Co-ordinating Committee for Media Reform

ETHICAL PRACTICE: A NEW SETTLEMENT FOR BRITISH NEWS PUBLISHING – preliminary briefing paper, 4 November 2011. For further information, please contact info@mediareform.org.uk.

The cycle of ethical crises which regularly engulf the British press arise not from a deficiency in the law or ethical codes, which already cover most eventualities, but from a culture of risk-taking in which laws and codes seem to operate more as a goad to excess (how far can we stretch the rules without breaking them?) than an expression of collective intent. In this, at least, a link can be drawn with the excesses of others—in the banking sector and in the scandal of MPs' expenses.

This latest crisis arises as much from a failure to apply existing law as to any weakness in the system but it does provide an opportunity to look again at the chronic failure of British news publishing to implement its own rules. This time we need to recognise that, as with many other areas of endeavour where risk-taking is endemic, regulatory frameworks may be required that enable and foster a greater sense of public responsibility. However no action should be taken that cuts across the essential freedom of journalists to investigate wrong-doing. It is to the delicate balance between private freedom and public responsibility that this paper is addressed.

Self Regulation

Ethics are not derived from laws; laws should arise from ethics. It is a shared sense of equity and justice, rooted in something deeper than fear or mere obedience that enables a group or community to set ethical standards which its members freely agree to abide by.

The problem we face is that organisations that have differing interests and very different ways of operating do not necessarily have a shared ethical sense to which they can all refer. Journalism is sharply divided between, on the one hand, those editors and journalists who have the freedom of action and conscience to operate ethically and, on the other, those who operate within a highly structured and competitive environment in which they are under heavy pressure to deliver stories by any means possible and often without even the protection of a trade union.

Whereas the former require protection from pressures that might prevent them from investigating abuses of power, the latter require firmer rules to prevent them from using their power (and desperation to grab market share) to traduce innocent people. Those individuals working for highly competitive news organisations also need protection—of their right to exercise their conscience.

The first journalists' code of ethics in the UK was established in 1884 precisely in order to differentiate responsible journalists from those working on the 'Yellow Press'. The National Union of Journalists introduced a code in 1936 in opposition to plans for a register from which 'unethical journalists' might be struck off (Gopsill 2007).

The current 'Editors Code', policed by the Press Complaints Commission, had no input from the NUJ (though it is clearly heavily influenced by the NUJ code) and it cannot therefore be said to represent the interests or concerns of ordinary working journalists. It was drafted by a team of editors, brought together by those publishers who fund the PCC. Yet it is still very often flouted by its members and no longer even represents all the newspapers since the withdrawal of the Express group in January 2011.

We suggest that a new regulatory body is required for news produced both on and off line. Called The News Publishing Commission, it would represent the interests of ordinary working journalists on and off line as well as editors and members of the public.

Statutory Regulation and Press Freedom

Whenever the idea of statutory backing to the reform of news publishing is considered, the argument from editors is always that it will have a chilling effect and prevent journalists from investigating wrongdoing. In reality we already have laws governing much of what journalists do. Our libel laws are so strict that people from other countries visit our law courts in order to get compensation for wrongs perpetrated in other jurisdictions. We also have laws governing the reporting of the legal process and we have a range of laws covering race hatred, bribery, electronic eavesdropping and so on.

However proprietors and editors shy away from a simple, enforceable system that would give quick, cheap access to redress from members of the public who feel that they have been misrepresented, even though it might actually lift (or ameliorate) the threat of court action from those genuinely exposing wrongdoing.

This paper will suggest changes in the statutory framework: both to secure greater press freedom and also to balance that by allowing people a right of reply and of redress in certain clearly defined circumstances.

We take the need for press freedom every bit as seriously as the editors. This is why we would like to see the concept of 'the public interest' clearly defined and enshrined in law. There will always be a 'grey area' in journalism in which editors encourage journalists to 'dig a little deeper'. That will always involve intrusion into places where those who wish to cover up wrongdoing would rather we didn't go.

Both the NUJ Code of Conduct and the Editors' Code allow the use of surreptitious means, if there is no alternative, to dig out stories in the public interest. *The Guardian*'s investigations editor, for instance, has admitted he used material from phone-taps in the paper's expose of bribery and corruption at BAE Systems (Leigh 2006). Leigh did so because he believed he was working 'in the public interest'.

However an understanding of the 'public interest' must include a sense of public service. The problem for journalists is that owners (often public companies) are more concerned with serving their shareholders than with serving the public. They transmit this view to the editors they appoint (Marr 2004: 235), who, in turn, increasingly, enforce a top-down editorial line that journalists are

expected to obey (Phillips 2010: 57). In this respect, Rupert Murdoch's definition of public service is instructive: 'Anybody who provides a service which the public wants, at a price it can afford, is providing a public service' (Murdoch 1989).

