

The PM Privacy Commission Report

PREFACE

When we began our work in early June this year no one could have anticipated just how rapidly the controversy about personal privacy and press intrusion would escalate to the point where it has become the issue of the moment with growing consensus on the need for more telling regulation of the press and serious questions about future conduct and ownership.

The debate about how, as a society, we balance our interest in protecting a free press and wider media, capable of challenging power, privilege and hypocrisy, against the rights of the individual is not new of course. It has been around since the arrival of the printing press and the ability to distribute opinion and allegation widely.

Our original focus was the flurry of concern about how the courts were seen to be striking a balance between the sometimes competing rights to personal privacy and freedom of expression – both enshrined in the Human Rights Act 1998. A particular concern then was the use of injunctions to prohibit publication of reports and the emergence of what were called ‘superinjunctions’ which went so far as to conceal the very existence of the order.

The ‘privacy’ omission was conceived as a way of probing more deeply, on behalf of the listeners, a complex and heated debate.

Our terms of reference were deliberately drawn widely to enable us to range across the whole subject. What became clear from early listener reaction was the widespread recognition of the connections between issues of media ownership, press regulation, data protection, the economic pressures facing newspapers, the various challenges associated with the arrival of social networking and the ‘citizen journalist’, the role of the law and its interpretation by the courts – including access to protection and redress for the individual. And the confidence we can place in police and parliament to act courageously to protect the citizen.

These connections become particularly important in any discussion of how things might be improved for the future. There is unlikely to be a single ‘silver bullet’ which solves the problems we now identify. The closure of a particular newspaper or the resignation or even prosecution of key individuals are unlikely to be an adequate response by themselves to what seems to be a veritable industry in the often illegal, pursuit of and trade in personal information and standards of conduct in some parts of publishing and possibly journalism which fundamentally threaten public trust and confidence in the freedoms they enjoy.

Our exercise has been modest in scale and depth. It was intended to be an experiment in public service broadcasting rather than an exhaustive examination of all the information available. Our ambition was to engage the audience in an extended exploration of the various issues. We have not had the time or resources to fully research any of the complex issues we have sought to explore. Nonetheless we have a body of evidence and informed opinion drawn from interviews with 10 knowledgeable witnesses with a wide range of views and it is all available for any one to explore – bbc.co.uk/blogs/ipm. We were disappointed that no serving editor of the so called ‘tabloid press’ responded to our invitation to give evidence but the

Our work for the Commission has reinforced our view that the questions we have considered are of real concern for everyone and are not just matters for the rich and famous or politicians or those who work in the media. Confidence that we can all live our lives free from the threat of inappropriate intrusion and can rely on vigorous, principled journalists and publishers -including broadcasters- to challenge those with power and influence over our lives is part of the (social contract) which underpins an open, free society. Nowhere was the threat to this confidence clearer than in the seismic shift in public perceptions of newspapers following the allegations that Gillian Triggs's mobile phone had been hacked into whilst she was being searched for by police and family. The horrified reaction of the country led to the closure of the 170-year old News of the World and the longer term consequences for the media are unfolding day by day.

We offer our conclusions as a contribution to the continuing debate and will ensure that they together with all the evidence submitted to us, along with the views of the Commission's listeners, is shared with Lord Justice Leveson's two part inquiry into the conduct and regulation of the press announced by the Commission in the hope that it will help it with its important work.

We are clear that the restoration of public trust and confidence must be the overriding concern and that there are questions about the independent regulation of the press: the future structure and ownership of the media industry in rapidly changing economic circumstances and the standards of conduct which we have a right to expect of journalists and more particularly publishers. Most important of all we need to be assured that those upon whom our freedoms depend, whether in Parliament or police have the courage and independence to stand up to the power and influence wielded by the big businesses which publishers and broadcasters most certainly are.

