they made no comment.”⁴²⁸

463. The police also told us that their hands were tied by lack of corroborating evidence and the stance of the newspaper’s solicitors, however, was described to us as “robust”.⁴²⁹ Detective Chief Superintendent Philip Williams, one of the investigating officers, told us:

“As part of our investigation strategy, we were asking the *News of the World* to supply more information pertaining to Mulcaire, his employment, his records of work, who he worked for and what stories he worked on, as was said, and any editors or journalists that he worked for because this was an ongoing process and we wanted to understand the whole picture. What it came back to was the *News of the World* saying, ‘No, there was no information’ and, therefore, we were left in isolation,

⁴²⁴ *Ibid.*

⁴²⁵ Q 1892

⁴²⁶ Q 1893

⁴²⁷ *Ibid.*

⁴²⁸ Q 1904

⁴²⁹ Q 1939

literally, with that document which, when you look at it, is not enough in evidence to pursue, which is where we have ended up.”⁴³⁰

464. Regarding the failure to conduct wider interviews, however, Mr Yates also said: “perhaps in 2006 it ought to have been done; I do not know, but in 2009 that is going to take us absolutely nowhere.”⁴³¹

465. The police also told us that under section 1 of the Regulation of Investigatory Powers Act (RIPA) it is only a criminal offence to access someone else’s voicemail message if they have not already listened to it themselves. This means that to prove a criminal offence has taken place it has to be proved that the intended recipient had not already listened to the message. This means that the hacking of messages that have already been opened is not a criminal offence and the only action the victim can take is to pursue a breach of privacy, which we find a strange position in law.

466. We recommend that Section 1 of the Regulation of Investigatory Powers Act is amended to cover all hacking of phone messages.

467. In 2006 the Metropolitan Police made a considered choice, based on available resources, not to investigate either the holding contract between Greg Miskiw and Glenn Mulcaire, or the ‘for Neville’ email. We have been told that choice was endorsed by the CPS. Nevertheless it is our view that the decision was a wrong one. The email was a strong indication both of additional lawbreaking and of the possible involvement of others. These matters merited thorough police investigation, and the first steps to be taken seem to us to have been obvious. The Metropolitan Police’s reasons for not doing so seem to us to be inadequate.

468. Nor are we impressed by the reported testimony of Neville Thurlbeck. Mr Thurlbeck also figured prominently in the case Max Mosley brought against the *News of the World* which we discuss in paragraphs 40 to 57 above. Mr Justice Eady’s judgement in that case included the following:

“The real problem, so far as Mr Thurlbeck is concerned, is that these inconsistencies demonstrate that his ‘best recollection’ is so erratic and changeable that it would not be safe to place unqualified reliance on his evidence as to what took place as between him, Woman E and her husband.”⁴³²

469. There is one other piece of evidence which we have heard in this inquiry which suggests Mr Thurlbeck’s involvement in this matter. On 9 April 2006, the *News of the World* published an article which described verbatim a joke message left on the telephone voicemail of Prince Harry by his brother, Prince William.⁴³³ The story was credited to both Clive Goodman and Neville Thurlbeck. In the light of the subsequent convictions of Clive Goodman and Glenn Mulcaire it is reasonable to conclude that this story was the result of an interception. Indeed, Mr Williams told us that he had evidence that Goodman and

⁴³⁰ Q 1907

⁴³¹ Q 1936

⁴³² Para 97 Mosley (2)

⁴³³ “Chelsy tears a strip off Harry”, *News of the World*, 9 April 2006

Mulcaire had accessed the princes' own phones to listen to voicemails,⁴³⁴ although they were not prosecuted for doing so.

470. Following the *Guardian* revelations, the PCC started a review of the phone-hacking and blagging affairs. In its conclusions, published in November 2009, and which quoted only part of the police evidence to us, it effectively exonerated the *News of the World*. This drew an angry response from the *Guardian*, whose reports, the PCC said, "did not quite live up to the dramatic billing they were initially given".⁴³⁵ Mr Rusbridger then resigned in protest from the Code Committee.

471. The following week, the PCC's new chair, Baroness Buscombe, gave a speech to the Society of Editors annual conference, which suggested that Gordon Taylor's lawyer, Mr Lewis, had misled this Committee. This was prompted by receipt of a letter from police lawyers denying that an officer, Detective Inspector Mark Maberly, had told Mr Lewis that Glenn Mulcaire had intercepted 6,000 people's voice messages. Mr Lewis, whom the PCC had not contacted for comment, also reacted furiously.

472. We accept that in 2007 the PCC acted in good faith to follow up the implications of the convictions of Clive Goodman and Glenn Mulcaire. The *Guardian*'s fresh revelations in July 2009, however, provided good reason for the PCC to be more assertive in its enquiries, rather than accepting submissions from the *News of the World* one again at face value. This Committee has not done so and we find the conclusions in the PCC's November report simplistic and surprising. It has certainly not fully, or forensically, considered all the evidence to this inquiry.

Operation Motorman

473. The 2003 investigation known as Operation Motorman was led by the Office of the Information Commissioner. It concerned offences under data protection legislation by a private investigator, Steve Whittamore, who had illegally accessed official databases by pretending to be someone he was not (a practice known as 'blagging'), and sold the harvested information to newspapers. The databases that were compromised included the DVLA and the Police National Computer.⁴³⁶

474. In May 2006, the then Information Commissioner, Richard Thomas, published a report of the investigation, entitled *What price privacy?*⁴³⁷ The report noted that the documentation seized during the investigation made links between Mr Whittamore and the press. The report listed the number of transactions undertaken by Mr Whittamore for each newspaper and the number of journalists working for each publication who had commissioned them. Most newspaper groups and a number of magazines were

⁴³⁴ Q 1996

⁴³⁵ PCC report on phone message tapping allegations, para 13.3

⁴³⁶ Information Commissioners Office, *What price privacy? The unlawful trade in personal confidential information*, HC (2005–06) 1056, para 5.1

⁴³⁷ *Ibid.*

implicated.⁴³⁸ The journalists seeking the information were not named in the report, though most were named in the documents.⁴³⁹

475. Although Mr Whittamore and three colleagues were convicted, journalists who had allegedly bought information from him were not. We questioned this decision during our 2007 inquiry.⁴⁴⁰ The then Information Commissioner told us that given the lightness of the sentences handed down to the investigators he had been advised by counsel that to pursue further prosecutions would not be in the public interest and would ‘attract severe criticism within the court system’.⁴⁴¹ The Information Commissioner accepted this advice.

476. In evidence to us on 14 July Nick Davies gave us his view:

“They prosecuted Steve Whittamore, the private investigator, and three of his colleagues who were involved in the network, gathering information, they came to Blackfriars Crown Court and pleaded guilty, and the judge in the case said, ‘Well, hang on a moment. Where are the news groups? Where are the journalists?’ and the answer to that question is that the Information Commission felt that, if they charged the newspaper groups, they would (a) hire very expensive QCs, which meant that the Information Commissioner’s office would have to do the same, and (b) they would have masses of preliminary hearings with all sorts of complex legal argument and the effect of that would have been to break the Information Commissioner’s office’s legal budget. They simply could not afford to take on Fleet Street, it was too expensive. It was not, as you might think, a political fear, ‘We’re not going to get into a fight with these powerful newspapers’; it was a budgetary thing.”⁴⁴²

477. Mr Davies showed us a copy of invoices, dated 1998, that related to Operation Motorman, which he said had come from the Information Commissioner:

“The Information Commissioner, some months ago, presented the press with a collection of invoices. Some of them dealt with News International, and I have just given you copies, and some of them dealt with other newspaper groups, so the Information Commissioner has previously made invoices public relating to Steve Whittamore’s work for other newspaper groups.”⁴⁴³

478. We put it to Mr Davies that his story in the *Guardian* amounted to nothing more than a rehash of old news. He denied this, saying, with regard to the lack of prosecutions in Operation Motorman: “This is a story which did not get reported.”⁴⁴⁴

438 Information Commissioners Office, *What price privacy?*

439 *Ibid.*, para 5.6

440 Culture, Media and Sport Committee, Seventh Report of Session 2006–07, *Self-regulation of the press*, HC 375

441 *Ibid.*, Q 41

442 Q 1233

443 Q 1236

444 *Ibid.*

479. He added:

“What I am really writing about, the core of that story in the *Guardian*, is the fact that we have discovered News Group have paid out more than one million quid to suppress legal actions in three cases. Why did they do that? Because the lawyers for the lead case, Gordon Taylor, managed to get hold of two different caches of evidence, one lot from Scotland Yard and one lot from the Information Commission, so, in writing that story, necessarily I have to tell you that it is those two caches of information which led to the *News of the World* saying here ‘take some money and will you please go quiet’. If I did not tell you about the Information Commission lot, I would only be telling you half the reason why News Group folded the case.”⁴⁴⁵

480. The Information Commissioner’s Office initially denied putting copies of the invoices we received from Mr Davies in the public domain.⁴⁴⁶ However, in a letter to the Chairman dated 5 August 2009, the Information Commissioner, Christopher Graham, confirmed that in fact his office had released samples of invoices from the Operation Motorman case: “These heavily redacted samples were released to the *Guardian* by the Information Commissioner’s press office in early 2007 to help illustrate the *Guardian*’s coverage of our report *What price privacy now?*. ”⁴⁴⁷

481. The Chairman of our Committee subsequently visited his offices in Cheshire and inspected the ledgers containing the documents seized, which amounted to 17,000 invoices or purchase orders from journalists for information.⁴⁴⁸ As the Information Commissioner has pointed out, many of these transactions would be for obtaining information perfectly legally.⁴⁴⁹ But it is reasonable to suppose that many others were not.

482. We asked the Information Commissioner whether, in the public interest, we could be provided with a redacted version to publish as part of our inquiry. He replied that he was eager to give us every assistance, but said:

“My concern is a practical one. The invoices fill a large cardboard box and there are four A4 ledgers that run to around 100 double sided pages each. I estimate that it would take a member of staff between one and two weeks to perform the redaction needed to remove any personally identifiable information. I also have doubts as to whether supplying redacted versions of all the ledgers and the invoices would serve any useful purpose.”⁴⁵⁰

483. We were subsequently given information that led us to believe that the information had in fact been transcribed into an electronic spreadsheet. We put this to the Information

⁴⁴⁵ Q 1240

⁴⁴⁶ Ev 341

⁴⁴⁷ Information Commissioner’s Office, *What price privacy now? The first six months progress in halting the unlawful trade in confidential personal information*, HC (2006–07) 36

⁴⁴⁸ Q 1804

⁴⁴⁹ *Ibid.*

⁴⁵⁰ Ev 342

Commissioner⁴⁵¹ and his Office accepted that this was the case.⁴⁵² Nevertheless David Smith, Deputy Information Commissioner, then told us that the work necessary to redact the spreadsheets would still take between 15 and 30 staff days.⁴⁵³ A copy of the Motorman spreadsheet relating to News International newspapers was subsequently obtained by a member of our Committee. The Information Commissioner then confirmed that the most straightforward redaction, column by column, would take relatively little time.⁴⁵⁴

484. We have been surprised by the confusion and obfuscation in the Information Commissioner's Office about the format of the information it holds, and to whom that information has been released. Given our interest in the ledgers, and the visit of our Chairman to the offices of the Information Commissioner to inspect them, we would have expected to be told that the information was available in an electronic format. As such, it could easily have been redacted to give more information about suspect activities than appeared in 2006 in *What price privacy now?*.

485. Nick Davies's *Guardian* article suggested that at least three News International executives were involved in commissioning Steven Whittamore for information. They included Mr Miskiw,⁴⁵⁵ who made 90 requests to Steven Whittamore, 35 of which were to illegally access databases.⁴⁵⁶ Mr Davies did not name to us the other two executives, but he confirmed that Andy Coulson was not one of them.⁴⁵⁷

486. Although the information in the *Guardian* which related to Operation Motorman was up to 15 years old, many were surprised by it. We have heard that a number of those named as victims of Mr Whittamore by the *Guardian*, such as Peter Kilfoyle MP, who was a minister in the Cabinet Office at the time, were until the story's publication completely unaware that they had been targeted.⁴⁵⁸

487. Christopher Graham explained to us why this might be the case:

“My predecessor had to make the judgement whether you throw the whole resources of the organisation into going through 17,000 pieces of evidence in order to assess the nature of a story and to work out whether the Ziggy Stardust in the ledger is the Ziggy Stardust you might need to alert. The decision was taken ‘no, we are going to approach this by trying to end the unlawful dealing in personal confidential information at source, we are going to go for closing down these operations and we are going to report formally to Parliament’.”⁴⁵⁹

451 Letter from the Chairman to the Information Commissioner, 20 October 2009 (not printed)

452 Ev 355

453 *Ibid.*

454 Ev 469

455 Q 1211

456 *Ibid.*

457 Q 1212

458 Q1809

459 Q 1804

488. In the absence of a proactive approach from the then Information Commissioner, the onus was on individuals to question whether they had been victims.⁴⁶⁰ Many will still be unaware that they were. The Information Commissioner defended his predecessor's decision not to inform the victims but told us: "I am very sorry if people feel let down by the ICO."⁴⁶¹ From the *Guardian's* reports, we also now know of one complaint to the PCC about intrusion, where it was held to be unfounded. Unknown to the complainant and PCC, however, private details had indeed been blagged by private investigators in the Motorman case.

489. The Information Commissioner told us that he feared that the *Guardian's* reporting was obscuring the positive aspects: "It was the Information Commissioner's Office who highlighted this whole thing; we are the good guys in this, Chairman."⁴⁶² As a result illegal blagging was much diminished. Nevertheless his Office remained vigilant:

"If the trade builds up again the Commissioner will consider making a formal request to the Secretary of State to use his order making power under the CJIA [Criminal Justice and Immigration Act] to bring in custodial sentences. The recent reports of phone tapping by print journalists would be used to support any case the Commissioner might need to make."⁴⁶³

490. The question of whether there should be custodial sentences for breaches of section 55 of the Data Protection Act is not a new one. We recommended in our 2007 report *Self-regulation of the press* that custodial sentences be used as a deterrent and were disappointed at the Government's rejection of our recommendation. However, we welcome the current Ministry of Justice consultation on the introduction of sentences⁴⁶⁴ and hope that a subsequent change in the law is imminent.

491. We recognise the value of the work of the Office of the Information Commissioner in investigating the activities of Steven Whittamore and his associates. The Office can take much of the credit for the fact that such illegal blagging, described to us in 2007 as being widespread across the newspaper industry, is now rare. However we are disappointed that the then Information Commissioner did not feel he had the resources to identify and inform all those who were or could have been the victim of illegal blags, and that he did not at the time make the case that he should be given such resources.

Conclusions regarding phone-hacking and blagging

492. The articles in the *Guardian* have been criticised for lack of clarity, in distinguishing between phone-hacking by Glenn Mulcaire and blagging and other data protection offences uncovered by Operation Motorman. It has also been asserted, by the *News of the World* and the police among others, that they contained no 'new

⁴⁶⁰ Q 1805

⁴⁶¹ *Ibid.*

⁴⁶² *Ibid.*

⁴⁶³ Ev 341

⁴⁶⁴ Ministry of Justice, *The knowing or reckless misuse of personal data – introducing custodial sentences*, consultation paper CP22/09, 15 October 2009

evidence'. The real question, however, is 'new' to whom? Assistant Commissioner Yates admitted to us that his assertion was, in fact, a circular argument. The *Guardian's* original revelations relied on unused and unpublicised evidence available to the police. And revelation of facts not already in the public domain is the very definition of 'news'.