A clearly defined 'public interest' defence in law is vital to any attempt at reform because it helps us to deal with the central contradiction of journalism—the fact that ethical journalists require defence for rule breaking if they are to do their job, whereas unethical journalists attempt to use a 'public interest defence' to protect themselves against criticism.

The public interest is a concept that is well understood by both the public and journalists (Morrison and Svennevig 2002) The Human Rights Act already embodies the concept as a reasonable defence for intrusion and if there is to be any extension of the law into the realm of journalism then that concept needs to be clarified.

The word 'public' in this instance embodies the notion of a whole society. For something to be in the 'public interest' it must affect the way in which we live together as a social group (Phillips, Couldry and Freedman 2010: 52). It should be information that will help us to live better together, or that will prevent us from being harmed. The BBC (2011: 7.1) has framed guidance of its own which helps us in this respect.

- Promoting accountability and transparency: gathering and presenting information to enable public scrutiny of government and those with authority or influence over audiences' lives
- Informing public debate: gathering, providing and testing information on key issues to help the public understand and debate decisions made on their behalf
- Preventing deception, fraud and corruption - providing audiences with the means to avert being misled by some statement or action, especially when public money is involved
- Crime and anti-social behavior: exposing criminal or significant anti-social behaviour, particularly by public figures
- The world - reporting from parts of the world where there are conflicts, where issues of major significance (e.g. climate change, human rights) require understanding, or where the policies of the UK and its allies are having significant effects.

With a clear public interest defense in place it should be possible to ensure that codes of ethical conduct are upheld and that those who choose willfully to ignore them will face some form of legal censure. We discuss this below in recommendations about enforcement.

Democracy and the right of reply

The public interest defence assumes that stories are being pursued for serious reasons but there is a whole mass of material written every day that is not serious and has never been intended to be serious. There is no intention here to suppress the exuberance of British news publishing. Many people read news for the fun of finding out what celebrities are up to or for moral tales derived from other lives. Storytelling is as much a part of journalism as reporting. Journalists, however, need to keep in mind that the stories they tell concern real people with real lives. We feel that the subjects of media intrusion also have rights and also need protection.

When information is inaccurate, unfair, or just 'made up', real people are affected and they should have an absolute right to tell their own side of the story and to correct misleading statements. And we should not underestimate the size of this problem or the distress it causes. The PCC's statistics show that in 2009, 87.2% of the complaints it received concerned accuracy and opportunity to reply, and only 23.7% were about privacy.

As MediaWise has pointed out, a statutory right of reply need be no threat to the commercial future nor to the democratic rights of publications. It argues that a right to reply has been 'commended by the Council of Europe and offered in other perfectly healthy democracies (France, Germany, Belgium, Norway, Sweden, Greece, Austria and Switzerland' (MediaWise 2010: 4)

There have been a number of attempts to establish a right of reply in this country. All of them have been vehemently opposed by editors who think that offering such a right would spoil the careful balance of their publications, take up too much space and introduce badly written and boring 'legal-ese' into their carefully planned publications.

The arguments were more reasonable before the advent of the internet, where the addition of a reply slot, immediately below an offending article, need not change the lay-out or look of the publication. With the addition of a mistakes and clarifications column in every newspaper and magazine—pointing out what items have been corrected and where they can be viewed in full—it should be possible for corrections to be made very fast, with minimal fuss and without damaging the look and feel of the publication. The advantage of using the web version for the full-length correction is that it can be done within hours of publication and be immediately available to those reading the offending article. At present it can take weeks or months to negotiate a right of reply and then it will read entirely out of context.

There can be no more useful corrective to journalistic malpractice than the knowledge that any person who is unfairly traduced has the right to reply immediately below their own article. It is to be hoped that by introducing such a statutory right, publications would very quickly take on board the need to offer a hotline for would-be complainants who could reply without needing to bring the law into play. However, in order to ensure that this right is backed up with the possibility of a sanction, complainants should be able to take their complaints further in the event that all interim attempts at redress are refused.

We now turn in more detail to the practical changes that would be required to foster a new ethical professional practice in British journalism. We have grouped our concerns into these main areas:

1 A statutory Right of Reply

2 Fostering an ethical environment at work

3 Harnessing new technology and fostering trust

4 Relationships with sources

5 Privacy

6 A new regulator combining a two-track approach to conciliation and arbitration via an Ombudsman and a Tribunal system.

1 The Right of Reply

Most news publishers now provide some opportunity for people to respond online (though this can be restricted to opinion pieces). Many publishers now also provide the author's email address beneath the published article should people want to get in touch (though this can be misleading in the case of British news publishers as the name on the article may not necessarily be that of the person responsible for the work).

These opportunities to respond are a significant step forward when compared to the opportunities provided by most print publications. However, despite the opportunities available to correct, many news publishers do not correct visibly, and do not publish corrections clearly on or around the original article published (there are, of course, exceptions).