Director Michael Lyons
Lord Leveson
Chairwoman Helen Siddell

14th July 2011

CONCLUSIONS

1. Right to Privacy

We are clear that Parliament intended to establish a right to personal privacy when it passed the Human Rights Act 1998. The Act also enshrines the right to freedom of expression and reflects the tension between the two. We are satisfied that concern to protect personal privacy is not just a matter for the rich, famous and powerful but extends to all the citizens of an open democracy. The courts will inevitably have to strike the balance in individual cases. We are not convinced that the judges' interpretation of the law at the moment is unsatisfactory. However we believe that, in the light of public disquiet, Parliament should take further action to define and reinforce the rights of individuals. The necessary provisions could be included in the forthcoming Defamation Bill.

4. Freedom of Expression

We are clear about the importance of a free press able to challenge those with economic and political power and to expose deceit and hypocrisy. However we believe that the public does distinguish between journalism for these purposes and intrusion into the private lives of individuals for titillation even though we accept there is an appetite amongst many for the latter. We believe that Parliament must keep this distinction firmly in mind in drafting any new legislation and seek to avoid any unintended constraints on investigative journalism.

5. Access to Protection and Redress

-a. We strongly support the suggestion that newspapers should as a matter of good practice disclose their intention to publish private matters relating to an individual. However we accept that a legal duty of prior notification as suggested by Lord Justice Slynn has the potential to have a chilling effect on investigative journalism. If a newspaper violates privacy without prior notification to the relevant individual in the absence of a public interest defence then there should be an award of aggravated damages and possibly some form of regulatory sanction.

-b. Injunctions will continue to have a part to play in protecting individuals' privacy but we are satisfied that following the conclusions of Lord Justice Slynn's committee there will be few if any super injunctions in the future. We are surprised that newspapers facing injunctions have not sought more often to argue a public interest defence. This has left the impression that either there has been no such defence or that the publishers concerned have been content to collude in their own gagging.

-c. Like the Culture, Media and Sport Select Committee, who in February 2001 published a report entitled 'Press Standards, Privacy and Libel', we are concerned by the prohibitive costs that are faced by the private individual seeking protection or redress from press intrusion. This has added to the impression that the right to privacy

is limited to those with the wealth or influence to defend it. We accept that the *ress +omplaints +ommission offers help to the individual concerned about intrusion into their private lives and has had some success with its pre#publication intervention to prevent publication of stories affecting ordinary people, and in setting guidelines for press coverage during major incidents. / onetheless we believe there is more to be done to ensure that ordinary members of the public are able to protect their privacy.

E. The *ublic nterest

We are satisfied that the Bditors9 definition of the public interest as used by the *ress +omplaints +ommission -see appendi" \$. is robust and offers an adequate basis for uß /

privacy of individuals and are not easily regulated. Both the *Trafigura* and *Jan Higgs* cases also point to the significance of interaction between newspapers and social media. Nonetheless in reaching our conclusion about the future regulation of newspaper publishers we believe it is possible to distinguish between social media and newspaper publishing on grounds of both the concentration of power within and the economic rewards available to the latter. We believe that despite the difficulties of protecting individual privacy in the age of Twitter, Facebook and Wikipedia that is no reason to dismiss the role of the law in protecting the individual citizen.

0. The behaviour of individual publishers and Journalists

Although the use of illegally obtained personal information by newspapers does appear to be widespread the evidence we have received suggests that it is not

both our remit and our resources but we are satisfied that there is real public concern and an appetite for further explanation.

10. Relations between Government and Newspaper Publishers

In this area, more than most, the conclusions emerging from our enquiries have been overtaken by events. Many witnesses questioned what they saw as too close a relationship between senior politicians and newspaper publishers born out of a desire to win their support and influence with the public. A greater concern perhaps was the suggestion that individual members of parliament may have been intimidated in their work of scrutiny and challenge by the prospect of becoming the focus of scandalous press coverage. Both sets of issues have been the subject of energetic discussion both within and without parliament over the last 4 weeks. We welcome the apparent consensus that parliament needs to do more to uphold its own vital role in protecting the legitimate private affairs of its citizens and to demand higher standards of conduct in both publishing and journalism.

11. The Police and the Press

Even before the recent allegations of payments by newspapers to police officers and

TERMS OF REFERENCE

1. To determine the circumstances and extent to which an individual's private life should be open to public scrutiny.
4. To establish whether there is public confidence in the current practices of the medical community.