493. The *Guardian* articles did contain new information, in particular, concerning the payments to Gordon Taylor and others and the 'for Neville' email. This inquiry has subsequently revealed more facts, including the pay-offs made to Clive Goodman and Glenn Mulcaire and that they tapped the phones of the princes themselves. They also highlighted the fact that a culture undoubtedly did exist in the newsroom of *News of the World* and other newspapers at the time which at best turned a blind eye to illegal activities such as phone-hacking and blagging and at worst actively condoned it. We condemn this without reservation and believe that it has done substantial damage to the newspaper industry as a whole.

494. We are encouraged by the assurances that we have received that such practices are now regarded as wholly unacceptable and will not be tolerated. We have seen no evidence to suggest that activities of this kind are still taking place and trust that this is indeed the case. However, we call on the Information Commissioner, the PCC and the industry to remain vigilant and to take swift and firm action should any evidence emerge of such practices recurring.

495. In seeking to discover precisely who knew what among the staff of the *News of the World* we have questioned a number of present and former executives of News International. Throughout we have repeatedly encountered an unwillingness to provide the detailed information that we sought, claims of ignorance or lack of recall, and deliberate obfuscation. We strongly condemn this behaviour which reinforces the widely held impression that the press generally regard themselves as unaccountable and that News International in particular has sought to conceal the truth about what really occurred.

6 Self-regulation of the Press

496. Finally we discuss self-regulation of the press; its future viability; the history and structure of the PCC, the current industry regulator; and its fitness for purpose. We also set out a considered programme of reform, aimed at making regulation of the press in the UK more effective.

The Press Complaints Commission

497. Press self-regulation in the United Kingdom began in 1953, when the industry established the Press Council in belated response to recommendations by a Royal Commission of 1949. The Council had two functions, to defend press freedom and to investigate complaints, but it never accomplished either task to the satisfaction of the public or of the press itself. Successive reforms, including the introduction of lay members, failed to raise its standing and by the late 1980s it had, in the words of one historian, ‘reached a state of terminal discredit’.⁴⁶⁵

498. In 1990, the Calcutt inquiry (see paragraph 10 above) recommended the replacement of the Press Council with a Press Complaints Commission, like the Press Council non-statutory and funded by the industry, but with a mandate to handle complaints more vigorously. It also recommended that the new body should not be charged with defending press freedom. The PCC was duly established by the industry in 1991.

499. The PCC is an independent body, which has two principal functions. It maintains and promotes a professional Code of Practice for journalists, and it deals with complaints from members of the public about possible breaches of the Code by newspapers and magazines. The board of the PCC is made up of 17 members: 10 lay members and seven editors. The PCC is funded by newspapers and magazines paying an annual levy to PressBof. Subscription to the system is voluntary, and not all UK publications choose to subscribe. In April 2009, during the course of our inquiry, the Chairmanship of the PCC passed from Sir Christopher Meyer to Baroness Buscombe.

500. Complaints to the PCC are adjudicated using its Code of Practice (see Appendix 1). The Code is written and revised by the Editors’ Code Committee which is made up of editors of national, regional and local newspapers sitting alongside the Chairman and Director of the PCC. Unlike the PCC itself, the Code Committee has no lay members except the Chairman and Director of the PCC. The Code is not legally binding, and judges are under no obligation to take account of PCC adjudications, although they have been referred to by the courts.⁴⁶⁶

501. Complaints under the terms of the Code are assessed by the PCC to determine whether the Code has been breached. If they conclude that it has, the editor concerned may offer to resolve the complaint by the publication of a correction, an apology, a further article or a reader’s letter. If offer is unsatisfactory to the complainant, the PCC will take a

465 R. Shannon, *A Press Free and Responsible: Self-Regulation and the Press Complaints Commission 1991–2001*, (London 2001), p 2

466 Ev 418

decision as to whether there remain issues for which redress is needed. If the PCC decides this is the case, the publication concerned is obliged to publish the PCC's adjudication with due prominence.⁴⁶⁷ A copy of the ruling will also appear in the PCC's bi-annual report and be placed on its website.

502. In 2008, the PCC received a record 4,698 complaints, an increase of 8% on 2007.⁴⁶⁸ It issued rulings on 1,420, broken down as follows:

Table 1.2

Formal rulings under the Code, 2008	
No breach of the Code	721
Sufficient remedial action offered by the newspaper	102
Resolved to the satisfaction of the complainant	552
Adjudicated and upheld	24
Adjudicated and not upheld	21

Press Complaints Commission: The Review 2008

Table 1.3

Possible breaches of the code by clause of the Code, 2008, by % of complaints	
Accuracy	71.4%
Opportunity to reply	0.5%
Privacy	8.8%
Harassment	3.4%
Intrusion into grief and shock	6.9%
Children	3.4%
Children in sex cases	0.1%
Hospitals	0.1%
Reporting of crime	1.1%
Clandestine devices and subterfuge	1.3%
Victims of sexual assault	0.4%
Discrimination	1.9%
Financial journalism	0%
Confidential sources	0.3%
Witness payments in criminal trials	0.1%
Payment to criminals	0.3%

Press Complaints Commission: The Review 2008

503. Both the principle of press self-regulation and its practice by the PCC have always had critics and have often been matters for general concern. Indeed, in 1993 Sir David Calcutt, in a second report commissioned by the Government, concluded that self-regulation was

⁴⁶⁷ Press Complaints Commission, *The Editors' Code of Practice*, clause 1-ii

⁴⁶⁸ Press Complaints Commission, 08 *The Review*, the Annual Report of the Press Complaints Commission

not working and recommended that the Government should impose statutory regulation.⁴⁶⁹ This recommendation was not acted upon.

504. This Committee and its predecessors have investigated these matters from time to time, most recently in our 2007 Report *Self-regulation of the press*,⁴⁷⁰ which concluded that self-regulation continued to be the best way to maintain press standards while ensuring freedom of the press:

“We do not believe that there is a case for a statutory regulator for the press, which would represent a very dangerous interference with the freedom of the press. We continue to believe that statutory regulation of the press is a hallmark of authoritarianism and risks undermining democracy. We recommend that self-regulation should be retained for the press, while recognising that it must be seen to be effective if calls for statutory intervention are to be resisted.”⁴⁷¹

505. The rationale for self-regulation which we expressed on that occasion found an echo in comments made to this inquiry by the then Creative Industries Minister, Barbara Follett MP:

“We have put a barrier between Government and press regulation for very good reasons. As I said earlier, I have seen and lived in a society where that barrier does not exist. What you risk when you lift that barrier is interference and occasionally short-term advantage or popularity or restricting something for other means. We have to be intensely careful.”⁴⁷²

506. Our 2007 comments also referred to the need for self-regulation to be seen to be effective. This constitutes a significant challenge and a continuous test for the PCC. It has no authority or resources besides those ceded to it voluntarily by the industry. It must satisfy Government and Parliament that the self-regulatory system is working. Most importantly, the PCC must have the trust of the public.

507. We have heard much praise for the PCC. Marcus Partington of the Media Lawyers Association highlighted its work behind the scenes, benefiting many ordinary people:

“Many people do not know that the PCC proactively will warn newspapers before a story, or as a story develops that, for example, certain people do not want to be approached; certain people have been approached and do not want to be approached again; and that sort of thing happens all the time but it happens maybe on a quiet, behind-the-scenes, level which is actually very effective. If newspapers are told, for example, that somebody does not want to be approached then they would obviously adhere to that instruction by the PCC . . . I think what is very important is the PCC

⁴⁶⁹ Department of National Heritage, *Review of press self-regulation*, by Sir David Calcutt, QC, Cm 2135, January 1993, para 8.2

⁴⁷⁰ Culture, Media and Sport Committee, Seventh Report of Session 2006–07, *Self-regulation of the press*, HC 375

⁴⁷¹ *Ibid.*

⁴⁷² Q 1089

in those circumstances is used by the non-celebrities, the ordinary people who can approach the PCC and then use their services.”⁴⁷³

508. Paul Dacre, the editor of the *Daily Mail*, said the PCC had brought about significant change:

“I have been in this business forty years; the journalistic landscape has changed dramatically since the ‘80s; journalists are much better behaved. There is an argument that the Code and the Commission has toughened things up so much that it is blunting the ability of some of the red top papers and the red top Sunday market to sell newspapers. [...] Self-regulation works and it would be nice if occasionally that was recognised, along with the fact that we have continual vigilance, we continually update things, we change things, we change the Code in response to public worries. We do not always get it right but we try.”⁴⁷⁴

509. Other voices from inside the industry, including editors, journalists and media lawyers, generally supported the PCC and saw little or no need for change.⁴⁷⁵

510. Even Mark Thomson and Jeremy Clarke-Williams, lawyers who primarily act for claimants and generally see the courts as the best remedy for press failings, acknowledged that the PCC was effective in dealing with press harassment.⁴⁷⁶ Mr Clarke-Williams also told us that using the PCC was a sensible option for a client who had uncovered minor inaccuracies.⁴⁷⁷

511. Gerry McCann also had praise for the PCC’s work in protecting his children and home from press harassment and intrusion, and there is evidence of general satisfaction among those in receipt of PCC decisions: the PCC routinely seeks feedback from them, and around 80% of those who responded in 2008 felt the procedure had been thorough and timely.⁴⁷⁸

512. There is no doubt that the PCC does a great deal of valuable work both in preventing breaches of the Code and in addressing complaints and we note that the PCC is successful as a mediator. The figures show that many people have benefited from a free and discreet service in exactly the way the PCC’s founders envisaged and we wish to commend the staff of the PCC for this work.

513. However, in the evidence presented to our inquiry, the general effectiveness of the PCC has been repeatedly called into question. Adam Tudor, of Carter-Ruck, who advised and represented the McCanns, suggested to us that the PCC not only lacked power, but also nerve:

⁴⁷³ Q 36

⁴⁷⁴ Q 588

⁴⁷⁵ For example see Ev 2, 7, 277, 285

⁴⁷⁶ Q 117

⁴⁷⁷ *Ibid.*

⁴⁷⁸ 08 *The Review*, the Annual Report of the Press Complaints Commission, p 30

“It cannot award damages. It cannot force apologies. As soon as there is any dispute of fact between the newspaper and the victim of the libel, the PCC backs off and says, ‘This needs to go to law.’”⁴⁷⁹

514. The law firm Schillings, in written evidence to us, offered a similar assessment of the PCC:

“It cannot: make findings of fact or declarations of falsity of allegations; make a monetary award of compensation in appropriate cases; compel witnesses or order disclosure; deal effectively with pre-publication disputes. There is also a general public perception that the Press Complaints Commission is too favourable to the media; accordingly there is a lack of public confidence in using this route to resolve serious complaints against the media.”⁴⁸⁰

515. Dissatisfaction is by no means restricted to lawyers. The Media Standards Trust, the Campaign for Broadcasting Freedom and the National Union of Journalists were among the organisations to voice concerns, as did some journalists and editors, as well as media commentators and others.

516. Our own investigation of the cases of the McCanns (see paragraphs 333 to 375), Max Mosley (paragraphs 40 to 57), the Bridgend suicides (paragraphs 381 to 398) and the PCC’s investigation of Glenn Mulcaire’s dealings with the *News of the World* (paragraphs 470 to 472) have also left us with deep misgivings.

517. Criticisms of the PCC and press self-regulation take a variety of forms. The Commission is said to lack teeth, to be insufficiently independent of the press industry and to be insufficiently proactive in upholding standards. We will address these in turn. We will also address more specific criticisms concerning the PCC’s statistics and the placing of newspaper corrections. Some conclusions and recommendations are given in the sub-sections where they fall naturally, but a number are withheld until the end of the section.

The PCC and fines

518. The PCC does not have and does not seek the power to impose fines, nor does the industry want it to have that power. The Society of Editors stated in written evidence: ‘The case for fines and compensation has not been made. The PCC system would be destroyed and the huge advantages of voluntary compliance lost.’⁴⁸¹ News International agreed, suggesting to us that such a power would reduce the PCC’s ability to resolve complaints:

“A body that was able to impose fines would bear little resemblance to today’s PCC. Its work would be slowed down by the involvement of lawyers on all sides and it would find that newspapers would be less likely to admit mistakes and offer ways of resolving complaints.”⁴⁸²

⁴⁷⁹ Q 195

⁴⁸⁰ Ev 37

⁴⁸¹ Ev 418

⁴⁸² Ev 415

519. Some editors also told us that the existing power of the PCC to oblige newspapers to make apologies, and sometimes to publish those apologies, was sufficient. Colin Myler insisted that PCC rulings were taken ‘very seriously’ in the industry and that ‘no editor wants an adjudication against them’.⁴⁸³

520. Paul Dacre took the same view:

“It is a matter of huge shame if an editor has an adjudication against him; it is a matter of shame for him and his paper. That is why self-regulation is the most potent form of regulation, and we buy into it. We do not want to be shamed.”⁴⁸⁴

521. Some witnesses, however, complained that the PCC was unable to punish errant publications in ways that would make a real difference. Max Mosley argued that self-regulation without financial sanctions was no regulation at all, and the industry wanted it that way:

“In the end Mr Murdoch would look at his pocket and he would make sure it did not happen. The journalists when they are on the scent will always overdo it and they need somebody holding them back and the best way of doing that would be a fine.”⁴⁸⁵

522. The Commission’s view is simple: “We believe it is not possible to combine the virtues of press self-regulation with a system of fines.”⁴⁸⁶ Its grounds for this belief are that industry ‘buy-in’ would be destroyed and some organisations would simply withdraw from the system. Further, any incentives to early resolution of complaints would be lost and disputes would swiftly turn into complex legal wrangles. It also argues that fines could not be imposed or collected without a legal basis – in effect that the PCC would have to become a statutory body.

523. There is merit here in reviewing briefly how these matters are managed in other industries. For example, among the responsibilities of Ofcom, a statutory body, is oversight of radio and television programmes and the conduct of those who make them. Ofcom can fine broadcasters for breaches of the Broadcasting Code.

524. The Advertising Standards Authority (ASA), like the PCC, is an industry-funded body which does not have power to impose fines. Unlike the PCC, however, the ASA can refer a broadcaster to Ofcom and it can refer an advertiser, agency or publisher to the Office of Fair Trading (OFT). Both Ofcom and the OFT have the power to impose fines, and both have a statutory basis.

525. In the premium-rate phone industry, the ultimate statutory authority lies with Ofcom, but PhonepayPlus, funded by a levy on service providers, handles day-to-day regulation and can fine companies in breach of its code. It also has discretion to charge an offending company for costs incurred in an investigation.

⁴⁸³ Q 833

⁴⁸⁴ Q 587

⁴⁸⁵ Q 152

⁴⁸⁶ *Ibid.*

526. One further example is the Panel on Takeovers and Mergers, which has the power to fine companies which breach its code. Its powers were put on a statutory basis in the Companies Act 2006.

527. We noted above our view, expressed in 2007, that self-regulation has to be seen to be effective. If the PCC is not seen to have authority, to uphold standards vigorously and to be independent of the press industry, one grave danger that arises is that members of the public will conclude that recourse to law is the only remedy.

