The Campaign for Press and Broadcasting Freedom (CPBF)

The CPBF was established in 1979. It is the leading independent membership organisation dealing with questions of freedom, diversity and accountability in the UK media. It is membership-based, drawing its support from individuals, trade unions and community-based organisations. Since it was established, it has consistently developed policies designed to encourage a more pluralistic media in the UK and has regularly intervened in the public and political debate over the future of press regulation in the United Kingdom.

1. The Committee has sought views on a large number of interesting questions. However, the CPBF would like to concentrate mainly on responding to those pertaining to the European Convention on Human Rights and its impact upon both privacy and press freedom. However, our answers to these questions will also lead us to respond briefly to the questions posed by the Committee about the role of the PCC in certain recent high-profile cases.

2.1. Although the Human Rights Act 1998 (HRA) was trumpeted by the government as 'bringing rights home', the plain and simple fact is that free speech as a right never had a home in Britain until given one by Article 10 of the European Convention on Human Rights (ECHR), which the HRA finally introduced into British law. Of course, Article 10 is by no means absolute; under certain circumstances prescribed by Article 10(2) governments may introduce restrictions on freedom of expression; furthermore, occasions may arise when Article 10 has to be balanced against other rights, in particular Article 8 which, under certain circumstances, establishes a limited right to privacy from media intrusion. However, not only has Convention jurisprudence established that when such balancing acts take place, there is a clear presumption in favour of Article 10, but when the HRA was debated in Parliament, a clause was inserted By Lord Wakeham, then chairman of the Press Complaints Commission, which laid down that in any case brought against the media, the court must have particular regard to the importance of the right to freedom of expression, and, in the case of 'journalistic, literary or artistic material', to 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'. The clause also laid down that the court must also have particular regard to 'any relevant privacy code', which would of course include the Press Complaints Commission's *Code of Practice*.

2.2. It is therefore immediately obvious that neither the ECHR nor the HRA establishes a right to privacy in the manner suggested by many newspapers and by editors such as Paul Dacre. However, it is precisely because they do fear that it establishes such a right (and also because they loathe anything contaminated by 'Europe') that most British newspapers have, from the very start, expressed such resolute hostility to the Act – although rarely have they been as honest about their motives as Dacre, preferring instead to invent and propagate myths about the HRA being a charter for terrorists, hijackers and freeloaders. In so doing, they have played the central role in creating the bizarre situation in which, apparently, the majority of the inhabitants of a democracy have come to believe that 'human rights' are dirty words. Indeed, as early as early as 1999, the anti-human rights clamour from most of

the national press had become so deafening that a bemused Hugo Young felt moved to write in the *Guardian*: 'Unembarrassed by the fact that the Human Rights Bill is a general law, applying to every citizen in his or her relationship with state authority, [newspapers] demand that the press be treated differently ... They propose that the press, alone among institutions with public functions, should stand above international human rights law'. Indeed, one might go further and ask whether newspapers which are fundamentally hostile to a measure which for the first time in British history has established a statutory right to freedom of expression, deserve seriously to be considered members of the 'Fourth Estate' as the term is generally understood.

2.3. In answer to the Committee's question, we would therefore argue 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.**

3.1. Lord Wakeham's amendment to the HRA was particularly important in that it is one of those much-needed measures which has helped to introduce a long-overdue public interest defence into cases involving the media. Again, this aspect of the HRA, like Article 10, serves only to enhance the protection offered by the law to serious journalism. And thanks to the Law Lords in the cases of Reynolds and Jameel, we now have a comprehensive and authoritative account of what actually constitutes the public interest as far as media content is concerned. (In comparison, the account given of the public interest in the PCC *Code* is scrappy and superficial).

3.2. In his speech to the Society of Editors conference, 9 November 2008, Paul Dacre addressed this question by arguing that 'if mass-circulation newspapers, which, of course, also devote considerable space to reporting and analysis of public affairs, don't have the freedom to write about scandal, I doubt whether they will retain their mass circulations with the obvious worrying implications for the democratic process … If the *News of the World* can't carry such stories as the Mosley orgy, then it, and its political reportage and analysis, will eventually probably die'. This is an approach which was also taken by Lord Woolf in 2002 in the appeal court judgement in the case involving the footballer Gary Flitcroft, and by Baroness Hale when the Naomi Campbell case reached the House of Lords in 2004. However, it is not one which has generally found favour with the judiciary, and in our view it is seriously flawed.

3.3. Firstly, we would seriously question the extent to which papers such as the *News of the World* and other such tabloids, which are the main offenders in the matter of invasion of privacy, do actually carry serious political reportage and analysis. Second, whilst it may indeed be the case that the middle-market tabloids the *Express* and the *Mail*, who are also offenders in this area, carry a certain amount of political reportage and analysis, it is our view that this so coloured by those papers' editorial lines that it is all too frequently quite impossible to tell fact from comment (and indeed from fiction); it thus not at all clear to us that this can be considered as serious journalism. Newspapers such as *The Times* and *Guardian* quite clearly do contain a great deal of serious journalism, which thus may avail itself of the public interest defence if necessary, and this manages to survive without being 'subsidised' by scandal-mongering elsewhere in the paper. If popular British newspapers wish to turn themselves into entertainment-based, celebrity-driven scandal sheets then that is entirely their decision, but they cannot then expect the legal protection now offered to

serious journalism which operates in the public interest – into which category no reasonable person would claim for one moment that the Max Mosley story falls. Nor, incidentally, can we see any reason why newspapers which fulfil no serious public purposes should be exempt from VAT.