EVIDENCE

Defining Public Interest

Central to the Commission's remit was a desire to establish what is in the public's interest - see point 1 of the terms of reference. Listeners were keen to define this and as one listener wrote:

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At the heart of the privacy debate is the difference between the public interest and the interest of the public. In 1990, the House of Lords made a landmark judgement after the former Irish MP Albert Reynolds had won an action against The Sunday Times following an article in 1989 that claimed he had misled the Irish Parliament. What has come to be known as the Reynolds defence of public interest can be pleaded by the media if they print defamatory information but can prove that the information is in the public interest and that it was secured through responsible journalism.

The Commission found that the definition of 'public interest' in the Editors Code used by the BBC was perfectly adequate. The Editors Code defines public interest as:

- 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.

The Commission was however concerned to hear evidence that newspapers rarely cite a public interest defence in recent injunctions relating to the publication of personal information or defending their use of illegally obtained information.

Ian Hargreaves referred to research by the Guardian which suggested that in only 4% of recent injunctions have newspapers sought to argue in favour of publication on grounds of public interest.

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However evidence given to the Commission by publicist "Clifford stressed that there is a real public appetite for stories about the private lives of the famous"

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The commissioners were not convinced that a public appetite for personal details of celebrities' lives was an adequate defence for their publication in all circumstances. We heard evidence which sought to argue that those who seek press attention for professional purposes -to promote their careers, films or simply in the search for a degree of celebrity. effectively make themselves legitimate targets for further coverage of their lives. We don't accept this although we are clear there are examples of individuals commercialising their private lives to such an extent that they seriously impair their ability to protect any remaining privacy.

Access to Protection and Reversal

The Commission heard evidence from a number of individuals who felt their personal privacy had been the subject of unwarranted intrusion by the press and explored with them the means available to the individual to defend that privacy. The role of the courts in granting injunctions has been explored above.

The expense of injunctions was made clear in the evidence given by Mac Holdsmith, 3*, 3a, 3osley and Helen Wood. 3r Holdsmith explained that it was only through his own personal wealth he could pursue and obtain an injunction to protect illegally obtained details of family emails.

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3a, 3osley spoke of the impact on his family of personal details revealed in the News of the World's now infamous story and explained that even after winning damages for privacy he is still out of pocket by thirty thousand pounds.

Helen Wood explained to the Commission that she could not afford to seek the protection of the courts.

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it should include clear guidance on prior notification and be supported by sanctions where it is not followed without good cause.

The +ommission was not convinced that the imposition of a legal requirement for prior notification is the right way forward and can see that this might have a chilling effect on investigative journalism. n the age of social media, it might be regarded as yet another inhibition on the difficult task that newspapers are seeking to perform. The +ommission is particularly wary of preventing or damaging real public interest stories on serious matters.

*publicist 3 a" +lifford described the lack of public confidence in the body. \$e argued that the self#regulatory system does not currently work and that the system needs to be overhauled and replaced with a body that isJ

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The +ommission also heard from listeners who asserted that public confidence in the *++ has been damagedJ

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Mac Holdsmith 3 * took a more generous viewJ

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The question of inadequate sanctions was taken up by other witnesses, including \$ugh Tomlinson and Mac Holdsmith 3 * who arguedJ

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The work of the *++ and its recent efforts to strengthen its operational independence were described by its 5 irector ;tephen &bell who underlined the *++'s success with its pre#publication workJ

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3 r &bell highlighted the *++'s complaints work e"plaining it receivesJ

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\$e also stressed the importance of their preventive work after major crimes and similar incidents and the support they provide to members of the public who could not afford to seek protection from the courts.

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The evidence of Helen Wood and David Anderson underlined that despite its efforts the potential help the *++ can provide is not always recognised.

In trying to reach a balanced judgement we were much struck by the testimony of Ian Hargreaves, himself an editor and a proponent of self regulation by the press

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We were impressed by the extensive report of the Culture Media and Sport Select Committee, Press standards, privacy and libel (February 2011) and its recommendations for there to be less of a presence from the newspaper industry on the Code Committee and for lay members to be appointed to the Committee. It also recommended further steps for the *++ to become more proactive.

We wrote to the *++ asking how it has reacted to the recommendations of the select committee and Sir Robert's reply is included as appendix 1.