528. The solicitor Jeremy Clarke-Williams, who spoke to us of “enormous cynicism” about the PCC, relayed the comments of clients: “Quite often members of the general public say, ‘There is no point going to the PCC, is there?’ when I meet with them at the initial client meeting. That is a sad reflection on the way in which it is regarded.”⁴⁸⁷

529. Another view was expressed by the editor of the *Guardian*, Alan Rusbridger, who told us that he had seen a shift in the role of the PCC: “I think over the last ten years it has changed its role into being more of a mediator and less of a regulator, and it did so almost without people noticing.”⁴⁸⁸

530. We have heard evidence that a gap is opening up between the type of work undertaken by the PCC and the expensive and time-consuming work of the courts.⁴⁸⁹ Such a gap defeats the purpose of regulation, potentially leaving many who are wronged in the press without access to satisfactory remedy. Gerry McCann told us: “From Kate’s and my point of view, taking the legal route was a last resort [...]. I think there is a gap there currently in the regulation.”⁴⁹⁰

531. We remain of the view that self-regulation of the press is greatly preferable to statutory regulation, and should continue. However for confidence to be maintained, the industry regulator must actually effectively regulate, not just mediate. The powers of the PCC must be enhanced, as it is toothless compared to other regulators.

532. In the case of the McCanns, Sir Christopher Meyer, the then PCC Chairman, argued to us that the issue was not about whether PCC was able or willing to assist the couple, but rather that a choice needed to be made by the McCanns themselves, between using the PCC’s services or going to the courts: “What I said to Gerry McCann when I first him was, this is what the PCC can do for you, this is how we can help. If you want damages, if it comes to that, we do not do money, the courts do money, so you are going to have to make a choice.”⁴⁹¹

533. Roy Greenslade argued to us that Sir Christopher had in fact himself undermined self-regulation by not encouraging the McCanns to consider the PCC route:

⁴⁸⁷ Q 117

⁴⁸⁸ Q 892

⁴⁸⁹ Qq 110–8, 193

⁴⁹⁰ Q 193

⁴⁹¹ Q 343

"Meyer could have said, 'Look, you're worried; we're going to take some action. If you want to go to law later that is your view,' but instead the PCC attitude is: 'If you're going to go to law we are having nothing to do with it.' I think that is wrong. I think that self-regulation should mean that they get involved irrespective of whether that person goes to law or not."⁴⁹²

534. Just as the PCC has no power to impose fines, it also does not deal with complaints that are, or will be, the subject of legal proceedings. The Media Standards Trust argues that people are bypassing the PCC altogether in favour of seeking redress through the courts, which are able to award damages, a trend accelerated by the introduction of CFAs.⁴⁹³

535. Adam Tudor, the McCanns' solicitor, told us:

"If you were to ask me how I think *The Express* would have reacted if Kate and Gerry McCann had brought a PCC complaint rather than a Carter-Ruck letter, you could probably have felt the sigh of relief all the way down Fleet Street. Perhaps that gives you a feel for how it would be perceived. First of all, I am afraid it would have led *The Express* to think that relatively speaking they were off the hook because of the lack of teeth that the PCC has. Secondly, almost by definition, by going to the PCC Kate and Gerry would have been tacitly sending out a signal, not only to *The Express*, but to the rest of Fleet Street that they had no appetite to see this through and therefore perhaps could be fobbed off, as it were."⁴⁹⁴

536. Max Mosley, in his evidence to us, explained that he did not consider using the services of the PCC, as in his view, "they have no power".⁴⁹⁵ He viewed the PCC as "very much a creature of the press"⁴⁹⁶ and asked us: "Who is the editor of the *Daily Mail*? Mr Dacre. Who is the chairman of the Code Committee? Mr Dacre. It would be funny if it was not such a serious matter."⁴⁹⁷

537. Sir Christopher Meyer did not comment on the findings on the quality of journalism practised in pursuing the story about Max Mosley. However, he rejected in the most extraordinary terms any suggestion that Mr Mosley's experience at the hands of the *News of the World* qualified Mr Mosley to comment on the services offered by the PCC:

"I must say it would be a desperate man who measured the quality of the PCC's service by something that Max Mosley may have said . . . I read what he had to say. It was absolutely predictable stuff, probably ventriloquised by Carter-Ruck, all the usual tired, pitiful stuff about limp wrists and – what was his stupid thing, arranging a piss-up in a brewery, some worn-out metaphor that he used. I really have no regard to what he had to say about the PCC."⁴⁹⁸

⁴⁹² Q 434

⁴⁹³ *A More Accountable Press: Part 1*

⁴⁹⁴ Q 195

⁴⁹⁵ Q 141

⁴⁹⁶ *Ibid.*

⁴⁹⁷ *Ibid.*

⁴⁹⁸ Q 344

538. We are concerned at Sir Christopher Meyer's dismissal in such a cavalier way of Max Mosley's lack of faith in the efficacy of the Press Complaints Commission. The judgment in *Mosley v News Group Newspapers* makes detailed criticisms of the *News of the World*. We would expect the head of the Press Complaints Commission to have been, at the very least, concerned at the evidence given and the findings made in the *Mosley* judgment.

539. It is right that a complainant cannot both use the courts and pursue a PCC complaint at the same time, even if this means that some choose to bypass the PCC in favour of the courts. Indeed, if complainants were allowed to pursue an issue in both the courts and through the PCC it would both create an unfair burden on the newspaper industry and potentially prejudice a court judgment. Nevertheless, in cases where there have been clear and systematic failings by the press, the PCC should not use court proceedings as a reason not to launch its own inquiry. If the PCC were seen as more balanced and effective, then it is more likely that people will wish to use its services.

The independence of the PCC

540. We have heard concern as to the independence of the PCC from the industry it regulates, notably relating to the number of newspaper and magazine editors on its committees.⁴⁹⁹ Gerry McCann and Max Mosley drew our attention to the fact that the editors of publications with which they were in dispute sat on the PCC or its committees.⁵⁰⁰ As discussed in paragraph 500 above, the only lay members of the Code Committee are the Chairman and Director of the PCC.

541. We note that Baroness Buscombe, the new Chairman of the PCC, announced in August 2009 an independent review of the PCC's governance, due to report in spring 2010, which includes consideration of:

“the operation of the PCC board, sub-committees and secretariat; how transparency in the system can be enhanced; whether the independent systems of accountability – the Charter Commissioner and Charter Compliance Panel – can be improved; and the PCC's Articles of Association.”⁵⁰¹

542. We acknowledge that the PCC itself has attempted to address the issue of ensuring that it is seen to be independent, increasing the number of lay members of the PCC to 10 as against seven industry members. However, we believe that more needs to be done to enhance the credibility of the PCC to the outside world. We recommend that the membership of the PCC should be rebalanced to give the lay members a two thirds majority, making it absolutely clear that the PCC is not overly influenced by the press. We further recommend that there should be lay members on the Code Committee, and that one of those lay members should be Chairman of that Committee. In addition to

⁴⁹⁹ E.g. Gerry McCann

⁵⁰⁰ Qq 141, 194

⁵⁰¹ “Buscombe announces independent PCC governance review”, www.pcc.org.uk

editors of newspapers and magazines, practising journalists should be invited to serve on the PCC's Committees.

543. While the process for appointing lay members of the PCC is relatively transparent, with vacancies advertised and a clear recruitment and interview process followed, the methodology for the appointment of press members is less clear. The departure of Peter Hill, editor of the *Daily Express*, described in paragraphs 554 to 556 below, is an example of this lack of clarity. **If the appointment and subsequent activities of the press members of the PCC are not transparent, then its activities will be little understood by the public. As a matter of best practice, information on all appointments to the PCC, as well as any rotation or dismissal of members, should be made available via the PCC's website as soon they occur and contained within the PCC's Annual Report.**

A more proactive approach?

544. We have already made clear our view that the PCC was too slow to intervene in two recent, high-profile cases where, at the very least, there were early grounds to believe the Code had been or would be breached, and where in fact the press engaged in sustained irresponsible reporting.

545. In the McCann case, despite the remarkable intensity and prominence of the coverage, and despite expressions of disquiet by many observers and by Mr McCann himself, the PCC remained virtually silent and invisible on the case until the conclusion of the Express Group libel case ten months after Madeleine McCann's disappearance. Indeed, the PCC annual reports for 2007 and 2008 contained only fleeting references to the case and no discussion of the coverage and the concerns it aroused.

546. In the case of the suicides in Bridgend, there was extensive and sustained media coverage of a number of suicides, self-evidently a cause for prompt action and close vigilance by the PCC, yet months were allowed to pass before Commission representatives visited the area.

547. The criticism that the PCC is insufficiently proactive enough is not new. Our predecessors in their 2003 inquiry, *Privacy and media intrusion*,⁵⁰² took evidence from the then Secretary of State for Culture, Media and Sport, Tessa Jowell, who stated: 'In terms of public confidence in the PCC's determination to uphold the Code then the capacity and the willingness to act proactively is something they should look into.'⁵⁰³

548. The Committee on that occasion recommended that the PCC should be more proactive and should take 'a more consistent approach to foreseeable events that herald intense media activity and people in grief and shock'.⁵⁰⁴ This recommendation was echoed by the Government in their response to the report.⁵⁰⁵ However, our predecessors' recommendation does not seem to have been acted upon with satisfactory effect.

502 Culture, Media and Sport Committee, Fifth Report of Session 2002–03, *Privacy and media intrusion*, HC 458-I

503 *Ibid.*, Q 785

504 *Ibid.*, para 72

505 Department for Culture, Media and Sport, *The Government's Response to the Fifth Report of the Culture, Media and Sport Select Committee on Privacy and Media Intrusion*, Cm 5985, October 2003, para 4.13

549. There is a perception that the PCC has no power to act unless it receives a complaint from a person, such as Mr or Mrs McCann for example, who is directly affected by a breach of the Code, and also that it cannot entertain so-called third party complaints'. This is not the case. The PCC is empowered, through its Articles of Association,⁵⁰⁶ to undertake proactive work:

"It shall also be the function of Commission to consider and pronounce on issues relating to the Code of Practice which the Commission, in its absolute discretion considers to be in the public interests."⁵⁰⁷

550. It is also able to investigate third party complaints: "The Commission shall have discretion to consider any complaint from whatever source that it considers appropriate to the effective discharge of its function."⁵⁰⁸

551. Nevertheless, it is clear to us that the PCC regards itself very much as a complaints-handling organisation. The PCC's own website makes clear that the circumstances in which it would consider undertaking a proactive inquiry are rare:

"The reasons noted above in relation to third party complaints may also militate against the PCC launching investigations proactively even where no complaint has been received. Nonetheless, as with third party complaints the PCC has an absolute discretion about whether or not to investigate a complaint. If it appeared to the Commission that there was a particular public interest in raising its own complaint then it could do so – but only in very exceptional situations"⁵⁰⁹

552. The failure of the PCC to prevent or at least limit the irresponsible reporting that surrounded the McCann and Bridgend cases has undermined the credibility of press self-regulation. In future the Commission must be more proactive. If there are grounds to believe that serial breaches of the Code are occurring or are likely to occur, the PCC must not wait for a complaint before taking action. That action may involve making contact with those involved, issuing a public warning or initiating an inquiry. We recommend that such action should be mandatory once three or more members of the Commission have indicated to the Chairman that they believe it would be in the public interest.

The authority of the PCC

553. The power of the self-regulatory system to a large extent depends on the participation of all the major newspaper and publications groups. PressBof described the level of compliance with payment of the levy, from which the PCC is funded, as 'high'.⁵¹⁰ However there are some notable publications which do not subscribe to the self regulatory system. Ian Hislop, editor of *Private Eye*, explained why it does not do so:

506 Articles of Association, as adopted 26 April 2006, www.pcc.org.uk

507 Article 53.1A, adopted by special resolution 23 February 1994

508 Article 53.4

509 Press Complaints Commission, *Frequently asked questions, Question 7: Why isn't the PCC pro-active? Should it not be prepared to take up breaches of the Code without waiting for complaints?*, www.pcc.org.uk

510 Ev 109

“We do not pay and *Private Eye* does not belong to the PCC, no. 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 PCC. 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 PCC adjudicating your complaint, so I would be lying if I said that did not occur to me. So no, I always thought it would be better for the *Eye* to be out of it.”⁵¹¹

554. Another example of publications which have not paid a subscription to PressBof was Express Group newspapers (*Daily Express*, *Sunday Express*, *Daily Star*, *Sunday Star*). In December 2007, the Express Group was ejected from the trade organisation the Newspaper Publishers Association (NPA) after disagreements about unpaid fees. In May 2008, the editor of the *Daily Express*, Peter Hill, left the PCC board. This was also two months after the Express Group was ordered to pay £550,000 damages to Kate and Gerry McCann. Express Group reinstated its subscription to PressBof on 15 February 2009. The PCC continued to adjudicate on complaints relating to the Express Group and the Group abided by PCC decisions during the period in which it did not subscribe.

555. The explanations we heard from Peter Hill and from the then Chairman of the PCC, Sir Christopher Meyer, for Mr Hill leaving the PCC were not completely clear or consistent. Mr Hill said that he had considered resigning but eventually chose not to, but also said he “felt it was time for a change”.⁵¹² Sir Christopher’s explanation was that there were a “combination of factors”,⁵¹³ including the non-payment of fees by Express Group to the NPA and the *Express*’s conduct in the McCann case.

556. Whatever the true reasons for Peter Hill’s resignation from the PCC, we believe that the fact that the Express Group did not pay subscriptions into the self-regulatory system for a prolonged period is deplorable, even though the PCC continued to issue judgements on articles in Express Group papers.

557. Even the temporary absence of contributions from such a major newspaper group exposed a weakness in the very principle of the self-regulatory system. We accept that this was an exceptional case. Nevertheless, it illustrates the need to ensure that the PCC is reliably resourced by the industry to carry out its functions.

558. We are concerned that there are currently no incentives to subscribe to the PCC so, as in the case of *Private Eye*, publications can operate seemingly normally outside of the regulatory system. Similarly, the Express Group did not seem to have suffered from not subscribing to the PCC. If in the future more newspapers or periodicals were to withdraw from the system, it would cease to be viable both financially and as a regulator. **We have concluded that there must be some incentive for newspapers to subscribe to the self-regulatory system. Without such an incentive for publications to join and remain in the PCC, the system is too precarious. We recommend that the Government consider whether proposals to reduce the cost burden in defamation cases should only be made**

⁵¹¹ Q 890

⁵¹² Q 679

⁵¹³ Q 363

available to those publications which provide the public with an alternative route of redress through their membership of the PCC.

559. Many, but not all, newspapers include in the employment contracts of their journalists an undertaking to respect the PCC Code. We have previously voiced our support for this procedure, mainly to bring home to journalists the importance of the Code, but also in the hope it would help protect journalists from being pressured into unethical practice. In our 2007 Report, *Self-regulation of the Press*, we concluded:

“In the limited time available, we have not been able to resolve what appear to be conflicting statements on whether journalists come under pressure from editors to breach the Code. We nonetheless support the inclusion in staff contracts of a clause requiring adherence to the Code of Practice as a condition of employment, which we believe would safeguard journalists who believed that they were being asked to use unethical newsgathering practices.”⁵¹⁴

560. Following his evidence session with us during the course of our current inquiry the editor of the *Daily Express*, Peter Hill, agreed to ensure his journalists sign a contract binding them to the PCC Code.⁵¹⁵ **We welcome Peter Hill’s decision to include adherence to the PCC Code in the contract of journalists who work at the *Daily Express*. We are disappointed that our previous recommendation on this matter was not acted on across the industry. We therefore recommend that the PCC should mandate the inclusion of a clause requiring respect for the Code in staff contracts of journalists of all subscribing publications.**

The PCC’s statistics

561. The PCC’s handling of complaints has been criticised by several submissions to our inquiry, and more widely, on the grounds that too many complaints fall by the wayside in the handling process.