Most importantly, few publishers distinguish between general comments by people with an interest in the article and people or organisations referred to within the piece who may wish to respond directly or correct a factual inaccuracy. A more ethical practice would give a right of reply immediately below the article, to those who have been mentioned. This should become normal practice and it should also be legally enforced.

The right of reply should be available to any person or organisation named in in print or online. Where organisations or groups of people are impugned it should be possible for the complaint to be taken up on their behalf by the newly constituted News Publishing Commission. (see below).

By insisting on an enforceable right of reply the British news media would be immediately opened up to alternative points of view at very little cost and with a minimum of disruption to existing practices.

There are a number of different existing examples of rights of reply that could provide models or starting points. The Finnish Freedom of Expression Act is a particularly apposite example and by enshrining the right of reply in a law that positively upholds freedom of expression, it demonstrates that the freedom of expression afforded to the press does not trump the freedom of expression afforded to the individual.

The Irish Broadcasting Act also includes a right of reply with the following very simple explanation:

> A Right of Reply is about the correction of incorrect facts or information; it **does not** provide for the broadcast of an alternative or contrary opinion. In other words, a person may not be satisfied with the manner in which a broadcaster has relayed information about him/her, but a Right of Reply will not be granted unless the facts or information are factually incorrect such that their honour or reputation have been impugned. (BAI, n.d.)

There are virtually no space limitations to publishing corrections online. Corrections can be made to the original article (visibly or invisibly); they can be published above, below, or beside the

article; they can be published on a separate page with a different URL, or they can be published in a consistent place elsewhere on the site.

Recommendations:

- A statutory right of reply should be introduced applying to any person who has been directly mentioned in an article. Decisions about the length, placing and timing of the reply should be decided by the News Publishing Commission (see below).
- The right of reply should be enforceable, in the first instance by a News Ombudsman and, in the event of dispute by a tribunal or court (see below).
- Print publications should provide a corrections and clarifications page where all replies are recorded, with basic details and a link to the on-line reply.
- In particularly serious cases, the right of reply should be offered with the same prominence, and in the same position, as the original article.

2 Fostering an ethical environment at work

Journalism is a competitive profession but it depends on a high degree of co-operation when working at speed and under pressure. This demands a high level of shared assumptions, a culture that is understood and accepted by all. A newsroom—and despite the fragmentation of media production virtually all journalists work in or for a newsroom of some kind—is a community in which arguments are a waste of time and everyone is under pressure to get on with the job.

The pressures are most intense on the once highly profitable mass-circulation titles that are scrambling to retain their share of a declining market (Bourdieu 2005). They are driven by a need for ever-increasing sensationalism, which requires ever greater intrusion into the lives of those deemed newsworthy.

A number of former *News of the World* journalists have explained that the use of illicit means of procuring information had been considered normal practice. One anonymous 'red-top insider' told the editor of trade paper the *Press Gazette* last year:

> It came about because of the massive pressure to get a story. When you have your editor shouting at you to get a story you lose your morality. If you need to get a story and everyone else is doing it, you think that's normal. (Ponsford 2011)

Ethical journalists have had little defense since the virtual destruction of the unions in the 1980s. The National Union of Journalists lost its agreements in many offices—including at News International, Daily Mail and Mirror groups—and was weakened almost everywhere. When the Press Complaints Commission was established by the Conservative government in 1991, the National Union of Journalists was not included (it had a seat on the previous body, the Press Council), thus ensuring that ordinary journalists have no representation here either.

It is ironic, given the pressure often exerted to get a story 'by any means possible', and the lack of any support for journalists working under extreme pressure from proprietors and editors, that a frequently quoted 'solution' to unethical conduct has been to make the Editors' Code part of

everyone's contract of employment. Thus journalists, whose own code of conduct cannot be enforced due to lack of representation at work, would be forced to sign up to, and be disciplined for, breaches of a code which they have had no part in drawing up in an atmosphere in which editors provide scant protection for anyone feeling squeamish about unethical practices.

Former Labour culture spokesman Ivan Lewis even suggested registering journalists in order to make it possible to 'strike them off' for inappropriate behaviour. It is hard to imagine how this would be possible, given the fluidity of movement in and out of journalism, and the existence of a growing number of informal news sites on the internet. However the biggest argument against it is that it provides no protection to journalists who are pressured to break the rules and yet it punishes them, rather than their editors, when they do so.

As things stand, the only action open to journalists concerned about what they are being asked to do is to sacrifice their jobs. In 1989 two reporters, Rose Waterhouse and David Connett, quit the *Sunday Times* over the way their copy was changed in the 'Death on the Rock' story—the shooting by the SAS of unarmed IRA volunteers in Gibraltar. The same year, on *The Times*, the arts editor Tim de Lisle resigned over being ordered to run a blurb for a Sky TV programme. In 2003, Kay Weltz, a *Sun* feature writer resigned over the paper's pro-Iraq war bias.