3.4. In answer to the Committee's question, therefore, we would firmly argue that **in the light of recent court rulings, the balance between press freedom and personal privacy is the right one.**

4.1. An excellent example of certain newspapers' inability to distinguish fact from comment is in fact provided by their coverage of human rights issues. Thus, after the Max Mosley case, *News of the World* editor Colin Myler complained vociferously that 'our press is less free today after another judgement based on privacy laws emanating from Europe. How those very general laws should work in practice has never been debated in the UK parliament. English judges are left to apply those laws to individual cases here using guidance from judges in Strasbourg who are unfriendly to freedom of expression. The result is that our media are being strangled by stealth'. It has also long been customary for certain newspapers to refer to judges as 'dictators in wigs'. This is a particular speciality of the *Mail*, and it was thus not surprising to find Paul Dacre repeatedly taking this line in his above-mentioned speech. For example, he argued that 'this law [privacy] is not coming from Parliament – no, that would smack of democracy – but from the arrogant and amoral judgements – words I use very deliberately – of one man'. This was the unfortunate Justice Eady, described by Dacre as possessing 'awesome powers' which enable him to 'bring in a privacy law by the back door' and 'with a stroke of his pen'. He was also echoed in these sentiments by Graham Dudman, managing editor of the *Sun*, who told the *Today* programme: 'Parliament has not made these decisions, one man has'. This is quite simply juridical and constitutional illiteracy. Journalism courses accredited by the National Council for the Training of Journalists spend a great deal of time teaching the fundamentals of law and public administration to their students, and it is frankly extraordinary to find editors of national newspapers spouting arrant nonsense which would disgrace a first year student on such a course.

4.2. The HRA strode in straight through the front door of Parliament, and is a quite decidedly British piece of legislation. As the Chief Justice Lord Woolf has made perfectly clear, UK law now includes the Human Rights Act, and judges are simply ensuring that the laws made by Parliament are upheld. Parliament makes the law, the Executive ensures that it is carried out under law, and the judiciary interprets and applies the law. By enacting the Human Rights Act, Parliament required the courts to interpret and apply both statute law and common law compatibly with the rights and freedoms protected by the European Convention. To argue that the courts are exceeding their authority in this matter, or that we are seeing a 'wholesale erosion of Parliamentary sovereignty', simply beggars belief. In the real world and not that of Dacre's fevered imaginings, the Act simply requires the courts to interpret legislation in a way compatible with Convention rights. The courts thus develop law in line with the Convention. In the case of legislation which they deem incompatible with Convention rights, all they can do is to issue a declaration of incompatibility and leave it up to Parliament to amend the legislation accordingly.

4.3.These are such obvious and fundamental points that they should not need stressing. However, the waters have been so thoroughly muddied by Dacre, Coulson and their ilk that we think it worth reproducing part of a letter to *The Times*, 11 November 2008, signed by the QCs Desmond Browne, Andrew Caldecott, Adrienne Page and Richard Rampton in which they state that: 'The suggestion that Mr Justice Eady is conducting a one-man mission to create a law of privacy, thereby circumventing the function of Parliament, does not bear proper examination. Firstly, the Judge was applying the law as Parliament intended. The Human Rights Act requires the English courts to recognise European Convention rights, including the right to respect for private and family life. Indeed, Parliament expressly made it unlawful for a court to act in a way which is incompatible with a Convention right. The task of the Court is to resolve the tension between personal privacy and freedom of expression, an area where there are no absolutes. In weighing these rights the public interest will always ensure that the corrupt and crooked will not "sleep easily in their beds". Mr Dacre may well prefer an era when freedom of expression did not have to take account of privacy rights, but Parliament has decided the contrary. Secondly, the decisions of Mr Justice Eady (like those of the many trial judges who have decided privacy cases) are subject to three levels of review: the Court of Appeal, the House of Lords and ultimately the European Court of Human Rights. In the cases cited by Mr Dacre, the Judge was doing no more than applying the law, as he was bound to do, developed by the House of Lords in the Naomi Campbell case and the European Court of Human Rights in the case of Princess Caroline'.

4.4. There are yet further factual flaws in Dacre's attack on Justice Eady. Firstly, he does not have a 'virtual monopoly' on privacy cases; for example, he was not involved in the Naomi Campbell, JK Rowling or Prince of Wales cases, all of which have contributed to the development of privacy law. Second, in the case of Lowe v Associated Newspapers (2006), Justice Eady actually strengthened the defence of fair comment which is available in defamation cases: ironically this involved a paper of which Dacre is Editor-in-Chief. Third, he has strongly promoted the statutory offer of amends procedure, which has been very widely adopted by media defendants as a means to settle libel complaints speedily and economically.