562. In its report *A More Accountable Press*,⁵¹⁶ the Media Standards Trust said:

“On average, about 80% of the complaints made to the PCC – the majority of which are about accuracy – are rejected. 45–60% are rejected because the complaint is ‘not formalised’; 10–15% because ‘they have no case under the code’; 10–20% because they are ‘outside the remit’ of the PCC; and 1–5% because they are made by ‘third-party complainants’.”⁵¹⁷

563. Professor Chris Frost, of Liverpool John Moores University, in written evidence, also noted the small proportion of complaints that result in adjudication:

“The PCC adjudicates only a tiny fraction of the complaints it receives – 2.18% (52 per year on average) over its full 18 years of work, but only 0.83% (30.6) for the last

⁵¹⁴ Culture, Media and Sport Committee, *Self-regulation of the press*, para 58

⁵¹⁵ Ev 172–173

⁵¹⁶ *A More Accountable Press: Part 1*, p 11

⁵¹⁷ *Ibid.*, p 11

five years. Not only does it adjudicate on very few, but this number is steadily reducing.”⁵¹⁸

564. By contrast, the PCC has pointed to rising numbers of complaints received as evidence of rising public confidence. In oral evidence to us, Sir Christopher Meyer, then the Chairman of the PCC, said:

“The more we are used the more our reputation rises [...]. I have to say to you, Chairman, that pro rata today it looks like we will have a figure of near to 6,000 [complaints] by the end of this year, people who have come to us for help, and last year’s figure of over 4,500 was itself an historic record. There is a credibility case launched against us; it is without merit and without foundation.”⁵¹⁹

565. It is consistently the case that a large proportion of the complaints in the PCC’s totals never qualify for scrutiny of any kind. Of 4,698 complaints received in 2008, no fewer than 3,278 were deemed unsuitable for consideration. This occurs, in part at least, because of the way in which a complainant is defined.

566. Members of the public may register complaints with the PCC in a simple process by letter, phone or email, after which they are required to formalise their complaints within seven days, providing written accounts of their grounds and copies of the articles objected to. Even though PCC staff are available to assist with this formalising process, in a significant proportion of cases people do not proceed from the first to the second stage and in consequence their complaints cannot be considered. However, the PCC’s published complaints totals, for instance those quoted by Sir Christopher Meyer above, include all first-stage complaints, not merely the formalised ones.

567. The PCC also notes in its 2008 report that it is increasingly dealing with multiple complaints.⁵²⁰ For example, in that year 584 people complained about comments in an article in the *Times* by Matthew Parris in relation to cyclists, but the PCC found it necessary to make only one ruling. This is likely to become more common: the PCC recently received more than 21,000 first-stage complaints about an article by Jan Moir in the *Daily Mail* concerning the death of Stephen Gately, a total at least in part inspired by an internet campaign. Such cases, if not thoughtfully presented, also have the potential to skew the statistics of PCC activity and in turn adversely affect public perceptions.

568. Controversy over the PCC’s complaints activity arises in part from the manner in which the PCC presents its complaints statistics in its annual and biannual reports, and we recommend that the PCC should conduct a review of this matter with a view to ensuring maximum clarity.

569. In particular, contacts from members of the public which are not followed up with the appropriate documentation should not be considered as true complaints. Including them in headline complaints totals (quoted frequently by both the PCC and its critics)

518 Ev 463

519 Q 356

520 08 *The Review*, the Annual Report of the Press Complaints Commission, p 26

is unhelpful to the public and we recommend that a different formula be found for presenting them in the statistical sections of PCC publications.

'Due prominence'

570. The interpretation of the Code's requirement for an apology to be printed with 'due prominence' remains a matter of controversy. In the Peaches Geldof case discussed in paragraph 326 above, Jonathan Coad told us that although the inaccurate headline ran across the from page, the apology that followed appeared on page two and occupied only 2.6% of the total area of the original coverage:

"The point is this: the newspaper agreed, as they could do no other, that the front page story was inaccurate, but what they would not do was put the correction on the front page. I went to the PCC and made the point that millions and millions of people who do not buy the newspaper will have seen this on the front page and therefore the only place for the correction to be is on the front page. In 2003 Sir Christopher Meyer came in front of you and said of prominence, not once but twice, that of course corrections must be 'at least as prominent' as the original article 'otherwise it would be ridiculous'. I think we would agree with that."⁵²¹

571. The Editors' Codebook, the companion manual to the PCC Code of Practice, states that while the PCC does not interpret 'due prominence' to mean 'equal prominence' it expects that "the positioning of apologies or corrections should generally reflect the seriousness of the error – and that would include front page apologies where appropriate."⁵²²

572. In oral evidence to us, the then Minister Barbara Follett acknowledged that the placing of apologies was a problem:

"From my own personal experience, the offence can be on page two in large type and the apology basically somewhere around the ads in very small type, and that is something which I would like to see changed."⁵²³

573. The printing of corrections and apologies should be consistent and needs to reflect the prominence of the first reference to the original article. Corrections and apologies should be printed on either an earlier, or the same, page as that first reference, although they need not be the same size. Newspapers should notify the PCC in advance of the proposed location and size of a correction or apology; if the PCC indicates that the requirement for 'due prominence' has not been fulfilled and the paper takes no remedial action, then this non-compliance should be noted as part of the published text of the correction or apology. We recommend that this should be written into clause one of the PCC Code.

521 Q 115

522 The Editors' Codebook, The handbook to the Editors' Code of Practice, 2nd edition, p 18

523 Q 1076

The future of the PCC

574. A truly effective self-regulatory body is one to which both the public and the industry looks as an active and leading upholder of standards; one which, at times when standards are a matter of genuine public concern, engages actively with the industry, publicly and privately, to ensure that standards are upheld. It can be relied upon to investigate and pronounce upon, without fear or favour, any issues which it believes have a bearing on the maintenance of standards in the public interest.

575. As we have recognised, the PCC does much good work both in preventing breaches of the Code through dialogue with newspapers before stories are published and in resolving complaints after publication. However, there is still a widespread view that its inability to impose any kind of penalty when a breach of the Code does occur significantly reduces its authority and credibility. **In order to command public confidence that its rulings are taken seriously by the press, we believe that, in cases where a serious breach of the Code has occurred, the PCC should have the ability to impose a financial penalty.** The industry may see giving the PCC the power to fine as an attack on the self-regulatory system. The reverse is true. We believe that this power would enhance the PCC's credibility and public support. We do not accept the argument that this would require statutory backing, if the industry is sincere about effective self-regulation it can establish the necessary regime independently. In the most serious of cases, the PCC should have the ultimate power to order the suspension of printing of the offending publication for one issue. This would not only represent a major financial penalty, but would be a very visible demonstration of the severity of the transgression.

576. **It is vital that both the press and the public understand that the PCC is more than a complaints handling body, and that it has responsibility for upholding press standards generally.** To this end, we recommend that the PCC should be renamed the Press Complaints and Standards Commission. Further, in order to equip it more fully to discharge this remit, we recommend that the PCC should appoint a deputy director for standards. It may be desirable for the person appointed to have direct experience of the newspaper industry; we recommend that this should be permitted.

577. **The freedom of the press is vital to a healthy democracy; however, with such freedom come responsibilities.** The PCC has the burden of responsibility of ensuring the public has confidence in the press and its regulation and it still has some way to go on this.

578. **This Report is the product of the longest, most complex and wide-ranging inquiry this Committee has undertaken.** Our aim has been to arrive at recommendations that, if implemented, would help to restore the delicate balances associated with the freedom of the press. Individual proposals we make will have their critics – that is inevitable – but we are convinced that, taken together, our recommendations represent a constructive way forward for a free and healthy UK press in the years to come.

Conclusions and recommendations

Privacy and breach of confidence

1. We understand that the refusal by a court to grant an injunction does not necessarily mean the defendant can publish straightaway: if the claimant appeals the decision, then the Court of Appeal has to hold the ring, pending the outcome of that appeal. That said, it seems to us wrong that once an interim injunction has been either refused or granted in cases involving the Convention right to freedom of expression a final decision should be unduly delayed. Such delay may give an unfair advantage to the applicant for the injunction as newspapers often rely on the currency of their articles. We recommend that the Ministry of Justice should seek to develop a fast-track appeal system where interim injunctions are concerned, in order to minimise the impact of delay on the media and the costs of a case, while at the same time taking account of the entitlement of the individual claimant seeking the protection of the courts. (Paragraph 32)
2. 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. We recommend that the Lord Chancellor, Lord Chief Justice and the courts should rectify the serious deficiency in gathering data on injunctions and should commission research on the operation of section 12 as soon as possible. (Paragraph 37)
3. We do not overlook the fact that, in *Cream Holdings v Bannerjee*, the House of Lords held that the effect of section 12(3) of the Human Rights Act was that, in general, no injunction should be granted in proceedings where Article 10 was engaged unless the claimant satisfied the court that he or she was more likely than not to succeed at trial. Although there is little statistical evidence available, we are nevertheless concerned at the anecdotal evidence we have received on this matter. Section 12 of the Human Rights Act is fundamental in protecting the freedom of the press. It is essential that this is recognised by the Courts. (Paragraph 38)
4. It is entirely understandable, as news and gossip spread fast, that parties bringing privacy (and confidence) cases may wish to bind the press in its entirety, not just a single enquiring publication. On the face of it, however, this appears contrary to the intention behind section 12, if the press has not been given proper notice and opportunity to contest an injunction. We recommend, therefore, that the Lord Chancellor and Lord Chief Justice also closely review these practices. (Paragraph 39)
5. A culture in which the threats made to Women A and B could be seen as defensible is to be deplored. The fact that *News of the World* executives still do not fully accept the inappropriateness of what took place is extremely worrying. The ‘choice’ given to the women by Neville Thurlbeck was in fact no choice at all, given the threat of exposure if they did not co-operate. (Paragraph 56)

6. We found the *News of the World* editor's attempts to justify the Max Mosley story on 'public interest' grounds wholly unpersuasive, although we have no doubt the public was interested in it. (Paragraph 57)
7. 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. On balance we recognise that this may take some considerable time. We note, however, that the media industry itself is not united on the desirability, or otherwise, of privacy legislation, or how it might be drafted. 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. (Paragraph 67)
8. We have received no evidence in this inquiry that the judgments of Mr Justice Eady in the area of privacy have departed from following the principles set out by the House of Lords and the European Court of Human Rights. While witnesses have criticised some of the judge's individual decisions, they have praised others. If he, or indeed any other High Court judge, departed from these principles, we would expect the matter to be successfully appealed to a higher court. The focus on this one judge regarding the development of privacy law, however, is misplaced and risks distracting from the ongoing national debate on the relationship between freedom of speech and the individual's right to privacy. (Paragraph 76)
9. Clearly pre-notification, in the form of giving opportunity to comment, is the norm across the industry. Nevertheless we were surprised to learn that the PCC does not provide any guidance on pre-notification. Giving subjects of articles the opportunity to comment is often crucial to fair and balanced reporting, and there needs to be explicit provision in the PCC Code itself. (Paragraph 91)
10. We recommend that the PCC should amend the Code to include a requirement that journalists should normally notify the subject of their articles prior to publication, subject to a "public interest" test, and should provide guidance for journalists and editors on pre-notifying in the Editors' Codebook. (Paragraph 92)
11. We have concluded that a legal or unconditional requirement to pre-notify would be ineffective, due to what we accept is the need for a "public interest" exception. Instead we believe that it would be appropriate to encourage editors and journalists to notify in advance the subject of a critical story or report by permitting courts to take account of any failure to notify when assessing damages in any subsequent proceedings for breach of Article 8. We therefore recommend that the Ministry of Justice should amend the Civil Procedure Rules to make failure to pre-notify an aggravating factor in assessing damages in a breach of Article 8. We further suggest that amendment to the Rules should stipulate that no entitlement to aggravated damages arises in cases where there is a public interest in the release of that private information. (Paragraph 93)

- 12.** The free and fair reporting of proceedings in Parliament is a cornerstone of a democracy. In the UK, publication of fair extracts of reports of proceedings in Parliament made without malice are protected by the Parliamentary Papers Act 1840. They cannot be fettered by a court order. However, the confusion over this issue has caused us the very gravest concern that this freedom is being undermined. We therefore repeat previous recommendations from the Committee on Parliamentary Privilege that the Ministry of Justice replace the Parliamentary Papers Act 1840 with a clear and comprehensible modern statute. (Paragraph 101)
- 13.** We welcome the Speaker's determination to defend freedom of speech in Parliament, as well as the comments by the Lord Chief Justice on the Trafigura affair, and strongly urge that a way is found to limit the use of super-injunctions as far as is possible and to make clear that they are not intended to fetter the fundamental rights of the press to report the proceedings of Parliament. Given the importance of these issues, we hope that a clear statement regarding the way forward is made before the end of this Parliament. (Paragraph 102)
- 14.** The evidence we have heard shows the impact of the internet on the leaking of information has fundamentally altered the dissemination of information, and consequently breaches of confidence. (Paragraph 112)
- 15.** In particular, the Trafigura and Barclays cases raise issues over the use of injunctions for breach of confidence by companies which do not have Article 8 rights to defend, the ease with which they appear to be granted and the consistency of practice in the court system. (Paragraph 113)

Libel and Press Freedom

- 16.** We have received limited evidence on hearings on meaning and the extent to which they are used. We agree, however, that any measures to provide more certainty at an earlier stage, and which cut the enormous costs of libel cases in the UK, should be pursued more vigorously. We urge the Government, therefore, to look closely at this aspect of procedure in its present review of the costs and operation of UK libel laws. (Paragraph 129)
- 17.** We recognise the difficulties with the whole burden of proof being placed on the defendant but believe, on balance, that in the interests of natural justice, defendants should be required to prove the truth of their allegations. We are concerned, however, to see cases where that burden becomes overly onerous. We make some recommendations in this Report regarding the defence of 'responsible journalism' and the burden of proof on companies suing for defamation, which may level the playing field and assist publication in the public interest. We also urge the Government, however, to examine this aspect of the operation of the UK's libel laws carefully, including how the courts might better require claimants to make reasonable disclosures of evidence, without increasing costs even further through expensive appeals. (Paragraph 135)
- 18.** The Bower case also highlights concerns which arise when judges exclude evidence which prevents a jury being presented with a rounded picture, or too narrow a view

of the thrust of an article. This aspect of the operation of the libel laws also needs examination. (Paragraph 136)