At the Express group, since it was taken over by Richard Desmond's Northern and Shell in 1999, there has been a series of editorial crises. In 2001, David Hellier, a city desk editor, walked out. He wrote to *The Journalist*: 'I'm sickened by the continual interference of the proprietor in allegedly objective reporting and above all in the inflammatory hate-stirring headlines on asylum seekers.'

At the *Daily Star* the NUJ chapel threatened strike action in 2003 to prevent the publication of a provocative and hostile feature on Islam. The following year the NUJ chapel at the *Express* protested vociferously at being forced into running inaccurate and racist stories on immigration. And this year a *Daily Star* reporter resigned over being pressured to write anti-Islam stories. On his resignation on 4 March 2011, Richard Peppiatt published a savage open letter to Richard Desmond detailing at least four occasions on which he had had to concoct fake stories (Peppiatt 2011).

These cases clearly demonstrate the fact that editors, proprietors and journalists cannot be considered to be a single interest group. Working journalists require separate representation and protection in any organisation established to protect and promote ethical journalism.

<u>A Conscience Clause and a Whistle Blowers Code</u>

On the initiative of the Express group NUJ chapel, the union developed its policy for a 'conscience clause' to be introduced into journalists' contracts, to enable them to refuse to work unethically without facing the loss of their jobs. The idea of a conscience clause was raised by the NUJ when giving evidence to the Commons Select Committee on Privacy and Media Intrusion in 2003. The committee recommended such a clause (Hagerty 2003) but it was rejected out of hand by both the PCC and the Society of Editors.

The Express NUJ Chapel wrote to the PCC in January 2004 asking it to adopt a clause to: 'Protect journalists who are unwilling to write racist articles which are contrary to the NUJ Code of Conduct. These articles were inflammatory, subjective and racist and individual journalists felt pressured into writing them—in direct contravention of the NUJ Code of Conduct as well as the

PCC Code' (Phillips 2008). PCC Chairman Sir Christopher Meyer later replied saying the issue was 'outside the Commission's jurisdiction.'

According to Robert Pinker, long serving member of the Press Complaints Commission, defending this position at an NUJ conference: 'It is not our job to be involved in disputes between employers and staff.' He also suggested that such a clause would affect sales by making newspapers 'so sanitised people will not want to read them' (quoted in Phillips 2008).

The conscience clause is now in the union's Code of Conduct. The text of the clause is: 'A journalist has the right to refuse assignments or be identified as the creator of editorial which would break the letter or the spirit of the code. No journalist should be disciplined or suffer detriment to their career for asserting his/her rights to act according to the code.'

The protection of freedom of expression should include a presumption of freedom of conscience. If journalists feel unable to make ethical decisions at work this is a matter that needs to be considered by any organisation established to protect press freedom and journalistic ethics.

Johnston Press has recently issued a notice to staff reminding them of the internal procedures for 'whistle blowing' in the event of 'unethical and improper practices' within the company. It would be helpful if all news organisations were to follow this lead and spell out publicly, their commitment to supporting ethical journalism and the ethical judgements of journalists working for them. These and other suggestions detailed below are a step towards a new ethical framework that encourages open debate and innovation while at the same time, discouraging unethical behaviour.

<u>Recommendations:</u>

- A new body, The News Publishing Commission, should be established replacing the PCC which should include working journalists who would be appointed by their own trade body and not by their editors.
- As part of its remit, the body would have the job of establishing a whistle blowers code and interceding on behalf of journalists who are concerned about unethical practices.
- The new ethical code would include a 'conscience clause' supporting journalists who refuse to work in ways that breach the code of practice.

3 Harnessing new technology and fostering trust

It would be remiss if, in the invention of an entirely new system of news regulation, the industry and policy makers did not take account of the increasing number of opportunities for transparency and accountability.

Being smarter about the uses of new communications technology would:

- help the public assess the trustworthiness of information
- allow journalists to be more accountable to the public
- enable more democratic debate without changing the tone, subject matter, or approach of news organizations

- allow for a variety of easily enforceable sanctions for ethical breaches (see below);
- facilitate tagging of corrected or problematic copy
- in particular, allow regular opportunities for a right of reply.

It is much easier to make news transparent and accountable online than it is in print or in broadcast. By improving transparency, news organisations can go a long way towards fostering a new and more trusting relationship with audiences while at the same time increasing the accountability of individual journalists.

If the work of journalists is traceable to them, they can be held accountable for what they do and protected from the widespread practice of having their work altered beyond recognition or the work of other people credited to them without their knowledge or permission (Phillips 2010: 62).

