

The media is without doubt one of the strongest mediums with which to damage the reputation of any person in the world, whether it be by falsehoods or invasion of privacy. There are numerous occasions where a person has a valid complaint about something that has been published about him, but has no recourse to the law because the unavailability of legal aid “effectively deters all but the intrepid or wealthy from taking action for libel”¹ and there is still no direct privacy law in the UK. Instead of using the law, the press looks after itself using a system of self-regulation.

As Gibbons points out, although effective control is “often thought to be legalistic in form, [it] may equally involve political convention, commercial custom or professional discipline.”² It is, however, balancing the politics of the independence of the media against its accountability (freedom of expression against “information failure” due to infringement of privacy) which forms the brunt of the argument when discussing self-regulation, with economic regulation concerning itself largely with concentrations of ownership and control of programme making falling under the broadcast media now regulated by Ofcom (a statutory body which became fully operational on 29th December 2003 courtesy of the Communications Act 2003).

Because of the nature of the press, restrictions on its ability to communicate will interfere with speech. The protection of such a liberty is critical for discovering truth. Yet how far should the press be allowed to go before it has over-stepped the mark? As Feintuck says, the independence of the press is key to the idea of democracy (stemming from the principle of constitutionalism) “in facilitating the calling to account of government”³, but how far can it be trusted to look after itself and not dabble in circumstances that are not in the public interest?

“The relationship between independence and accountability is one of the most difficult problems for media regulation to solve, especially for ... regulators. Where bodies are given responsibility for promoting values ... they require a reasonable degree of autonomy. Accountability will necessarily be indirect, therefore, and is likely to be best achieved through the articulation of clear objectives and decision making.”⁴

At least once every decade since the end of World War II there has been a threat from the Government to introduce a statutory framework to regulate the press as a result of its unfair and sometimes malicious behaviour, and each time the press has responded by arguing the case for tightened self-regulation and insistence that it will be on its best behaviour from then on. Ever since the first calls

¹ *Media Law*, 2002, G Robertson & A Nicol, p 675

² *Regulating the Media*, 1998, T Gibbons, p 5

³ *Media Regulation, Public Interest and the Law*, 1999, M Feintuck, p 16

for a self-regulatory body in 1949 the press has tried to avoid the issue of regulation entirely, but in 1953 the General Council of the Press came into being as a reaction to a Private Members' Bill. Despite improvements to the Council in 1962, the last Royal Commission to report on this subject (in 1977) still found much to criticise and, as a result of increased funding and lay membership, the then named Press Council continued to grow, albeit without laying down a comprehensive code of conduct.

Following a stream of complaints causing considerable disquiet amongst the public and Parliament, the Newspaper Publishers Association declared a "unanimous commitment to a common Code of Practice to safeguard the independence of the Press from threats of official control". Although this represented a step in the right direction from an industry quite obviously feeling hot under the collar, it was too little too late as the Calcutt Committee of 1990 offered the press: -

"... one final chance to prove that voluntary self-regulation can be made to work."⁵

Calcutt made several recommendations aimed at solving the problem caused by the Council's apparently contradictory claims that it would both safeguard press freedom and condemn malpractice, the latter of which would be the function of the present regulatory body, the Press Complaints Commission ("PCC"). However, the PCC was backed up by proposals for a statutory complaints tribunal to wait in the wings as a fallback to concentrate to minds of the press. The industry acted rapidly to make the PCC a reality, investing £1.5 million a year into it and in 1990 a Code of Practice ("the Code") was finally drawn up.

All complaints are judged up against the 17 clauses making up the Code. If there is no prima facie breach of the Code then the PCC can take the complaint no further. The first clause prohibits the publication of inaccurate material. Breach of this clause will lead to an apology being printed as well as the statement being "corrected promptly and with due prominence". Related to clause one are clauses two and three, allowing individuals or organisations the opportunity to reply to inaccuracies while making sure that the publication clearly distinguishes between fact and opinion.

The remaining clauses of the Code relate directly or indirectly to the privacy of the individual, and prohibit actions such as the use of listening devices and long lens photography (unless in the public interest), the naming of victims of crimes, the gaining of information from hospitals or chequebook journalism and clauses to specifically protect children.