19. Much of the recent publicity given to concerns of the medical and science community about the harmful effects of UK libel laws on their ability to comment has followed the court rulings to date in the Simon Singh case and media coverage of the cases of the British cardiologist Peter Wilmshurst and the Danish radiologist Henrik Thomson, who have faced action from overseas commercial interests. (Paragraph 141)
20. We look forward, clearly, to the outcome of the important Simon Singh case. Even from the limited evidence we have received, we believe that the fears of the medical and science community are well-founded, particularly in the internet age and with the growth of 'libel tourism'. We urge the Government, therefore, to take account of these concerns in a review of the country's libel laws, in particular the issue of fair comment in academic peer-reviewed publications. (Paragraph 142)
21. We appreciate the difficulties, and costs, to date in running a *Reynolds* defence have meant that it has not often been used in cases which have actually reached court. Nevertheless, we endorse the development of a 'responsible journalism' defence by the courts. We particularly welcome the House of Lords judgment in *Jameel* which emphasises the need for flexibility and, in our view, the realistic approach the courts must bring to consideration of the defence so that it appropriately protects the media's freedom of expression. However, we are concerned that the defence remains costly and therefore inaccessible to publishers with poor financial resources. We will be making a number of recommendations on costs which we intend should ensure access to this defence in appropriate cases. (Paragraph 161)
22. We are also concerned that, partly because of the lack of certainty of a *Reynolds* defence, many cases have to be settled before they come to court, and that as a result there are few opportunities for a body of case law based on Lord Hoffman's judgment in *Jameel* to be developed. Indeed, it may take decades and we are of the view that the problem is more urgent than that, especially given the challenges facing smaller regional newspaper groups. (Paragraph 162)
23. The desirability of affording greater protection to genuinely responsible journalism begs the question of whether the law should be amended to put the *Reynolds* defence, or an expanded version of it, on a statutory footing, perhaps through an amendment to the 1996 Defamation Act. However, there is a risk of unforeseen consequences. It could be maintained that *Reynolds/Jameel* applied more flexibly is sufficient and we are concerned that codifying the defence and the 'public interest' in law may in itself introduce rigidities or make for less accurate reporting. However it is our opinion that there is potential for a statutory responsible journalism defence to protect serious, investigative journalism and the important work undertaken by NGOs. We recommend that the Government launches a detailed consultation over potentially putting such a defence, currently available in common law, on a statutory footing. We welcome consultations already launched by the Ministry of Justice in the field of media law. Such a further exercise will provide an opportunity to gain more clarity and show the Government is serious about protecting responsible journalism and

investigations by the media, authors and NGOs in the public interest. (Paragraph 163)

24. We hope that Government measures to reduce costs and to speed up libel litigation will help address the mismatch in resources between wealthy corporations and impecunious defendants, along with our recommendations to widen and strengthen the application of the responsible journalism defence. Given the reaffirmation by the House of Lords in *Jameel* of the rights of companies to sue in defamation, the law could only be changed by statute, if Parliament felt it desirable to address potential abuses of libel laws by big corporations. One possible way of addressing the issue might be to introduce a new category of tort entitled “corporate defamation” which would require a corporation to prove actual damage to its business before an action could be brought. Alternatively, corporations could be forced to rely on the existing tort of malicious falsehood where damage needs to be shown and malice or recklessness proved. We also consider that it would be fairer to reverse the general burden of proof in such cases. Given the seriousness of this issue, we recommend that the Government examines closely the law as it now stands, looking also at how it operates in Australia, and consults widely on the possibility and desirability of introducing such changes in the UK through an amendment to the Defamation Act 1996. (Paragraph 178)
25. Whatever the constitutional situation, or diplomatic niceties, we believe that it is more than an embarrassment to our system that legislators in the US should feel the need to take retaliatory steps to protect freedom of speech from what they view as unreasonable attack by judgments in UK courts. The Bills presented in Congress, allowing for triple damages, were reminiscent of the 1970 Racketeer Influenced and Corrupt Organisations Act, which was originally aimed at tackling organised crime. As such, they clearly demonstrated the depth of hostility to how UK courts are treating ‘libel tourism’. It is very regrettable, therefore, that the Government has not sought to discuss the situation with their US counterparts in Washington, or influential states such as New York and California. We urge it to do so as soon as possible. (Paragraph 205)
26. We welcome the Lord Chancellor’s establishment of the Working Group on Libel and the inclusion of ‘libel tourism’ in its remit. We also agree with him that it is important to have an evidence base for decision-making. During the course of our inquiry we asked for information on the number of cases challenged on the grounds of jurisdiction and the success rate of such challenges. We have been provided with no such information and it was not clear who would be responsible for collecting it. Without reliable data it is difficult to see how the Government can monitor the implementation of Rule 6.36 of the Civil Procedure Rules. (Paragraph 207)
27. We recommend that the Ministry of Justice and the Courts Service should as a priority agree a basis for the collection of statistics relating to jurisdictional matters, including claims admitted and denied, successful and unsuccessful appeals made to High Court judges and cases handled by an individual judge. We further recommend that such information be collated for the period since the House of Lords judgment in the *Berezovsky* case in May 2000 and is published to inform debate and policy options in this area of growing concern. (Paragraph 208)

- 28.** In cases where neither party is domiciled nor has a place of business in the UK, we believe the claimant should face additional hurdles before jurisdiction is accepted by our courts. On balance, we believe there is sufficient evidence to show that the reputation of the UK is being damaged by overly flexible jurisdictional rules and their application by individual High Court judges, as exemplified by Mr Justice Eady in the *Mardas* and *New York Times* case. (Paragraph 214)
- 29.** We recommend that the Ministry of Justice and the Civil Justice Council consider how the Civil Procedure Rules could be amended to introduce additional hurdles for claimants in cases where the UK is not the primary domicile or place of business of the claimant or defendant. We believe that the courts should be directed to rule that claimants should take their case to the most appropriate jurisdiction (ie the primary domicile or place of business of the claimant or defendant or where the most cases of libel are alleged to have been carried out). (Paragraph 215)
- 30.** It is clear that a balance must be struck between allowing individuals to protect their reputations and ensuring that newspapers and other organisations are not forced to remove from the internet legitimate articles merely because the passage of time means that it would be difficult and costly to defend them. We welcome the Lord Chancellor's consultation and look forward to his conclusions. As a general consideration, we believe it would be perverse if any recommendations increased the uncertainty faced by publishers under the UK's already restrictive libel laws. (Paragraph 229)
- 31.** In order to balance these competing concerns, we recommend that the Government should introduce a one year limitation period on actions brought in respect of publications on the internet. The limitation period should be capable of being extended if the claimant can satisfy the courts that he or she could not reasonably have been aware of the existence of the publication. After the expiry of the one year limitation period, and subject to any extension, the claimant could be debarred from recovering damages in respect of the publication. The claimant would, however, be entitled to obtain a court order to correct a defamatory statement. Correction of false statements is the primary reason for bringing a defamation claim. Our proposal would enable newspapers to be financially protected in some degree from claims against which the passage of time may make establishing a defence difficult. (Paragraph 230)
- 32.** We have also received evidence that electronic archives should be protected by 'qualified privilege'. This issue is explored by the consultation, with a one year limitation period suggested, unless the publisher has not amended or flagged the online version in response to a complaint. We agree. This would take into account views expressed by the ECtHR in *Times Newspapers v UK*, regarding the increasing importance of online archives for education and research in modern times. (Paragraph 231)
- 33.** The offence of criminal libel is untenable in a modern, democratic society. We therefore welcome the Government's decision, 27 years after it was advocated by the Law Commission, to repeal the law of criminal libel. We hope this will encourage

other legislatures, including the Scottish Parliament, to demonstrate their own commitment to freedom of expression by doing the same. (Paragraph 235)

Costs

34. The evidence we have heard leaves us in no doubt that there are problems which urgently need to be addressed in order to enable defamation litigation costs to be controlled more effectively. We find the suggestion that the problem confronting defendants, including the media, who wish to control their costs can be solved by settling cases more promptly to be an extraordinary one. If a defendant is in the right, he should not be forced into a settlement which entails him sacrificing justice on the grounds of cost. (Paragraph 262)
35. We are aware that machinery exists for defendants to protect their position as to costs by making a payment into court. It does not appear to us that this machinery effectively protects a defendant, who genuinely attempts to settle a claim at an early stage, against a determined and deep-pocketed litigant. This is another issue which needs to be addressed by the Ministry of Justice. (Paragraph 263)
36. Mandatory universal costs capping, if implemented in isolation, is too crude an instrument to introduce greater discipline while preserving flexibility and access to justice. We therefore welcome the costs budgeting pilot which has the potential to impose greater discipline on those incurring costs. Without such discipline, no cost control methods are likely to succeed. We also welcome Lord Justice Jackson's proposal that there should be a more interventionist approach to controlling costs by the courts. Nevertheless, we recommend that costs capping should remain as a remedy to be used in those cases where parties cannot agree a way to make costs budgeting work. (Paragraph 274)
37. The offer of amends procedure was intended to provide a simple and effective way of acknowledging a mistake, and putting it right at minimal cost to both parties by means of an apology, payment of moderate compensation and suitable costs. Whatever the rights and wrongs of the individual case, headline figures for costs such as those incurred by the *Guardian* in the Tesco case simply undermine Parliament's purpose in introducing the offer of amends procedure. (Paragraph 279)
38. Within the context of more active case management by the courts, we can see merit in the proposal that there should be some limitation on the maximum hourly rates that can be recovered from the losing party in defamation proceedings. This should have a significant impact on costs across the board. While we note the difficulties identified by the Advisory Committee on Civil Costs, we agree with the Ministry of Justice that it should reconsider this issue now that Lord Justice Jackson's final report has been published. (Paragraph 285)
39. Although some have suggested that CFAs should be means-tested, in practice, given the high costs involved, this would be likely to result in access to justice being limited to the extremely poor and the super rich. The complexities involved also do not lend themselves to a simple or proportionate solution. We therefore do not support the introduction of means-testing for CFAs. (Paragraph 292)

- 40.** We welcome steps taken so far to limit recoverability of After The Event insurance premiums in publication proceedings. However, we agree with Lord Justice Jackson that ATE premiums should become wholly irrecoverable. The fact that it is possible for insurance companies to offer ATE insurance at no cost to the policy holder, whether they win or lose their case, is extraordinary and discredits the principle on which ATE insurance is based. We recommend that the Ministry of Justice should implement his recommendations in this respect. (Paragraph 306)
- 41.** All the evidence we have heard leads us to conclude that costs in CFA cases are too high. We also believe that CFA cases are rarely lost, thereby undermining the reasons for the introduction of the present scheme. However it is vital to the maintenance of press standards that access to justice for those who have been defamed is preserved. We do not agree with the Ministry of Justice that the maximum level of success fees should be capped at 10%, nor do we believe that success fees should become wholly irrecoverable from the losing party. However we would support the recoverability of such fees from the losing party being limited to 10% of costs leaving the balance to be agreed between solicitor and client. This would address the key issue and seems to us to provide a reasonable balance, protecting access to justice, adequately compensating solicitors for the risks taken, giving claimants and their lawyers, in particular, a strong incentive to control costs and ensuring that costs to a losing party are proportionate. (Paragraph 307)
- 42.** This is by no means the first time that attempts have been made to control the costs of civil litigation. The Government must ensure that this time measures are effective. Equally, it will be important that the impact of such measures in practice is systematically monitored so that any necessary adjustments can be made. (Paragraph 308)
- 43.** Lawyers must also play their part. Just as the press must be accountable for what it writes, lawyers must be accountable for the way in which cases are run, and that includes costs. The current costs system, especially the operation of CFAs, offers little incentive for either lawyers or their clients to control costs, rather the contrary. It also leads to claims being settled where they lack merit. We hope that the combined effect of our recommendations, the Ministry of Justice consultations and the conclusions of Lord Justice Jackson, will provide the impetus for a fairer and more balanced approach to costs in publication proceedings. (Paragraph 309)

Press standards

- 44.** There is still a great deal of good, responsible journalism in the British press. However, the picture painted for us of corners being cut and of fewer journalists struggling to do more work is cause for concern. If the press is to command the trust and respect of the public, the public needs to know that the press is committed to high standards even in difficult times. (Paragraph 324)
- 45.** While we have no absolute proof of the link between financial pressures and declining press standards, we are concerned at the evidence we have heard that one may be contributing to the other. Such a state of affairs is in no-one's interest. If press standards decline, then public confidence in the press is likely to be diminished even

further, leading to declining sales and worsening still further the finances of the industry. (Paragraph 325)

- 46.** Misleading headlines can cause harm and are poor journalism, but we recognise the difficulty the courts must face in drawing distinctions between messages conveyed in headlines and in articles and weighing their relative impact. We feel the PCC, for its part, could more do to address the problem of headlines than offer brief guidance in its Editors' Codebook. We recommend that the PCC Code itself should be amended to include a clause making clear that headlines must accurately reflect the content of the articles they accompany. (Paragraph 332)
- 47.** Of course, it is impossible to say for certain that untrue articles were written in the McCann case as a result of pressure from editors and news desks. It is, however, clear that the press acted as a pack, ceaselessly hunting out fresh angles where new information was scarce. Portugal was also a foreign jurisdiction, where contempt of court laws were unclear, and no consideration was given to how reporting might prejudice any future trial. It is our belief that competitive and commercial factors contributed to abysmal standards in the gathering and publishing of news about the McCann case. (Paragraph 351)
- 48.** That public demand for such news was exceptionally high is no excuse for such a lowering of standards. Nor could the efforts of the McCanns to attract publicity for their campaign to find their daughter conceivably justify or excuse the publication of inaccurate articles about them. (Paragraph 352)
- 49.** While the lack of official information clearly made reporting more difficult, we do not accept that it provided an excuse or justification for inaccurate, defamatory reporting. Further, when newspapers are obliged to rely on anonymous sources and second-hand information, they owe it to their readers to make very clear that they are doing so, just as they owe it to their readers clearly to distinguish speculation from fact. (Paragraph 353)
- 50.** The PCC Code of Conduct states in paragraph 1a that 'the Press must take care not to publish inaccurate, misleading or distorted information, including pictures'. In paragraph 1c, it states that 'the Press, while free to be partisan, must distinguish clearly between comment, conjecture and fact.' We believe it was obvious as early as May 2007 that a number of newspapers were ignoring these requirements, yet the PCC remained silent. That silence continued even though the coverage remained a matter of public concern through the summer and autumn of that year. It was only in March 2008, after the Express Group settled in the McCanns' libel case, that the PCC spoke out. By then, as we have seen, hundreds of false and damaging articles about the McCanns and others had been published across a large number of titles. This was an important test of the industry's ability to regulate itself, and it failed that test. (Paragraph 364)
- 51.** While we understand Mr Dacre's regret that the McCanns did not make a formal complaint to the PCC, we do not believe that justifies the PCC's failure to take more forceful action than it did. Under its Articles of Association, the PCC has the power to launch an inquiry in the absence of a complaint; such provisions were in our view

made for important cases such as this. Nor does the McCanns' decision to sue for libel justify inaction: they did not sue until early in 2008. (Paragraph 365)