Since we held our hearings the Prime Minister has responded to mounting public concern following allegations about the hacking of Gill Triggs' mobile phone. She has announced a wide ranging two part inquiry under Lord Justice Leveson into the conduct of the press and has indicated the Government's intention to change the regulatory arrangements for the newspapers. She spoke of finding a new way of regulating the press that ensures press freedom and press responsibility.

We are clear that whilst this must be approached with care there is an urgent need to restore public confidence in the integrity of the press. Newspaper publishers have demonstrated their own disdain for the process of self regulation. We believe there is room to define at least a statutory framework for regulation of the press with lessons to be drawn from the experience of Ofcom in broadcasting and the investigative work of the Information Commissioner. New regulatory arrangements must be able to demonstrate real independence from newspaper publishers: ensure an energetic sense of justice

The # of Information

Although our original terms of reference made no explicit reference to continuing concerns about phone hacking, blagging and other ways of gaining access to private personal information this more than any other issue grew in significance during our work. It is at the heart of the public reaction focussed on News International and the News of the World in particular.

Listeners' initial responses urged us to pursue this strand. The evidence of Hugh Grant - particularly relating to his own covert recording of journalist Paul McCartney and Ian Musgraves focussed us on both the scale of what was involved as well how widespread is the use of this material across UK newspaper publishing. It was however the evidence of Christopher Graham, the Information Commissioner, which was the most telling. He outlined his twin public duties relating to data protection and freedom of information, his special independent status and the substantial investigative resources he has at his disposal. He summarised the findings of Operation Motorman, carried out by his office in 1971 which revealed the press were the main customers of an individual who specialised in blagging information from databases phone companies. He underlined just how widespread was the purchase from

Government Oversight of Personal Privacy and the Conduct of the Press

Individual citizens depend upon parliament to protect their rights and liberties. We became increasingly concerned at the evidence we received suggesting that successive governments have failed to tackle adequately press intrusion and particularly the theft of personal information.

Mac Holdsmith, a newly elected MP, argued

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Several witnesses underlined that Government ministers -including Prime Ministers- have become too close to powerful publishers, although this is hardly a recent development.

Herald editor Ian Huxbridge focussed on what several witnesses saw as the power of the press to intimidate individual MPs

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The Information Commissioner Christopher Hraham reflected on the media's power over politicians and linked it with the apparent reluctance of Government to pursue custodial sentences for data protection offences

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; some listeners supported Christopher Hraham's view]

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Questions about close relations between Governments and newspaper publishers and whether such links have resulted in a lack of adequate scrutiny of press conduct have been conspicuous in much of the recent debate. We strongly welcome the Prime Minister's statement of the 4th of July which underlines the need for a new relationship to restore public confidence. We believe there is an appetite for change across Parliament but that must be translated into different behaviours.

Parliamentary Privilege

The Commission is clear that the use of parliamentary privilege to reveal the detail of court orders such as injunctions is something for parliament itself to consider. Mac Holdsmith J³ said:

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The flouting of court orders by parliamentarians under the cloak of privilege is a reflection of a diminishing respect for the judiciary. This is a constitutional issue of considerable importance although not in the scope of the Terms of Reference.

The Future Shape of the Newspaper Industry

Social Media

The potential significance of new media developments and especially social media for the future protection of personal privacy was explicitly recognised in the second of our terms of reference]

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It was a matter of real interest to listeners and raised by many of our witnesses. Jimmy Wales was clear about the revolutionary nature of social media and stressed that by its nature it is not amenable to regulation.

The significant contribution of social media to the shape of recent events was made clear in the part it played in breaching the injunction protecting details of the Ryan Higgs affair and Ian Muscardin also outlined the part Twitter had played in exposing the Trafalgar superinjunction]

The distinction was made by other witnesses including Sugh Hrant who stressed the question of the profit motive]

APPENDIX

A* The Commission

The commissioners are three individuals with widely different professional backgrounds united by a shared belief in the importance of a free and responsible media for the well being of our democracy. Their biographies are contained in the appendix. The commission includes Sir Michael Lyons as its chair, Baroness Helen Siddell and Lord Edward Faulks.