They would also acquire greater protection from plagiarism (Phillips 2011: 144). In many of the emerging democracies plagiarism is rampant and regarded by journalists as one of the biggest threats to their ability to make an honest living but it is a serious issue in the UK as well. In the USA, plagiarism of the type that is endemic in the British news media (Phillips 2011: 144) is frowned upon as is the embellishment of stories with 'facts' that have been invented. This higher level of ethical practice operates without the need for legislation because a culture of professional practice has been fostered in Journalism schools and also in newspapers that (until quite recently) operated largely on a regional basis with very high profits and without significant competition.

In the British context, organisations may need the encouragement of a regulatory body in order to adopt these straightforward changes.

Transparent provenance

One of the most important aides to transparency and accountability is information about provenance. In other words, information about:

- where the content came from
- who created it, who published it
- when it was first published
- when it was last updated
- who changed it and what they changed.

In a fast moving news environment it will always be necessary for sub (copy) editors to re-write work and to piece together material from several sources but it is straightforward to capture the changed history of articles published online. Each time an article is republished it leaves a digital footprint of each of the changes made. These can be made visible to the reader, via a link, so that they only appear when the reader clicks on the change history icon. Digital publishing can also capture who made the changes and when (for a simple and effective demonstration of this see the Wikipedia 'change history' pages). This minor change, which would only be visible to those who looked for it, would have the effect of improving accountability with very little extra effort.

Once this information is available within the content, in a consistent and searchable fashion, it creates the foundations for proper transparency and accountability. Having such basic information integrated into content published online:

- Provides the public with consistent basic information about provenance of content
- Makes it possible to sort, search, select and distinguish discrete elements of information

This basic information allows readers to trace the history of an article, discover who wrote it, when it was originally written, how often it has been altered. This is very important data for those who might access the article at a later date. It is often impossible to tell whether a story is new or old or who wrote it. This has led to documented problems when outdated data is re-circulated as new information. Meta-data which remains with an article as it is re-used, will also help people to discover where a story started, thus enabling more efficient verification. It would also allow the original author to take credit for the work, even after it has been re-used elsewhere. Such embedded data will also allow individuals to trace re-use of their own work.

The public can be empowered to check the provenance and credibility of information themselves, and given tools that help them do this. There are already a number of metadata methodologies for capturing basic information that are in widespread use by news organisations, particularly in the US including:

hNews: a news microformat standard now in use by over 1,200 US news sites that embeds basic provenance metadata within each article published, including:

- Author
- Publisher
- Date/Time published

rNews: a linked data standard for those publishing in RDFa format, developed in part by the *New York Times* and now recommended by the IPTC (international news metadata standards body).

scheme.org: a standard developed and endorsed by Google, Bing and Yahoo.

However, no mainstream news organisations as yet provide change histories of articles and as a result it is hard to discover who is responsible for the content or an article and when it was originally produced. If an original observation is corrected later, it is usually impossible to trace the original version.

<u>Sourcing</u>

It is technically straightforward to link to sources online. All freely available content management systems enable simple linking. This practice builds trust by allowing readers to read back to original documents so that they can check information themselves. This in no way undermines the work of the journalist but merely demonstrates that they feel sure of their information and don't need to hide it. (There is no suggestion here that stories should link to confidential sources).

Analysis done in June and July 2011 by the Media Standards Trust (2011) showed that some UK news publishers have taken this opportunity and regularly link out. BBC news online, *The Guardian* and the *Financial Times* all regularly cite and link to sources. The online sites of the *Mail*, *Express* and *Sun*, as well as other national papers, rarely link outside their own sites and, when they do, it is often not to original sources but to their own stories or to sponsors. This finding has been replicated both in the UK (Redden and Witschge 2010) and internationally (Quandt 2008: 732)

Evolving best practice for online sourcing would not only help users to check the veracity of content more easily, but aid search engine optimisation, provide a clear line of accountability between original sources and reporting and allow journalists to take credit for their own 'scoops'.

Transparent Principles

Most professional news organisations adhere to a statement of principles. In the UK this is normally the Editors' Code of Practice, as overseen by the Press Complaints Commission. Individual news organisations often have their own principles statements. The Associated Press has its own 'News Values and Principles' as do other international news organisations.

In many countries, including the USA, each news outlet has its own newsroom Code of Practice to which staff must adhere (Cookson and Jempson 2004). In the UK, however, these statements are rarely easily accessible within the publication itself (in print or online), and more rarely still are the principles attached to the individual article itself. Yet this is where they would be most helpful. If, when a member of the public is reading an article, they can see on what principles—if any—the article was written, they can assess it according to those principles.

Making these principles accessible is as easy as embedding a link and then indicating that link in a consistent manner. In the case of the Associated Press the link is indicated by a small blue square with a 'P' at the top of each article. Click on this blue 'P' square and you go straight to the AP's statement of principles.