⁴ *Regulating the Media*, 1998, T Gibbons, p 54

⁵ *Report of the Committee on Privacy and Related Matters*, 1990, paragraph 14.38

The PCC is, however, still heavily criticised, and the corner stone of these criticisms is the balancing of Articles 8 and 10 of the European Convention of Human Rights (the rights to a private life and freedom of expression respectively). However, neither of these rights can be considered to be absolute because in the real world they conflict and, as noted by Professor Pinker, privacy itself is paradoxical concept: -

“People can only come to appreciate the value and nature of privacy by growing up in a society. In order to become social, however, people have to accept limits on their privacy. Privacy is not, therefore, an absolute and the right to invade it is not an absolute and this is the dilemma that all members of society have to live with.”⁶

However, having to “live with” this dilemma is in no small part thanks to the Government and the PCC. The Government has rejected the idea of a direct privacy law leaving the protection of human rights in the hands of the judiciary, who in turn have held themselves only able to intervene, following the judgements in cases such as *Douglas v Hello*⁷, where the PCC themselves have failed to balance rights under Articles 8 and 10.

The two main ways in which the media can infringe the rights of an individual (or a corporate entity) are by defamation and invasion into privacy. While damage caused by defamation can be repaired, once a person’s privacy has been invaded it can never be restored, indicating the need for the PCC to implement a prior restraint procedure to prevent invasion into privacy happening in the first place. Yet the PCC is vigorously opposed to such a procedure because this would interfere with the workings of a free press.

The courts make injunctions for invasion into privacy comparatively easy to obtain because such a right to privacy is essential for civilised society except where the information is in the public interest, even though the decision in *A v B&C*⁸ means that not everything which interests the public is exclusively relating to matters such as crime and public health.

“It is extraordinary therefore that the PCC, whose role is supposed to be to provide some bulwark between the press and its subjects, should be seen to so vehemently oppose [rights to privacy]. The only possible explanation for this is that it is campaigning on behalf of its paymaster, the print press.”⁹

⁶ *Press Freedom and Press Regulation – Current Trends in Their European Context*, R Pinker, [2002] 4 Communications Law 102 @ 103

⁷ [2001] 2 WLR 992

⁸ [2003] QB 195

⁹ *The Press Complaints Commission - Some Myths About Self-Regulation*, 2003, J Coad, <http://www.simkins.co.uk>

The question to be posed here is whether the press itself thinks that it should operate within the rule of law or not. If it does, then the Code which, inter alia, accepts a need for privacy, should fall within the bounds of legal protection, which effectively gives legal immunity to the press. If the answer to the question is no, then the right to privacy should be enforceable against the press as it is enforceable against other public bodies. If the press want their right under Article 10 to be enforceable then they should equally accept the enforceability of privacy rights.

The PCC is often said to have no teeth with which to tear into publications in breach of the Code. Indeed, the only punishment the PCC has the power to hand out is that a misleading story should be “corrected promptly and with due prominence”¹⁰ in a later edition of the publication in which it was found. Because of the nature of the PCC as a non-statutory body, it does not impose fines or require payments of financial compensation. The PCC defends this position¹¹, saying that to do otherwise would involve cost to the complainant in the form of lawyers, and this in turn would defeat the purpose of the PCC to handle complaints quickly. It offers evidence from privacy cases in the European Court of Human Rights that fines would only be minimal anyway (about £10,000) and this would not act as a successful deterrent for large newspapers. Indeed, the PCC claims that the loss of advertisement space in the publication because of the printing of the adjudication and an apology would act as the financial punishment due to the loss of income. However, the PCC does not seem to recognise that the greater the punishment, the greater the incentive not to breach the Code. Especially, considering that the aforementioned “due prominence” is often an article “the size of a postage stamp deep in the middle pages of a subsequent edition”¹², one has to consider just how seriously editors take the PCC. Compared to the Advertising Standards Authority (“ASA”) on which it was modelled, the PCC does not offer to compensate the victim or require the editor to refrain from repeating the breach and recommendations discussed below have sought to rectify this.

Calcutt recognised that the improbability of all sections of the print media following PCC adjudications was the factor most likely to provide demand for statutory regulation. Many tabloids and entertainment based publications will continue to publish stories to boost sales irrespective of the Code or adjudications by the PCC, and only the imposition of hefty monetary fines is likely to solve this problem.