The witnesses were chosen in light of listener response. For example the information commissioner Christopher Hraham was suggested by many listeners to give evidence. Please see appendix for a full list of witnesses.

To listen to the hearings in full and to read the transcripts please go to the blog at <http://www.bbc.co.uk/blogs/ipmi>

A* Listener Reaction

The commission produced these Terms of Reference and consulted 3 listeners before beginning their work.

The response revealed particular interest in

1. Whether it is possible to distinguish between an individual's public and private lives and whether the protection of privacy should be less where a matter of public interest is involved

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4.. The impact of social media and how this might be covered in any attempt to protect personal privacy more effectively.

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@.. How personal and private data should be stored was a regular concern voiced by listeners. Christopher Hraham, the Information Commissioner, was invited to give evidence so as to address these concerns.

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E.. The role of the police in investigating criminal intrusion and their relationship with the media. The Commission invited Chief Constable Andrew Trotter from Association of Chief Police Officers (ACPO) to give evidence.

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The Terms of Reference were not changed but Commissioners took the above points -and other raised as in response * 3 broadcasts of the evidence sessions. into account in the questioning of witnesses and the preparation of this report.

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Sir Michael Lyons is an economist. He was Chairman of the >>+ Trust 4??0#4?11.
*reviously a *rofessor of public policy and Chief Executive of @ major local authorities

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- The *++ currently has the largest lay majority of any similar press council in Europe. Its structure is, in essence, the same as another self-regulatory body in the I 2J the &&. *ublic members outnumber editors by 1? to 0. The Hovernance %eview recommended that membership not be increased further, saying it would not Cimprove the independence of the *++ in practical terms as it is already safeguardedD. The +ommission is currently in the process of e"aminging how its practical independence might be enhanced further.
- The *++ has increased its proactive work since the ;elect +ommittee report. It is impossible to outline every e"ample for obvious reasons. \$owever, there are

- The *++ last year, following a further recommendation from the Governance Review, created the role of Deputy Chairman.
- The *++, as stated above, is not responsible for the wording of the Code. The issue of incorporating prior notification into I 2 law was, as you know, recently rejected by the European courts. However, it is something that the Code Committee is examining, pending the conclusion of the Ashley's proceedings. The Commission has previously upheld a complaint against the Editors of the World for failing to contact an individual before publication.

<http://www.pcc.org.uk/news/index.html#article0/T=w/>.

- The Commission has undertaken recently to review its sanctions, and clearly this will be a matter for legitimate debate. Historically, there have been objections to the institution of a system of fines, which has the potential to slow down and antagonise the necessary mediation process. However, this will now be looked at again.

I hope you agree that the *++ has cooperated fully with your inquiry. I trust that any report will be fair-minded and factual, and coverage of it entirely impartial. With kind regards.

Stephen Bell

An extract from the Information Commissioner's report that price privacy notices are not accessible. This can be accessed here: http://www.ico.gov.uk/news/current_topics/press_documents/library/corporate_research_and_reports/WS&TN%20+BN%20Q&RN/!W.pdf

The following table shows the publications identified from documentation seized during the operation of the Stortman investigation, how many transactions each publication was positively identified as containing.

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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, in printed and online versions of publications.

Editors should cooperate swiftly with the ICJ 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 ICJ.

1 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. In cases involving the omission, prominence should be agreed with the ICJ in advance.

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.

4 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.

ii. Editors will be expected to justify intrusions into any individual's private life without

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.

1? >Clandestine Devices and Interception

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.

11 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.

intend to write in the near future.

1E Confidential sources

Journalists have a moral obligation to protect confidential sources of information.

1F 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 (1).

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.

Sii. 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 overriding 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.

Siii. 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.

17 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.

The public interest

There may be exceptions to the clauses marked S 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.

4. There is a public interest in freedom of expression itself.

@. Whenever the public interest is invoked, the *++ will require editors to demonstrate fully that they reasonably believed that publication, or journalistic activity undertaken with a view to publication, would be in the public interest.

E. The *++ will consider the extent to which material is already in the public domain, or will become so.

F. In cases involving children under 17, editors must demonstrate an exceptional public interest to override the normally paramount interest of the child.