New technologies will, of course, emerge that enable even greater transparency and accountability than is already possible. However, if news publishers adopted even a small number of the methods outlined here, then the public would have much greater foundation on which to make its own judgments, and to respond if they wanted to.

Recommendations

- All news organisations should be obliged to provide a link at the bottom of all articles (alongside Twitter, Facebook, etc.) to the agreed ethical code providing information on rights of reply and complaints procedures. Print organisations should flag up the existence of this on-line information.
- The new Commission would provide expert help on technical innovations to improve transparency, develop an agreed code for the placement of right of reply and consult and recommend on new standards of transparency using meta-data.

4 Relationship with sources

Several studies in the last decade have charted the growth of the public relations industry, or media-oriented institutional leaders, and the close relations that have developed between powerful sources and journalists/owners (see Barnett and Gaber 2001, Jones 2002, Davis 2002, Cottle 2003, Miller and Dinan 2008, Davies 2008).

In an era when news is barely profitable, journalists have also become more dependent on the good will and 'information subsidies' supplied by large institutions. Source institutions, from politics, business, the police and elsewhere, have also become more media-oriented in their business and political strategies. This is most clear in the area of politics (Barnett and Gaber 2001, Franklin 2004, Wring 2005, Davis 2010). However, it has also been well documented in the areas of policing, crime and terrorism (Schlesinger and Tumber 1994, Thussu and Freedman 2003, Miller 2004), and also business and finance (Cassidy 2002, Doyle 2006, Davis 2007).

According to Davis (2007: 65-66): 'The financial journalists are very slowly being marginalised … you have to be very stubborn-minded to pursue an investigative story on your own. The companies don't like it, the PRs don't like it … The real scoop, as opposed to financial PR plants, is increasingly rare.'

At one level this means that the number of media relations specialists and PR experts employed by institutions has grown considerably. In 1979, the Ministry of Defence employed 58 information officers but, by 2006, that had risen to 230, an almost four-fold increase. The Home Office went from 27 to 145 staff, more than a five-fold increase. The Metropolitan Police went from 6 information officers in 1979 to 51 in 1999 (all figures in COI directories, 1979, 2006).

Second, a large proportion of those employed to run PR operations for institutions have recently moved from senior journalist posts to institutional source ones, without any preconditions being set. Alastair Campbell, Andy Coulson and Neil Wallis are obvious examples but there are many others. These revolving doors, at the higher levels of news media and institutions, result in a series of conflicts of interest. During the recent Select Committee hearings it was revealed that almost half the public affairs staff at the Metropolitan Police had previously worked for News International.

Such conflicts of interest have clearly hindered the ability of public institutions to hold each other to account. Both politicians and police officers have been reluctant to investigate wrong-doing in the news media (as the phone hacking scandal has amply demonstrated). Similarly, journalists are often strongly discouraged from investigating powerful sources for fear of a loss of information and access and, at the editorial/owner end, a loss of advertising and political fall-out. Equally significantly, such patterns and relations have resulted in certain public interest news areas being avoided and/or reported within very limited frameworks.

The reality is that most responsible news reporting is constructed out of journalists' exchanges with sources. Journalists do need to access (official and 'off the record') sources and build up relations with them in order to investigate and cover stories. Nevertheless the interdependency in many reporting sectors has come to hinder ethical and good journalist practice.

It is difficult to police such interaction without seriously impeding investigative journalism however, once a journalist has left the employ of a news organisation, in order to take up a public relations position, all financial relationships with the news organisation should cease immediately. It is clearly unethical for a public relations officer, employed by an organisation, to take money for stories or tip-offs.

Similarly, while there must remain a role for the whistle blower acting in the public interest, information they deliver should by definition be freely given in the public interest. More problematic is the sale of information which may be of interest to the public, or at least to publishers wishing to increase sales with sensational stories, but which owes its origin to a breach of trust—especially by public servants, such as police, prison and hospital staff, and local or central government staff. Even privatisation of previously public services does not free staff from their obligation to confidentiality. It is the journalist's job to ask questions and collect information, but not to wield a chequebook to encourage others to commit wrongdoing.

Recommendations:

- Journalists, once employed by other organisations, must not retain office space, receive payments or other inducements from their previous news employer
- Public servants should be barred from taking payment from journalists for any information related to their work unless they are themselves the author of the work and are credited for it.

5 Privacy

Article 8 of the European Convention on Human Rights states: 'Everyone has the right to their private and family life, their home and their correspondence.'

The arguments against any form of privacy law have always related to the viability of the press. Lord Woolf in *A v B and C* (the 2002 Gary Flitcroft case) noted that:

> Any interference with the press has to be justified because it inevitably has some effect on the ability of the press to perform its role in society. This is the position irrespective of whether a particular publication is in the public interest…the courts must not ignore the fact that if newspapers do not publish information which the public are interested in, there will be fewer newspapers published, which will not be in the public interest.