- 52. The newspaper industry's assertion that the McCann case is a one-off event shows that it is in denial about the scale and gravity of what went wrong, and about the need to learn from those mistakes. (Paragraph 373)
- 53. In any other industry suffering such a collective breakdown – as for example in the banking sector now – any regulator worth its salt would have instigated an enquiry. The press, indeed, would have been clamouring for it to do so. It is an indictment on the PCC's record, that it signally failed to do so. (Paragraph 374)
- 54. The industry's words and actions suggest a desire to bury the affair without confronting its serious implications – a kind of avoidance which newspapers would criticise mercilessly, and rightly, if it occurred in any other part of society. The PCC, by failing to take firm action, let slip an opportunity to prevent or at least mitigate some of the most damaging aspects of this episode, and in doing so lent credence to the view that it lacks teeth and is slow to challenge the newspaper industry. (Paragraph 375)
- 55. We have sympathy with the views of PAPYRUS but consider that a complete ban on the reporting of the method of suicide would have a negative impact on the freedom of the press. For reasons which we detail below, we do not believe that the guidance contained in the PCC Code on suicide reporting should be altered, but rather that the PCC needs to enforce compliance with the Code as it stands. (Paragraph 380)
- 56. We recommend that the PCC should not wait for people who find themselves suddenly thrust into the media glare in traumatic circumstances to come to it, but should take more steps to ensure that such people are aware of its services. This could perhaps most easily be achieved through dedicated and compulsory training of coroners and police family liaison officers about ways in which the PCC can help and through providing them with standard leaflets which can be offered to those with whom they come into contact. (Paragraph 392)
- 57. The coverage of suicide in the media is one of the most sensitive areas that falls into the PCC's remit. We note the good work the PCC did in Bridgend from May 2008, although we believe the PCC should have acted sooner and more proactively. (Paragraph 395)
- 58. The PCC Code provides suitable guidance on suicide reporting, but in our view the PCC should be tougher in ensuring that journalists abide by it. The experience of Bridgend shows the damage that can be caused if irresponsible reporting is allowed to continue unchecked; the PCC needs to monitor the conduct of the journalists and the standard of coverage in such cases. (Paragraph 396)
- 59. During our inquiry, regarding the reporting of personal tragedies, we also asked how the press – local newspapers, in particular – moderated their websites, when asking readers to comment on stories. Certain comments of which we have been made aware have been sick and obscene. The PCC told us, though, that it did not consider this a major issue. (Paragraph 397)

- 60.** The Editor's Codebook refers to complaints about newspaper websites, making clear that editors are responsible for "any user-generated material that they have decided to leave online, having been made aware of it, or received a complaint." We believe this does not go far enough, with respect to moderating comment on stories about personal tragedies, in particular. The Codebook should be amended to include a specific responsibility to moderate websites and take down offensive comments, without the need for a prior complaint. We also believe the PCC should be proactive in monitoring adherence, which could easily be done by periodic sampling of newspaper websites, to maintain standards. (Paragraph 398)
- 61.** It is likely that the number of victims of illegal phone-hacking by Glenn Mulcaire will never be known. Nevertheless, there is no doubt that there were a significant number of people whose voice messages were intercepted, most of whom would appear to have been of little interest to the Royal correspondent of the *News of the World*. This adds weight to suspicions that it was not just Clive Goodman who knew about these activities. (Paragraph 423)
- 62.** We have seen no evidence that Andy Coulson knew that phone-hacking was taking place. However, that such hacking took place reveals a serious management failure for which as editor he bore ultimate responsibility, and we believe that he was correct to accept this and resign. (Paragraph 439)
- 63.** Evidence we have seen makes it inconceivable that no-one else at the *News of the World*, bar Clive Goodman, knew about the phone-hacking. It is unlikely, for instance, that Ross Hindley (later Hall) did not know the source of the material he was transcribing and was not acting on instruction from superiors. We cannot believe that the newspaper's newsroom was so out of control for this to be the case. (Paragraph 440)
- 64.** The idea that Clive Goodman was a "rogue reporter" acting alone is also directly contradicted by the Judge who presided at the Goodman and Mulcaire trial. In his summing up, Mr Justice Gross, the presiding judge, said of Glenn Mulcaire: "As to Counts 16 to 20 [relating to the phone-hacking of Max Clifford, Simon Hughes MP, Andrew Skylett, Elle Macpherson and Gordon Taylor], you had not dealt with Goodman but with others at News International." (Paragraph 441)
- 65.** Despite this, there was no further investigation of who those "others" might be and we are concerned at the readiness of all of those involved: News International, the police and the PCC to leave Mr Goodman as the sole scapegoat without carrying out a full investigation at the time. The newspaper's enquiries were far from 'full' or 'rigorous', as we – and the PCC – had been assured. Throughout our inquiry, too, we have been struck by the collective amnesia afflicting witnesses from the *News of the World*. (Paragraph 442)
- 66.** The *News of the World* and its parent companies did not initially volunteer the existence of pay-offs to Clive Goodman and Glenn Mulcaire, and their evidence has been contradictory. We do not know the amounts, or terms, but we are left with a strong impression that silence has been bought. (Paragraph 449)

- 67.** The newspaper's approach in this instance also differed markedly, we note, from that adopted towards sports reporter Matt Driscoll, to whom a tribunal awarded nearly £800,000 – possibly the biggest amount in the industry to date – in November 2009 for unfair dismissal after persistent bullying by then editor Andy Coulson. The newspaper strongly resisted that particular claim. (Paragraph 450)
- 68.** Gordon Taylor was cited in one of the charges over which Glenn Mulcaire was convicted in 2007. In the civil action, however, the *News of the World* nonetheless initially resisted the claim, and on a false basis. We consider there was nothing to prevent the newspaper group drafting its confidentiality agreement to allow the PCC and this Committee to be informed of these events, so as to avoid, at the very least, the appearance of having misled us both. We also believe that confidentiality in the Taylor case, and the size of the settlement and sealing of the files, reflected a desire to avoid further embarrassing publicity to the *News of the World*. (Paragraph 455)
- 69.** We recommend that Section 1 of the Regulation of Investigatory Powers Act is amended to cover all hacking of phone messages. (Paragraph 466)
- 70.** In 2006 the Metropolitan Police made a considered choice, based on available resources, not to investigate either the holding contract between Greg Miskiw and Glenn Mulcaire, or the 'for Neville' email. We have been told that choice was endorsed by the CPS. Nevertheless it is our view that the decision was a wrong one. The email was a strong indication both of additional lawbreaking and of the possible involvement of others. These matters merited thorough police investigation, and the first steps to be taken seem to us to have been obvious. The Metropolitan Police's reasons for not doing so seem to us to be inadequate. (Paragraph 467)
- 71.** We accept that in 2007 the PCC acted in good faith to follow up the implications of the convictions of Clive Goodman and Glenn Mulcaire. The *Guardian's* fresh revelations in July 2009, however, provided good reason for the PCC to be more assertive in its enquiries, rather than accepting submissions from the *News of the World* one again at face value. This Committee has not done so and we find the conclusions in the PCC's November report simplistic and surprising. It has certainly not fully, or forensically, considered all the evidence to this inquiry. (Paragraph 472)
- 72.** We have been surprised by the confusion and obfuscation in the Information Commissioner's Office about the format of the information it holds, and to whom that information has been released. Given our interest in the ledgers, and the visit of our Chairman to the offices of the Information Commissioner to inspect them, we would have expected to be told that the information was available in an electronic format. As such, it could easily have been redacted to give more information about suspect activities than appeared in 2006 in *What price privacy now?*. (Paragraph 484)
- 73.** The question of whether there should be custodial sentences for breaches of section 55 of the Data Protection Act is not a new one. We recommended in our 2007 report *Self-regulation of the press* that custodial sentences be used as a deterrent and were disappointed at the Government's rejection of our recommendation. However, we welcome the current Ministry of Justice consultation on the introduction of

sentences and hope that a subsequent change in the law is imminent. (Paragraph 490)

- 74. We recognise the value of the work of the Office of the Information Commissioner in investigating the activities of Steven Whittamore and his associates. The Office can take much of the credit for the fact that such illegal blagging, described to us in 2007 as being widespread across the newspaper industry, is now rare. However we are disappointed that the then Information Commissioner did not feel he had the resources to identify and inform all those who were or could have been the victim of illegal blags, and that he did not at the time make the case that he should be given such resources. (Paragraph 491)
- 75. The articles in the *Guardian* have been criticised for lack of clarity, in distinguishing between phone-hacking by Glenn Mulcaire and blagging and other data protection offences uncovered by Operation Motorman. It has also been asserted, by the *News of the World* and the police among others, that they contained no ‘new evidence’. The real question, however, is ‘new’ to whom? Assistant Commissioner Yates admitted to us that his assertion was, in fact, a circular argument. The *Guardian’s* original revelations relied on unused and unpublicised evidence available to the police. And revelation of facts not already in the public domain is the very definition of ‘news’. (Paragraph 492)
- 76. The *Guardian* articles did contain new information, in particular, concerning the payments to Gordon Taylor and others and the ‘for Neville’ email. This inquiry has subsequently revealed more facts, including the pay-offs made to Clive Goodman and Glenn Mulcaire and that they tapped the phones of the princes themselves. They also highlighted the fact that a culture undoubtedly did exist in the newsroom of *News of the World* and other newspapers at the time which at best turned a blind eye to illegal activities such as phone-hacking and blagging and at worst actively condoned it. We condemn this without reservation and believe that it has done substantial damage to the newspaper industry as a whole. (Paragraph 493)
- 77. We are encouraged by the assurances that we have received that such practices are now regarded as wholly unacceptable and will not be tolerated. We have seen no evidence to suggest that activities of this kind are still taking place and trust that this is indeed the case. However, we call on the Information Commissioner, the PCC and the industry to remain vigilant and to take swift and firm action should any evidence emerge of such practices recurring. (Paragraph 494)
- 78. In seeking to discover precisely who knew what among the staff of the *News of the World* we have questioned a number of present and former executives of News International. Throughout we have repeatedly encountered an unwillingness to provide the detailed information that we sought, claims of ignorance or lack of recall, and deliberate obfuscation. We strongly condemn this behaviour which reinforces the widely held impression that the press generally regard themselves as unaccountable and that News International in particular has sought to conceal the truth about what really occurred. (Paragraph 495)

Self-regulation of the Press

79. We remain of the view that self-regulation of the press is greatly preferable to statutory regulation, and should continue. However for confidence to be maintained, the industry regulator must actually effectively regulate, not just mediate. The powers of the PCC must be enhanced, as it is toothless compared to other regulators. (Paragraph 531)
80. We are concerned at Sir Christopher Meyer's dismissal in such a cavalier way of Max Mosley's lack of faith in the efficacy of the Press Complaints Commission. The judgment in *Mosley v News Group Newspapers* makes detailed criticisms of the *News of the World*. We would expect the head of the Press Complaints Commission to have been, at the very least, concerned at the evidence given and the findings made in the *Mosley* judgment. (Paragraph 538)
81. It is right that a complainant cannot both use the courts and pursue a PCC complaint at the same time, even if this means that some choose to bypass the PCC in favour of the courts. Indeed, if complainants were allowed to pursue an issue in both the courts and through the PCC it would both create an unfair burden on the newspaper industry and potentially prejudice a court judgment. Nevertheless, in cases where there have been clear and systematic failings by the press, the PCC should not use court proceedings as a reason not to launch its own inquiry. If the PCC were seen as more balanced and effective, then it is more likely that people will wish to use its services. (Paragraph 539)
82. We acknowledge that the PCC itself has attempted to address the issue of ensuring that it is seen to be independent, increasing the number of lay members of the PCC to 10 as against seven industry members. However, we believe that more needs to be done to enhance the credibility of the PCC to the outside world. We recommend that the membership of the PCC should be rebalanced to give the lay members a two thirds majority, making it absolutely clear that the PCC is not overly influenced by the press. We further recommend that there should be lay members on the Code Committee, and that one of those lay members should be Chairman of that Committee. In addition to editors of newspapers and magazines, practising journalists should be invited to serve on the PCC's Committees. (Paragraph 542)
83. If the appointment and subsequent activities of the press members of the PCC are not transparent, then its activities will be little understood by the public. As a matter of best practice, information on all appointments to the PCC, as well as any rotation or dismissal of members, should be made available via the PCC's website as soon they occur and contained within the PCC's Annual Report. (Paragraph 543)
84. The failure of the PCC to prevent or at least limit the irresponsible reporting that surrounded the McCann and Bridgend cases has undermined the credibility of press self-regulation. In future the Commission must be more proactive. If there are grounds to believe that serial breaches of the Code are occurring or are likely to occur, the PCC must not wait for a complaint before taking action. That action may involve making contact with those involved, issuing a public warning or initiating an inquiry. We recommend that such action should be mandatory once three or more

members of the Commission have indicated to the Chairman that they believe it would be in the public interest. (Paragraph 552)

- 85. Whatever the true reasons for Peter Hill's resignation from the PCC, we believe that the fact that the Express Group did not pay subscriptions into the self-regulatory system for a prolonged period is deplorable, even though the PCC continued to issue judgements on articles in Express Group papers. (Paragraph 556)
- 86. Even the temporary absence of contributions from such a major newspaper group exposed a weakness in the very principle of the self-regulatory system. We accept that this was an exceptional case. Nevertheless, it illustrates the need to ensure that the PCC is reliably resourced by the industry to carry out its functions. (Paragraph 557)
- 87. We have concluded that there must be some incentive for newspapers to subscribe to the self-regulatory system. Without such an incentive for publications to join and remain in the PCC, the system is too precarious. We recommend that the Government consider whether proposals to reduce the cost burden in defamation cases should only be made available to those publications which provide the public with an alternative route of redress through their membership of the PCC. (Paragraph 558)
- 88. We welcome Peter Hill's decision to include adherence to the PCC Code in the contract of journalists who work at the *Daily Express*. We are disappointed that our previous recommendation on this matter was not acted on across the industry. We therefore recommend that the PCC should mandate the inclusion of a clause requiring respect for the Code in staff contracts of journalists of all subscribing publications. (Paragraph 560)
- 89. Controversy over the PCC's complaints activity arises in part from the manner in which the PCC presents its complaints statistics in its annual and biannual reports, and we recommend that the PCC should conduct a review of this matter with a view to ensuring maximum clarity. (Paragraph 568)
- 90. In particular, contacts from members of the public which are not followed up with the appropriate documentation should not be considered as true complaints. Including them in headline complaints totals (quoted frequently by both the PCC and its critics) is unhelpful to the public and we recommend that a different formula be found for presenting them in the statistical sections of PCC publications. (Paragraph 569)
- 91. The printing of corrections and apologies should be consistent and needs to reflect the prominence of the first reference to the original article. Corrections and apologies should be printed on either an earlier, or the same, page as that first reference, although they need not be the same size. Newspapers should notify the PCC in advance of the proposed location and size of a correction or apology; if the PCC indicates that the requirement for 'due prominence' has not been fulfilled and the paper takes no remedial action, then this non-compliance should be noted as part of the published text of the correction or apology. We recommend that this should be written into clause one of the PCC Code. (Paragraph 573)

92. In order to command public confidence that its rulings are taken seriously by the press, we believe that, in cases where a serious breach of the Code has occurred, the PCC should have the ability to impose a financial penalty. The industry may see giving the PCC the power to fine as an attack on the self-regulatory system. The reverse is true. We believe that this power would enhance the PCC's credibility and public support. We do not accept the argument that this would require statutory backing, if the industry is sincere about effective self-regulation it can establish the necessary regime independently. In the most serious of cases, the PCC should have the ultimate power to order the suspension of printing of the offending publication for one issue. This would not only represent a major financial penalty, but would be a very visible demonstration of the severity of the transgression. (Paragraph 575)
93. It is vital that both the press and the public understand that the PCC is more than a complaints handling body, and that it has responsibility for upholding press standards generally. To this end, we recommend that the PCC should be renamed the Press Complaints and Standards Commission. Further, in order to equip it more fully to discharge this remit, we recommend that the PCC should appoint a deputy director for standards. It may be desirable for the person appointed to have direct experience of the newspaper industry; we recommend that this should be permitted. (Paragraph 576)
94. The freedom of the press is vital to a healthy democracy; however, with such freedom come responsibilities. The PCC has the burden of responsibility of ensuring the public has confidence in the press and its regulation and it still has some way to go on this. (Paragraph 577)
95. This Report is the product of the longest, most complex and wide-ranging inquiry this Committee has undertaken. Our aim has been to arrive at recommendations that, if implemented, would help to restore the delicate balances associated with the freedom of the press. Individual proposals we make will have their critics – that is inevitable – but we are convinced that, taken together, our recommendations represent a constructive way forward for a free and healthy UK press in the years to come. (Paragraph 578)

Annex

Glossary of terms

Access to justice – The ability of a person to obtain legal advice and representation, and to secure the adjudication through the courts of their legal rights and obligations.