In its 2003 report “Privacy and Media Intrusion” (“the Report”) the Culture, Media and Sport Committee (“the Committee”) recommends that “[T]he industry should consider agreeing a fixed scale

¹⁰ *PCC Code of Practice s1(2)*

¹¹ See <http://www.pcc.org.uk/students/faqsanswered.htm>

¹² *The Press Complaints Commission - Some Myths About Self-Regulation*, 2003, J Coad, <http://www.simkins.co.uk>

of compensatory awards to be made in serious cases”¹³. The idea is that a fixed award would limit the need for lawyers to get involved, a point raised by the PCC against the viability of fines. The possibility was also put forward that this compensation may also be awarded to the complainant’s chosen charity rather than the complainant directly.

This recommendation has been heavily criticised by the PCC. Indeed, Guy Black, the PCC's director, said that he had “real problems” with the plan¹⁴. The Government concluded that if the complainant wanted compensation then they would take their complaint to the Courts. In The Guardian’s article¹⁵, Guy Black continues: -

“Most complaints are from ordinary people about local newspapers. They don’t want money; they don’t necessarily even want anything published. They want an apology from the editor and an assurance that it’s not going to happen to anyone else. We were never meant to be a watered-down version of the legal system.”

Imposing fines would hit local newspapers and other small publications a lot harder than it would the larger companies in the industry and this has been cited as another reason against awarding compensation for a misdemeanour by the press. However, the recommendation was only for “moderate fines” in “serious cases”, and if the PCC was interested in the slightest about such a proposal which would, without a doubt, increase public confidence in the PCC, then it would have at least investigated the idea.

If such a recommendation was carried out in placing press regulation on a statutory footing, it is difficult to see why the Government could not build a “case-by-case” clause into the legislation by allowing judicial discretion, perhaps even basing the size of the fine on the publications income.

The reference in the Human Rights Act to a “privacy code” begs the question about why the PCC’s decisions have rarely been judicially reviewed, especially considering that the Advertising Standards Authority (“ASA”) is reviewable because it is “exercising a public function which, if the ASA did not exist, would no doubt be exercised by [a statutory office].”¹⁶ The PCC also exercises such a function.

“It would be sensible ... for the PCC to concede reviewability, because this would have the ... advantage of making the PCC a more impressive alternative to privacy

¹³ Recommendation 27, *Privacy and Media Intrusion*, 2003, Culture, Media and Sport Committee

¹⁴ *Press Body Queries Fines Plan*, The Guardian, 18 July 2003, M Wells

¹⁵ *Ibid.*

¹⁶ *R v ASA ex p. The Insurance Service* [1990] 2 Admin LR 77, per Glidewell LJ

law – a public tribunal subject to court supervision, as distinct from a private industry committee.”¹⁷

The courts would only be able to interfere on matters regarding interpretation of the Code rather than technicalities, any jurisdiction would be reserved for serious cases ¹⁸. However, with the fall back position of court supervision, public confidence in the PCC would be increased as the Code would be considered to carry more weight.

A lack of expertise in the area of media law can act very much against a complainant faced with the publication’s legal team containing a wealth of experience in the Code and precedent. To stand a realistic chance of beating such opposition, a claimant would be forced to pay for their own legal representation at cost to themselves without any way to redeem this cost whether or not their complaint is upheld.

In the event that the PCC does become reviewable, its desire for the complainant not to use lawyers may lead to problems. Complainants who have been unsuccessful will feel that they have not been given a fair hearing, since they are not given a hearing at all, and this frustration will be even more evident where disputed facts are decided against the complainant on the basis of written communication with representatives of the publication.

Further comparison to the ASA is of detriment to the PCC. For example: -

“The ASA is ... more respected precisely because it engages in monitoring [compliance with its code and its own adjudications] and may act against breaches without the need to await a complaint from an interested member of the public. As Calcutt recognised, a monitoring exercise is essential to any Code that purports to regulate intrusions into privacy, as victims (other than of notorious infringements) will be reluctant to give the matter further publicity by making a complaint.”¹⁹

However, once more, the PCC refuses to be proactive so as to defend the press’ freedom of speech, and without a mechanism in place to enforce its adjudications and punishments, again, one has to question just how seriously the press takes the Commission.

Another accusation levelled against the PCC is that of bias.