There is, however, a fundamental flaw in this argument, namely that the newspapers which devote the most space to scandal, devote the least to matters of genuine public interest. European law already recognises a clear 'public interest' defence against prosecution for privacy breaches and it would be even more important to build in protections for press freedom if penalties were to be increased to a level that would actually act as a deterrent to publication.

It needs to be stressed that, once an individual's privacy has been breached, no legal remedy on earth is capable of 'un-breaching' it. As things stand, those who cannot afford to take out a pre-emptive injunction to prevent press intrusion, have no chance of protecting their privacy. The only way to extend protection to them is to ensure that ethical codes and laws relating to the protection of privacy are obeyed by publishers.

'Red Top' newspapers make a great deal of money out of exposing people to ridicule and have repeatedly demonstrated that they are not in the least deterred by the relatively small fines currently levied by the courts in breaches of privacy cases. One way to enforce the law would be for penalties to be greatly increased so that they out-weigh the clear financial benefits of publication to the media organisations involved. They could, for example, in the worst cases, equal the heaviest fines levied by Ofcom for breaches of its Programme Code (for example, the £2m levied in 2007 on GMTV for cheating viewers who entered its premium-rate phone-in competition).

Any increase in penalties should be offset against greater protection for journalists who inadvertently breach the law, do so in the public interest, or who make clear and documented attempts to make amends. As the law stands, the courts are enjoined to: 'pay particular regard to any relevant privacy code'. Thus any public interest protection enshrined in a code of ethical behaviour for journalists must be taken into account when deciding a privacy case. One possible step forward, to protect those who are genuinely interested in 'the public interest' rather than things that are merely interesting to the public, would be to encourage publications to obtain 'prior advice' in cases where the balance of privacy/public interest was in doubt. Where prior advice had been sought it should be considered a defence against prosecution.

Recommendations

- The public interest defence should be clarified and enshrined in statute
- Breaches of privacy law should be subject to bigger fines but a defence of 'prior advice' or 'public interest' should also be recognised to protect press freedom
- Adjudications of the Ombudsman or News Tribunal (see below) would provide a defence against action in the higher courts.

6 A new regulator: the News Publishing Commission

The PCC has shown itself unwilling or unable to police standards or to protect journalists who are coerced into breaching the code. The case against the PCC has already been extensively aired by MediaWise (Cookson and Jempson 2004, MediaWise 2010) and the Media Standards Trust (2009) and we will not rehearse those arguments here.

There are arguments for extending the reach of Ofcom, the body that already successfully regulates the broadcast industries. MediaWise suggests that, in a converging world where journalists work across platforms, it may be wise to have a single regulatory system (MediaWise 2010). There are, however, important reasons why it might be wiser to keep them separate.

Broadcast, linear and time-based media, occupy a very particular space in the news spectrum (even when the broadcasts appear online). They offer one-way traffic of 'speech without response' (Baudrillard 1985). As such it is right that these extremely powerful media are bound by a regulatory demand that they should, as the Ofcom Broadcast Code puts it, 'ensure that news, in whatever form, is reported with due accuracy and presented with due impartiality.'

However, this regulation is unnecessary for interactive, non-linear publication, because on-line publication contains within it the means to offer a right of reply. Where there is a direct means of responding to harmful or inaccurate reports, licensing and regulation of content (which is required for broadcasting) would be burdensome and chilling. It would crush innovation, and prevent smaller organisations entering the market.

The biggest concern would be that, in attempting to force a marriage between these two different media forms, the arguments would go the other way. Instead of extending impartiality regulations to the internet (which would be totally unworkable), we would see a relaxing of the current regulatory regime for broadcasting so that impartiality would no longer be required. We have only to look to the USA and the rise of Fox News, to see what an unregulated broadcaster can do, commanding huge audiences that have little immediate access to alternative viewpoints.

Rather than extending the writ of Ofcom, it would be preferable to establish a commission that covers all non-broadcast publishing platforms. Where TV news channels provide websites they would still come under the code of their ultimate licensing body. All other publications would be accountable to a new News Publishing Commission (NPC) which would embrace both on and offline publications.

The NPC would incorporate much of the better work and practice offered by the PCC but it would have a wider remit and be capable of enforcing judgements. By joining the NPC, members would enjoy its protection. All complaints against publications would be directed through a two-track conciliation or arbitration system (see below for details) but, in return, members would be protected against further (and more onerous) court action (Tomlinson 2011). This would be similar to the system available to the construction industry (Brett 2011). It may also be useful (as the Media Trust has suggested), to make VAT exemption for print publications contingent on signing up to the News Publishing Commission as this would provide an additional incentive to sign up to the Commission and the Code..