ATE (After the Event) insurance – Insurance taken out by one party against the risk of him having to pay his opponent's legal costs, where the insurance policy is taken out “after the event” giving rise to court proceedings.

CFA (Conditional Fee Agreement) – An agreement pursuant to which a lawyer agrees with his or her client to be paid a success fee in the event of the client's claim succeeding, where the success fee is not calculated as a proportion of the amount recovered by the client. A typical example of a CFA is where a lawyer is retained on a “no win, no fee” basis.

Claimant – The person issuing the claim, previously known as the plaintiff.

Costs – The costs incurred by a party through engaging lawyers to act for it. These costs may include the cost of expert witnesses, barristers, photocopying and other disbursements. Costs may be distinguished from fees which are payable to the court in civil litigation.

Costs capping – A mechanism whereby judges impose limits on the amount of future costs that the successful party can recover from the losing party.

Costs shifting – The ordering that one person is to pay another's costs. Costs shifting usually operates on a “loser pays” basis, so that the unsuccessful party is required to pay the successful party's recoverable costs.

CPR (Civil Procedure Rules 1998) – The primary rules of court for civil litigation in England and Wales, introduced as a consequence of the Woolf reforms.

Defamation – The use of words to injure a person's reputation. Libel and slander are defamation.

Defendant – The person who has a claim made against them. They can defend (dispute the claim) or admit liability, in part or in full.

ECHR (European Convention on Human Rights) – The Convention for the Protection of Human Rights and Fundamental Freedoms (also called the “European Convention on Human Rights” and “ECHR”) was adopted under the auspices of the Council of Europe in 1950 to protect human rights and fundamental freedoms in Europe.

ECtHR (European Court of Human Rights) – the Strasbourg court that considers human rights-based appeals from contracting states.

HRA (Human Rights Act 1998) – Incorporates the ECHR into UK law.

Injunction – A court order which either restrains a person from a course of action or behaviour, or which requires a person to follow another course of action.

Jurisdiction – The area and matters over which a court has legal authority.

Libel – A written and published statement/article which infers damaging remarks on a person's reputation.

Master of the Rolls – Head of the Court of Appeal (Civil Division).

One way costs shifting – A regime under which the defendant pays the claimant's costs if his or her claim is successful, but the claimant does not pay the defendant's costs if the claim is unsuccessful.

PCC (Press Complaints Commission) – The self-regulatory body of the press. Funded by the newspapers and magazines that subscribe to it, the PCC handles and adjudicates complaints made about articles appearing in the British press.

PressBof – The Press Standards Board of Finance is the financial arm of the PCC and manages the subscriptions and fees from the industry.

Publication – releasing information to a party other than the subject of the information (third party).

Qualified one way costs shifting – A system of one way costs shifting which may become a two way costs shifting system in certain circumstances, e.g. if it is just that there be two way costs shifting given the resources available to the parties.

Slander – Spoken words which have a damaging effect on a person's reputation.

Sub judice – An ongoing case or matter that is before a judge and has not yet been decided.

Tort – An action in tort is a claim for damages to compensate the claimant for harm suffered. Such claims arise from cases of personal injury, breach of contract and damage to personal reputation. As well as damages, remedies include an injunction to prevent harm occurring again.

Appendix

Press Complaints Commission Code of Practice

Newspaper and magazine publishing in the U.K.

Editors' Code of Practice

This is the newspaper and periodical industry's Code of Practice. It is framed and revised by the Editors' Code Committee made up of independent editors of national, regional and local newspapers and magazines. The Press Complaints Commission, which has a majority of lay members, is charged with enforcing the Code, using it to adjudicate complaints. It was ratified by the PCC on the 1 August 2007. Clauses marked* are covered by exceptions relating to the public interest.

The Code

All members of the press have a duty to maintain the highest professional standards.

The Code, which includes this preamble and the public interest exceptions below, sets the benchmark for those ethical standards, protecting both the rights of the individual and the public's right to know. It is the cornerstone of the system of self-regulation to which the industry has made a binding commitment.

It is essential that an agreed code be honoured not only to the letter but in the full spirit. It should not be interpreted so narrowly as to compromise its commitment to respect the rights of the individual, nor so broadly that it constitutes an unnecessary interference with freedom of expression or prevents publication in the public interest.

It is the responsibility of editors and publishers to apply the Code to editorial material in both printed and online versions of publications. They should take care to ensure it is observed rigorously by all editorial staff and external contributors, including non-journalists.

Editors should co-operate swiftly with the PCC in the resolution of complaints. Any publication judged to have breached the Code must print the adjudication in full and with due prominence, including headline reference to the PCC.

Accuracy

- i. The press must take care not to publish inaccurate, misleading or distorted information, including pictures.
- ii. A significant inaccuracy, misleading statement or distortion once recognised must be corrected, promptly and with due prominence, and – where appropriate – an apology published.
- iii. The press, whilst free to be partisan, must distinguish clearly between comment, conjecture and fact.

- iv. A publication must report fairly and accurately the outcome of an action for defamation to which it has been a party, unless an agreed settlement states otherwise, or an agreed statement is published.

Opportunity to reply

A fair opportunity for reply to inaccuracies must be given when reasonably called for.

Privacy*

- i. Everyone is entitled to respect for his or her private and family life, home, health and correspondence, including digital communications. Editors will be expected to justify intrusions into any individual's private life without consent.
- ii. It is unacceptable to photograph individuals in a private place without their consent.

Note – Private places are public or private property where there is a reasonable expectation of privacy.

Harassment*

- i. Journalists must not engage in intimidation, harassment or persistent pursuit.
- ii. They must not persist in questioning, telephoning, pursuing or photographing individuals once asked to desist; nor remain on their property when asked to leave and must not follow them.
- iii. Editors must ensure these principles are observed by those working for them and take care not to use non-compliant material from other sources.

Intrusion into grief or shock

- i. In cases involving personal grief or shock, enquiries and approaches must be made with sympathy and discretion and publication handled sensitively. This should not restrict the right to report legal proceedings, such as inquests.
- ii. * When reporting suicide, care should be taken to avoid excessive detail about the method used.

Children*

- i. Young people should be free to complete their time at school without unnecessary intrusion.
- ii. A child under 16 must not be interviewed or photographed on issues involving their own or another child's welfare unless a custodial parent or similarly responsible adult consents.
- iii. Pupils must not be approached or photographed at school without the permission of the school authorities.

- iv. Minors must not be paid for material involving children's welfare, nor parents or guardians for material about their children or wards, unless it is clearly in the child's interest.
- v. Editors must not use the fame, notoriety or position of a parent or guardian as sole justification for publishing details of a child's private life.

Children in sex cases*

- 1. The press must not, even if legally free to do so, identify children under 16 who are victims or witnesses in cases involving sex offences.
- 2. In any press report of a case involving a sexual offence against a child –
 - i. The child must not be identified.
 - ii. The adult may be identified.
 - iii. The word "incest" must not be used where a child victim might be identified.
 - iv. Care must be taken that nothing in the report implies the relationship between the accused and the child.

Hospitals*

- i. Journalists must identify themselves and obtain permission from a responsible executive before entering non-public areas of hospitals or similar institutions to pursue enquiries.
- ii. The restrictions on intruding into privacy are particularly relevant to enquiries about individuals in hospitals or similar institutions.

Reporting of Crime*

- i. Relatives or friends of persons convicted or accused of crime should not generally be identified without their consent, unless they are genuinely relevant to the story.
- ii. Particular regard should be paid to the potentially vulnerable position of children who witness, or are victims of, crime. This should not restrict the right to report legal proceedings.

Clandestine devices and subterfuge*

- i. The press must not seek to obtain or publish material acquired by using hidden cameras or clandestine listening devices; or by intercepting private or mobile telephone calls, messages or emails; or by the unauthorised removal of documents, or photographs; or by accessing digitally-held private information without consent.
- ii. Engaging in misrepresentation or subterfuge, including by agents or intermediaries, can generally be justified only in the public interest and then only when the material cannot be obtained by other means.

Victims of sexual assault

The press must not identify victims of sexual assault or publish material likely to contribute to such identification unless there is adequate justification and they are legally free to do so.

Discrimination

- i. The press must avoid prejudicial or pejorative reference to an individual's race, colour, religion, gender, sexual orientation or to any physical or mental illness or disability.
- ii. Details of an individual's race, colour, religion, sexual orientation, physical or mental illness or disability must be avoided unless genuinely relevant to the story.

Financial journalism

- i. Even where the law does not prohibit it, journalists must not use for their own profit financial information they receive in advance of its general publication, nor should they pass such information to others.
- ii. They must not write about shares or securities in whose performance they know that they or their close families have a significant financial interest without disclosing the interest to the editor or financial editor.
- iii. They must not buy or sell, either directly or through nominees or agents, shares or securities about which they have written recently or about which they intend to write in the near future.

Confidential sources

Journalists have a moral obligation to protect confidential sources of information.

Witness payments in criminal trials

- i. No payment or offer of payment to a witness – or any person who may reasonably be expected to be called as a witness – should be made in any case once proceedings are active as defined by the Contempt of Court Act 1981. This prohibition lasts until the suspect has been freed unconditionally by police without charge or bail or the proceedings are otherwise discontinued; or has entered a guilty plea to the court; or, in the event of a not guilty plea, the court has announced its verdict.
- ii. * Where proceedings are not yet active but are likely and foreseeable, editors must not make or offer payment to any person who may reasonably be expected to be called as a witness, unless the information concerned ought demonstrably to be published in the public interest and there is an over-riding need to make or promise payment for this to be done; and all reasonable steps have been taken to ensure no financial dealings influence the evidence those witnesses give. In no circumstances should such payment be conditional on the outcome of a trial.

- iii. * Any payment or offer of payment made to a person later cited to give evidence in proceedings must be disclosed to the prosecution and defence. The witness must be advised of this requirement.

Payment to criminals*

- i. Payment or offers of payment for stories, pictures or information, which seek to exploit a particular crime or to glorify or glamorise crime in general, must not be made directly or via agents to convicted or confessed criminals or to their associates – who may include family, friends and colleagues.
- ii. Editors invoking the public interest to justify payment or offers would need to demonstrate that there was good reason to believe the public interest would be served. If, despite payment, no public interest emerged, then the material should not be published.

PCC Guidance Notes

Court Reporting (1994)

Reporting of international sporting events (1998)

Prince William and privacy (1999)

On the reporting of cases involving paedophiles (2000)

The Judiciary and harassment (2003)

Refugees and Asylum Seekers (2003)

Lottery Guidance Note (2004)

On the reporting of people accused of crime (2004)

Data Protection Act, Journalism and the PCC Code (2005)

Editorial co-operation (2005)

Financial Journalism: Best Practice Note (2005)

On the reporting of mental health issues (2006)

The extension of the PCC's remit to include editorial audio-visual material on websites (2007)

The public interest

There may be exceptions to the clauses marked * where they can be demonstrated to be in the public interest.

1. The public interest includes, but is not confined 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.

2. There is a public interest in freedom of expression itself.

3. Whenever the public interest is invoked, the PCC will require editors to demonstrate fully how the public interest was served.
4. The PCC will consider the extent to which material is already in the public domain, or will become so.
5. In cases involving children under 16, editors must demonstrate an exceptional public interest to over-ride the normally paramount interest of the child.

Formal Minutes

Tuesday 9 February 2010

Members present:

Mr John Whittingdale, in the Chair

Mr Peter Ainsworth	Rosemary McKenna
Philip Davies	Mr Adrian Sanders
Paul Farrelly	Mr Tom Watson

Paul Farrelly declared a pecuniary interest as a pension holder with Guardian Media Group.

Mr Tom Watson declared an interest as, in a legal dispute with the *Sun* newspaper which had been settled during the inquiry, he had been represented by Carter-Ruck Solicitors on a Conditional Fee Agreement.

Mr John Whittingdale declared an interest as an elected member of the Board of the Conservative party, the formal employer of Mr Andy Coulson.

Draft Report (*Press standards, privacy and libel*), proposed by the Chairman, brought up and read.

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

Paragraph 1 read, amended and agreed to.

Paragraphs 2 to 6 read and agreed to.

Paragraph 7 read, amended and agreed to.

Paragraphs 8 to 10 read and agreed to.

Paragraph 11 read, amended and agreed to.

Paragraphs 12 to 56 read and agreed to.

Paragraph 57 read.

Motion made, to leave out paragraph 57 — (*Philip Davies*)

The Committee divided.

Ayes, 1

Noes, 5

Philip Davies

Mr Peter Ainsworth
Paul Farrelly
Rosemary McKenna
Mr Adrian Sanders
Mr Tom Watson

Paragraph 57 agreed to.

Paragraphs 58 to 66 read and agreed to.

Paragraph 67 read.

An amendment made.

Another amendment proposed, in line 3 to leave out the words "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." and to insert the words "We do not believe it is healthy for a *de facto* privacy law to be introduced through decisions of unelected judges and believe that the law in this regard should be determined by Parliament." — (*Philip Davies*)

Question put, That the amendment be made.

The Committee divided.

Ayes, 1

Noes, 5

Philip Davies

Mr Peter Ainsworth
Paul Farrelly
Rosemary McKenna
Mr Adrian Sanders
Mr Tom Watson

Paragraph 67, as amended, agreed to.

Paragraphs 68 to 92 agreed to.

Paragraph 93 read, amended and agreed to.

Paragraphs 94 to 100 agreed to.

Paragraph 101 read, amended and agreed to.

Paragraph 102 read, amended and agreed to.

Paragraphs 103 to 112 agreed to.

Paragraph 113 read, amended and agreed to.

Paragraphs 114 to 116 agreed to.

Paragraph 117 read, amended and agreed to.

Paragraph 118 read, amended and agreed to.

Paragraphs 119 to 134 agreed to.

Paragraph 135 read.

Motion made, to leave out paragraph 135 and to insert the following new paragraph "We recognise the difficulties with the burden of proof being placed on the defendant, and believe that whilst no system is perfect the most important priority is to protect freedom of speech and a free press. Therefore we believe the burden of proof should be reversed to bring it into line with the US where the system works well. We urge the Government to closely monitor this new regime carefully." — (*Philip Davies*)

Question put, That the new paragraph be read a second time.

The Committee divided.

Ayes, 2

Noes, 4

Philip Davies
Mr Adrian Sanders

Mr Peter Ainsworth
Paul Farrelly
Rosemary McKenna
Mr Tom Watson

Paragraph 135 agreed to.