¹⁷ *Media Law*, 2002, G Robertson & A Nicol, p 681

¹⁸ *R v PCC ex p. Stewart-Brady* [1997] EMLR 185, *per* Lord Woolf

¹⁹ *Media Law*, 2002, G Robertson & A Nicol, p 707

“*Private Eye* is the only print journal which refuses to recognise the PCC, on the basis (says Ian Hislop) that certain editor-members of the Commission are themselves so morally questionable that no ethical judgement they make deserves to be recognised.”²⁰

The PCC’s function is to make judgements against an industry from which it is directly funded and in which most of its members are found. Organisations in such circumstances will have difficulty making fair decisions. With such pressure from the print press, a shake up of the PCC at least in its composition should be undertaken, with more lay members independent of both the Government and the industry being the obvious answer as recommended in the Report. To its credit, the PCC has taken on board recommendations about its membership made in the Report²¹, and this can only serve to benefit the public and may even pacify Mr Hislop.

Obtaining funding from different parties to remove bias is difficult to achieve. Government funding would have to work on the basis of “no strings attached” or the similar arguments could be raised. Charging people to make the complaints, as was tried in Sweden, may put the service beyond the reach of some of the public. In some emerging democracies, such as Bosnia, grants from non-governmental organisations have been used to establish self-regulatory councils, but such an approach would be unlikely in the democratically developed UK.

The composition and function of the PCC as a self-regulatory body for the press, against the back drop of its predecessors, indicates that to say that the media, and specifically the press considering the now statutory regulation of the broadcast media, are drinking in the “last chance saloon” is now an overused expression and is unlikely to have any noticeable effect on the behaviour of the media.

The formation of regulatory bodies only started as a reaction by the media to threats of statutory control by the Government. Every time there is a public outcry regarding unsatisfactory media behaviour, the threats arise yet again and are followed by the inevitable retreat and promise of higher standards from the press.

If self-regulation is to continue, the PCC needs to become more proactive, seeking out misdemeanours before they appear in print. Despite insistence by the PCC that it does fulfil this function²², the lack of

²⁰ *Media Law*, 2002, G Robertson & A Nicol, p 709-710

²¹ *PCC Response to the Culture, Media and Sport Select Committee’s Recommendations Following its Inquiry Into Privacy and Media Intrusion*, www.pcc.org.uk

²² *PCC Response to the Culture, Media and Sport Select Committee’s Recommendations Following its Inquiry Into Privacy and Media Intrusion*, www.pcc.org.uk

an effective deterrent or monitoring of punishments to actions in breach of the Code means that calling it a “public relations exercise”²³ is not being unduly harsh on the Commission, even if its relationship with the public is not particularly warm.

Further reform of the PCC could involve a greater lay membership. If the PCC was run by people from outside the media but with experience of media law, it would have the power to hold the media to ransom. It would be able to make unbiased decisions and any threat by the media to withdraw funding would inevitably end in statutory control.

The PCC says in its Executive Summary to the Committee that alternatives to itself would be impractical and undesirable since statutory controls would be impossible to implement under the Human Rights Act and privacy laws would be inaccessible to “ordinary people”. This would not be the case. A privacy law balancing rights under Articles 8 and 10 would only reflect what is currently being done by the courts and what is inherent within the Code itself. Any substance to the inaccessibility argument is instantly undermined considering how actions for libel (the closest equivalent to a privacy law) are currently run.

The Human Rights Act and the courts have recognised the importance of the Code in raising the standards of the press. However, it cannot be right to rob the individual of the legal system when faced with the power of the press. To do so would be to render his rights under the European Convention illusory.

“... the protection of such rights must both constitutionally and as a matter of practical common sense be the responsibility of the Courts. Rather than the press putting forward specious and self-interested arguments against the proper framework for such protection, they should endorse and contribute to it to ensure that it strikes the right balance between the vital and proper rights of free speech, and the individual’s right of privacy.

“The alternative is an ad hoc process via case law, since judiciary ... has shown itself willing to step in to protect the individual against the media.”

The current situation requires the Government to add substance to its threats or the PCC to become more effective by implementing some changes outlined above, but given the history of the exercise, the bell for last orders in the Last Chance Saloon may be a long time in coming.

²³ *Media Law*, 2002, G Robertson & A Nicol, p 706