4.5. Given the increasing frequency with which newspapers, and especially the *Mail*, mount personal attacks on named judges, **we strongly recommend the ending of the convention by which judges do not respond publicly to such attacks, and urge senior members of the judiciary to make official judicial responses to these attacks in future.**

5.1. In the light of Dacre's animus against the judiciary, we wonder whether he would like to see a return to the situation of the late 1980s when juries, revolted by the sensationalist antics of the popular press, awarded massive damages against offending newspapers. This finally resulted in juries being given judicial guidance about the size of the damages to be awarded in particular cases, and in the Court of Appeal acquiring the power to substitute its own awards in place of those which it considered excessive. We seem to remember these measures being strongly supported by the press – the selfsame press which now complains about the 'excessive' power of judges.

5.2. Whatever the case, however, and in answer to the Committee's question, we would strongly argue that **financial penalties for libel or invasion of privacy**

applied either by the courts or a self-regulatory body, should be exemplary rather than compensatory. We would also argue that the courts or a self-regulatory body should be empowered to ensure that the award of any such damages be carried with due prominence in the offending newspaper(s).

5.3. As the Campaign for Press and Broadcasting Freedom we firmly believe in the 'publish and be damned' principle – in other words, newspapers should be free to publish what they will – but also free to take the consequences. The consequences, however, have to be meaningful ones. In our view, given the enormity of the offences committed by various newspapers, the awards of £60,000 to Max Mosley, and, in the McCann and McCann-related cases, of £550,000 to the McCanns themselves, of £375,000 to the so-called 'Tapas Seven', and of £800,000 to Robert Murat, Michaela Walzuch and Sergey Malinka, were nothing less than derisory. Given the incomes of the papers in question, and, more particularly, given *the increases in sales which these stories generated*, these damages (and the associated costs) were little more than pinpricks and were no doubt simply laughed off by the editors concerned. Significantly, the *News of the World*'s response to its defeat at the hands of Mosley was to run a full page advertisement in the *Press Gazette* featuring a woman in a basque over which was superimposed the word 'Domination'. The advertisement was headed 'Mosley's not the only one getting a spanking' and boasted that 'we've been beating our rivals for 165 years'.

5.4. At the very least, then, damages should be fixed at a level which ensures that no paper can actually profit from running a story which is later shown to have broken the law. This means that damages have to be computed, in part, in terms of sales figures and associated advertising revenue. But this ensures merely that newspapers cannot profit from their crimes. Computing the exemplary aspects of damages is considerably more difficult, but, when doing so, it should be borne in mind that (a) popular newspapers routinely insist that those breaking the law should be publicly 'named and shamed', and that their sentences should be primarily punitive and retributive; and (b) that the vast majority of the British press vociferously supported the 'sequestration' of the assets of those unions which broke industrial relations law in the 1980s. Admittedly the British press routinely acts as though its endless strictures apply to everything except newspapers, but in our view what's sauce for the goose ….

6.1. At 5.2. above there is mention of a 'self-regulatory body', and this is clearly a reference to the PCC. However, we have not the slightest doubt that the PCC as presently constituted would never dream of levying financial penalties on newspapers which infringed its *Code* and/or the law. As we have argued in earlier submissions to this Committee, were the PCC to become a regulator with real teeth, the newspaper industry would simply cease forthwith to finance it. Indeed, one of the most striking things about both the McCann, McCann-related and Mosley cases has been the almost complete invisibility of the PCC – an invisibility which springs from the fact that none of those who were libelled or whose privacy was infringed thought the PCC remotely worth bothering with, a judgement with which we would heartily concur. Even so, one might have expected the PCC to institute some kind of retrospective enquiry or inquest into the McCann and McCann-related cases which, between them, *involved every single popular national daily newspaper published in Britain*. But no. Absolute silence.

6.2. Furthermore, the Executive Editor of the *News of the World*, Neil Wallis, sits on the PCC Code of Practice Committee, and this is chaired by Paul Dacre. This illustrates all too clearly why the PCC is part of the problem and not part of the solution when it comes to the questions raised by this Committee. The PCC cannot act effectively on these matters – even if it wanted or knew how to – because it is financially and organisationally beholden to the very newspapers which repeatedly insist on infringing the law, abusing the judiciary and trashing the European Convention on Human Rights and the Human Rights Act 1998. Thus since the PCC is congenitally incapable of constructing and enforcing a satisfactory code on privacy, and governments are far too terrified of being monstered by the press even to contemplate formulating a privacy law, the only option is to allow the courts to do so in ways which are fully compatible with the ECHR and HRA and which thus give adequate protection to freedom of expression. **We thus conclude in answer to the Committee's questions that news organisations have made no changes whatsoever in the light of the McCann and McCann-related cases, and that the successful libel actions against the *Express* and other papers arising out of these cases indicate a near-fatal weakness with the self-regulatory regime of the PCC.**

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