Paragraphs 136 to 163 agreed to.

Paragraph 164 read, amended and agreed to.

Paragraph 165 read, amended and agreed to.

Paragraphs 166 to 167 agreed to.

Paragraph 168 read, amended and agreed to.

Paragraphs 169 to 183 agreed to.

A paragraph—(*The Chairman*)—brought up, read the first and second time, and inserted (now paragraph 184).

Paragraphs 184 to 204 (now paragraphs 185 to 205) agreed to.

Paragraph 205 (now paragraph 206) read, amended and agreed to.

Paragraph 206 (now paragraph 207) read, amended and agreed to.

Paragraph 207 (now paragraph 208) agreed to.

Paragraph 208 (now paragraph 209) read, amended and agreed to.

Paragraphs 209 to 229 (now paragraphs 210 to 230) agreed to.

A paragraph—(*Paul Farrelly*)—brought up, read the first and second time, and inserted (now paragraph 231).

Paragraphs 230 to 260 (now paragraphs 232 to 262) agreed to.

Paragraph 261 (now paragraph 263) read, amended and agreed to.

Paragraphs 262 to 276 (now paragraphs 264 to 278) agreed to.

Paragraph 277 (now paragraph 279) read, amended and agreed to.

Paragraphs 278 to 289 (now paragraphs 280 to 291) agreed to.

Paragraph 290 (now paragraph 292) read, amended and agreed to.

Paragraphs 291 to 304 (now paragraphs 293 to 306) agreed to.

Paragraph 305 (now paragraph 307) read, amended and agreed to.

Paragraph 306 (now paragraph 308) agreed to.

Paragraph 307 (now paragraph 309) read, amended and agreed to.

Paragraphs 308 to 321 (now paragraphs 310 to 323) agreed to.

Paragraph 322 (now paragraph 324) read, amended and agreed to.

Paragraphs 323 to 366 (now paragraphs 325 to 368) agreed to.

A paragraph—(*Paul Farrelly*)—brought up, read the first and second time, and inserted (now paragraph 369).

Paragraphs 367 to 418 (now paragraphs 370 to 421) read and agreed to.

Paragraph 419 (now paragraph 422) read, amended and agreed to.

Paragraph 420 (now paragraph 423) read, amended and agreed to.

Paragraphs 421 to 427 (now paragraphs 424 to 430) read and agreed to.

Paragraph 428 (now paragraph 431) read, amended and agreed to.

Paragraphs 429 to 435 (now paragraphs 432 to 438) read and agreed to.

Paragraph 436 (now paragraph 439) read, amended and agreed to.

Paragraphs 437 to 445 (now paragraphs 440 to 448) agreed to.

Paragraph 446 (now paragraph 449) read, amended and agreed to.

A paragraph—(*Mr Tom Watson*)—brought up and read the first time. Question put, That the new paragraph be read a second time.

The Committee divided.

Ayes, 4

Noes, 2

Paul Farrelly
Rosemary McKenna
Mr Adrian Sanders
Mr Tom Watson

Mr Peter Ainsworth
Philip Davies

Paragraph agreed to (now paragraph 450).

Paragraphs 447 to 465 (now paragraphs 451 to 469) agreed to.

Paragraph 466 (now paragraph 470) read, amended and agreed to.

Paragraphs 467 to 490 (now paragraphs 471 to 494) agreed to.

Paragraph 491 (now paragraph 495) read, amended and agreed to.

Paragraphs 492 to 496 (now paragraphs 496 to 500) agreed to.

Paragraph 497 (now paragraph 501) read, amended and agreed to.

Paragraphs 498 to 511 (now paragraphs 502 to 515) agreed to.

Paragraph 512 (now paragraph 516) read, amended and agreed to.

Paragraphs 513 to 538 (now paragraphs 517 to 542) agreed to.

Paragraph 539 (now paragraph 543) read, amended and agreed to.

Paragraphs 540 to 553 (now paragraphs 544 to 557) read and agreed to.

Paragraph 554 (now paragraph 558) read, amended and agreed to.

Paragraphs 555 to 570 (now paragraphs 559 to 574) agreed to.

Paragraph 571 (now paragraph 575) read, amended and agreed to.

Paragraph 572 (now paragraph 576) agreed to.

Paragraph 573 read (now paragraph 577), amended and agreed to.

A paragraph—(*The Chairman*)—brought up, read the first and second time, and added (now paragraph 578).

Annex amended and agreed to.

Summary amended and agreed to.

A paper was appended to the Report as Appendix.

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

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

Written evidence was ordered to be reported to the House for printing with the Report, together with written evidence previously reported and ordered to be published.

Written evidence was ordered to be reported to the House for placing in the Library and Parliamentary Archives.

Ordered, That embargoed copies of the Report be made available, in accordance with the provisions of Standing Order No. 134.

[Adjourned till Tuesday 23 February at 10.15 am

Witnesses

Tuesday 24 February 2009

Mr Nick Armstrong, Charles Russell LLP, **Mr Tony Jaffa**, Foot-Anstey Solicitors, **Mr Keith Mathieson**, Reynolds Porter Chamberlain LLP, and **Mr Marcus Partington**, Chairman, Media Lawyers Association

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Ev 12

Mr Mark Thomson, Carter-Ruck Solicitors, **Mr Jeremy Clarke-Williams**, Russell, Jones & Walker Solicitors, **Mr Jonathan Coad**, Swan Turton Solicitors, and **Mr Rod Christie-Miller**, Schillings Lawyers

Ev 38

Tuesday 10 March 2009

Mr Max Mosley

Ev 52

Tuesday 10 March 2009

Mr Gerry McCann, **Mr Clarence Mitchell**, the McCanns' media adviser and spokesman, and **Mr Adam Tudor**, Carter-Ruck Solicitors

Ev 67

Thursday 19 March 2009

Mr Anthony Langan, Public Affairs Manager, Samaritans

Ev 80

Mr Tim Fuller

Ev 86

Tuesday 24 March 2009

Mr Jeff Edwards, Chairman, Crime Reporters Association, **Mr Sean O'Neill**, Crime and Security Editor, the Times, and **Mr Ben Goldacre**, the Guardian

Ev 93

Sir Christopher Meyer, Chairman, and **Mr Tim Toulmin**, Director, Press Complaints Commission, and **Mr Tim Bowdler**, Chairman, Press Standards Board of Finance

Ev 112

Tuesday 21 April 2009

Mr Nick Davies, writer and journalist, and **Mr Roy Greenslade**, Professor of Journalism, City University and columnist and blogger, the Guardian

Ev 125

Thursday 23 April 2009

Mr Paul Dacre, Editor-in-Chief, and **Mr Robin Esser**, Executive Managing Editor, Associated Newspapers

Ev 143

Tuesday 28 April 2009

Mr Peter Hill, Editor, Daily Express

Ev 159

Tuesday 5 May 2009

Mr Colin Myler, Editor, News of the World, and **Mr Tom Crone**, Legal Manager, News Group Newspapers

Ev 174

Mr Ian Hislop, Editor, Private Eye, and **Mr Alan Rusbridger**, Editor, the Guardian

Ev 188

Tuesday 19 May 2009

Sir Anthony Clarke, Master of the Rolls, and **Lord Justice Rupert Jackson**, Court of Appeal Judge

Ev 212

Rt Hon Jack Straw MP, Secretary of State for Justice and Lord Chancellor

Ev 224

Tuesday 2 June 2009

Mr Mark Stephens, Senior Member, Intellectual Property and Media, Finer Stephens Innocent LLP, and **Ms Charmian Gooch**, Director, Global Witness

Ev 242

Barbara Follett MP, Minister for Culture, Creative Industries and Tourism, Department for Culture, Media and Sport

Ev 255

Tuesday 14 July 2009

Mr Tim Toulmin, Director, Press Complaints Commission

Ev 264

Mr Alan Rusbridger, Editor, **Mr Paul Johnson**, Deputy Editor, and **Mr Nick Davies**, writer and journalist, the Guardian

Ev 275

Tuesday 21 July 2009

Mr Tom Crone, Legal Manager, News Group Newspapers, and **Mr Colin Myler**, Editor, News of the World

Ev 304

Mr Andy Coulson, former Editor, and **Mr Stuart Kuttner**, Managing Editor, News of the World

Ev 321

Wednesday 2 September 2009

Mr Christopher Graham, Information Commissioner, and **Mr David Clancy**, Investigations Manager, Information Commissioner's Office

Ev 342

Mr John Yates, Assistant Commissioner, and **Mr Philip Williams**, Detective Chief Superintendent, Metropolitan Police Service

Ev 358

Mr Mark Lewis, Solicitor Advocate, Stripes Solicitors

Ev 379

Tuesday 15 September 2009

Mr Les Hinton, Chief Executive Officer, Dow Jones & Company, and former Executive Chairman, News International Ltd

Ev 385

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3 Media Lawyers Association (MLA)	Ev 6, 451, 452
4 Mark Thomson	Ev 23
5 Russell Jones & Walker Solicitors	Ev 26
6 Swan Turton Solicitors	Ev 30, 48
7 Schillings Lawyers	Ev 34
8 Max Mosley	Ev 52, 468
9 Times Newspapers Limited	Ev 92
10 Press Complaints Commission	Ev 102, 264, 458, 478
11 Press Standards Board of Finance Limited, Newspaper Publishers Association, Newspaper Society, Periodical Publishers Association, Scottish Daily Newspaper Society and Scottish Newspaper Publishers Association	Ev 108
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13 Express Newspapers	Ev 159
14 Daily Express	Ev 172
15 Guardian News and Media Ltd	Ev 184, 290, 293, 294, 295, 470
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19 Global Witness	Ev 238
20 Department for Culture, Media and Sport, and the Ministry of Justice	Ev 252, 259
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22 Information Commissioner's Office	Ev 340, 341, 355, 462, 468
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26 National Union of Journalists	Ev 407
27 News International Ltd	Ev 410, 464, 469, 482; 484
28 Society of Editors	Ev 418
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30 Loreena McKennitt	Ev 436
31 Media Standards Trust	Ev 441
32 PAPYRUS	Ev 444
33 Alan Dee	Ev 446
34 Martyn Jones MP	Ev 447
35 Joint Committee on Human Rights	Ev 448
36 Tesco PLC	Ev 451
37 Media Lawyers Association	Ev 451, 452
38 Carter-Ruck Solicitors	Ev 452, 461
39 Shane Morris	Ev 453
40 David Price Solicitors and Advocates	Ev 454

41	Crown Prosecution Service	Ev 454, 456, 457
42	The Centre for Social Cohesion	Ev 460
43	Professor Chris Frost	Ev 463
44	Sir David Eady	Ev 479
45	Sense About Science	Ev 483
46	Culture, Media and Sport Committee to Mr John Yates, Assistant Commissioner, Metropolitan Police Service	Ev 485

List of unprinted written evidence

The following written evidence has been reported to the House, but to save printing costs it has not been printed and copies have been placed in the House of Commons Library, where they may be inspected by Members. Other copies are in the Parliamentary Archives, and are available to the public for inspection. Requests to inspect them should be addressed to The Parliamentary Archives, Houses of Parliament, London SW1A 0PW (tel. 020 7219 3074). Opening hours are from 9.30 am to 5.00 pm on Mondays to Fridays.

1. Pow Trust
2. Jonathan Steinberg
3. Peter Burden
4. BOND (British Overseas NGOs for Development)
5. Drew Sullivan, Advising Editor, Center for Investigative Reporting in Bosnia and Herzegovina and the Organised Crime and Corruption Reporting Project
6. The Press Standards Board of Finance Limited
7. Index on Censorship and English PEN
8. Trinity Mirror Plc
9. Which?
10. Farrer & Co LLP
11. Adrian Zuckerman
12. The Madeleine Foundation
13. Elaine Deculos
14. Brooke M. Goldstein
15. David Wyn Davies
16. Olswang
17. Paul Joslyn
18. College Art Association
19. Terence Ewing
20. Shane Morris
21. The Booksellers Association
22. Duncan Anderson
23. Mario Petrov
24. Culture, Media and Sport Committee, letter to Les Hinton, Chief Executive Officer, Dow Jones & Company, and former Executive Chairman, News International Ltd
25. Culture, Media and Sport Committee, letter to Alan Rusbridger, Editor, the Guardian
26. Culture, Media and Sport Committee, letter to Rebekah Wade (now Brooks), Chief Executive, News International Ltd
27. Les Hinton, Chief Executive Officer, Dow Jones & Company, and former Executive Chairman, News International Ltd, letter to the Culture, Media and Sport Committee
28. Alan Rusbridger, Editor, the Guardian, letter to the Culture, Media and Sport Committee
29. Rebekah Wade (now Brooks), Chief Executive, News International Ltd, letter to the Culture, Media and Sport Committee

30. Culture, Media and Sport Committee, letter to Tim Toulmin, Director, Press Complaints Commission
31. Tim Crook
32. Tom Bower

List of Reports from the Committee during the current Parliament

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Second Report	Press standards, privacy and libel	HC 362-I, II
First Report	The work of the Committee in 2008–09	HC 264

Session 2008–09

Seventh Report	BBC Commercial Operations: Further Report	HC 968
Sixth Report	The Licensing Act 2003	HC 492
Fifth Report	BBC Commercial Operations	HC 24
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Eleventh Report	Draft Heritage Protection Bill	HC 821
Tenth Report	Harmful Content on the Internet and in Video Games	HC 353 I, II
Ninth Report	Draft Cultural Property (Armed Conflicts) Bill	HC 693
Eighth Report	Tourism	HC 133 I, II
Seventh Report	European Commission White Paper on Sport	HC 347
Sixth Report	London 2012 Games: the next lap	HC 104 I, II
Fifth Report	On-course horserace betting	HC 37
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Third Report	Work of the Committee in 2007	HC 234
Second Report	Ticket touting	HC 202
First Report	Public service content	HC 36 I, II
Third Special Report	European Commission White Paper on Sport: Government Response to the Committee's Seventh Report 2007–08	HC 1029
Second Special Report	On course horserace betting: Government Response to the Committee's Fifth Report 2007–08	HC 549
First Special Report	Public service content: Response from Ofcom to the Committee's First Report of Session 2007–08	HC 275

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Seventh Report	Self-regulation of the press	HC 375
Sixth Report	Caring for our collections	HC 176 I, II
Fifth Report	New Media and the creative industries	HC 509 I, II
Fourth Report	Call TV quiz shows: Joint response from Ofcom and	HC 428

	ICSTIS to the Committee's Third Report of Session 2006–07	
Third Report	Call TV quiz shows	HC 72
Second Report	London 2012 Olympic Games and Paralympic Games: funding and legacy	HC 69 I, II
First Report	Work of the Committee in 2006	HC 234
First Special Report	Self-regulation of the press: Replies to the Committee's Seventh Report of Session 2006–07	HC 1041
Session 2005–06		
Fourth Report	Women's Football	HC 1357
Third Report	Preserving and Protecting our Heritage	HC 912 I, II, III
Second Report	Analogue Switch-off	HC 650 I, II
First Report	Broadcasting Rights for Cricket	HC 720
Second Special Report	Women's Football: Replies to the Committee's Fourth Report of Session 2005–06	HC 1646
First Special Report	Maritime Heritage and Historic Ships: Replies to the Committee's Fourth Report of Session 2004–05	HC 358