The advantage of this system is that it makes it worthwhile for the vast majority of publications (on or off line) to be directly involved with upholding press ethics. In belonging to the commission they are offered its protection, but the protection requires them to abide by the code. This would immediately undermine the claim often made by the editors that the internet is unregulated and that it is unfair to force them to abide by even the most basic regulations because they will be undercut by the competition. The best rejoinder to this argument is to spread regulation, not to restrict it. An ethical news media and a statutory right of reply should be a basic right in a democracy and it is fair that every publisher, rich or poor, small or large, should be required to play by the same rules.

<u>How complaints would be handled</u>

A *News Commission Board* will be composed of members of the public, ordinary working journalists and editors, who must nominated by their trade body, union, or by relevant civil society organisations. This composition would work along similar lines to that successfully established by the Irish Press Council.

A *News Ombudsman*. The commission board would appoint an independent ombudsman who can operate as a first port of call for members of the public. The Ombudsman would deal with complaints from the public for all organisations affiliated to the commission and would be responsible for mediation and for enforcing the right of reply.

A *News Tribunal*. Where complainants are not satisfied with the decisions of the Ombudsman there would be a right to take the matter further. We suggest that an independent News Tribunal, constituted on the same basis as an employment tribunal, should be established (as suggested by Brett 2011). The tribunal would be drawn from panels representing journalists and the public and would sit with a legally trained chairperson. Members of the public would have the right to ask for a full adjudication and sanctions would involve the removal of offending material, a statement that must be linked to the original article and published in a prominent position, and limited powers to fine news organisations for persistent breaches and/or to offer compensation to complainants.

Fines and compensation: the Tribunal should have power to impose a graduated system of limited but significant fines in the case of repeated offences. The object would not be to price small organisations out of the marketplace, so fines would be ruled out where clear and serious attempts have been made to correct erroneous or unfair statements. Where compensation was set it would be limited to covering the reasonable cost of expenses incurred in pursuing a complaint.

Courts: None of the above would cut across the right of complainants to take court action but courts would be obliged to take account of actions taken at a lower level. Publications would themselves have the right to bring proceedings in a Tribunal in order to pre-empt court action by organisations seeking to injunct them. In the case of serious and persistent breaches, or where publications have ignored the rulings of the Tribunal or Commission, the courts should have the right to impose significant fines related to the turnover of the organisation involved. A clearly defined Public Interest defence, similar to that used by Ofcom in relation to broadcasting, should be drawn up as part of a specific law relating to Privacy and prior advice should be admissible as a defence in privacy cases.

<u>Funding</u>

The PCC is currently paid for via subscription and has a turnover of approximately £2 million whereas Ofcom is funded to the tune of £100 million. By extending membership to all publications the fee income would be somewhat increased but funding would not be sufficient to cover the Tribunals so public funding would be necessary (as outlined in CCMR's Funding Models document). It might be advisable to set the Tribunal up within the Courts and Tribunals Service in order to ensure that funding is provided on the same basis as for other tribunals.

Summary of Recommendations:

A Statutory Right of Reply:

1. Any person or organisation specifically mentioned who believes that they have been seriously misrepresented should have a right of reply. Print publications should provide a mistakes and clarifications section, where a right of reply can be summarised with a referral to the on-line version where it must be reproduced in full, without comment. This would normally be immediately below the offending article, as it appears online, at the top of the comments column.

2. In the case of a failure to offer a right of reply**,** where publications are members of the News Publishing Commission a complainant can take their case to the News Ombudsman (see below) for an adjudication (this would be a free service), the News Tribunal (see below) or to a court.

3. The action of a publication in providing a right of reply or the judgement of the News Ombudsman would be taken into consideration in mitigation as is currently the case under section 12.4 of the Human Rights Act.

The News Publishing Commission

4. A News Publishing Commission would be formed to replace the PCC. The commission's composition and duties are described below. They would incorporate much of the existing good practice of the PCC as well as having additional responsibilities.

5. *Membership of the Commission:* all publications are eligible for membership of and representation by, the Commission. All publications registered with the Commission would be eligible for VAT exemption. Any organisation withdrawing from the Commission would lose their VAT exemption. Organisations with a turnover of less than £50,000 (ie not VAT registered) would be eligible for free associate membership of the Commission. They would be able to make use of the Ombudsman's services and their members would be eligible to stand for tribunal panels and as members of the commission board (see below).

6. *Composition of the Board:* the Commission board will be composed of members of the public, ordinary working journalists and editors who must nominated by their trade body, union, or by relevant civil society organisations. This composition would work along similar lines to that successfully established by the Irish Press Council.

7. *The role of the Commission* would be to promote press freedom and to oversee and update a code of conduct and ensure that it is implemented. The Commission would have a number of other duties that are described below.

8. *Code of Ethical Practice*: the Commission would draw up a Code of Practice which would be based on the current PCC editors' code. The code would include a conscience clause allowing journalists to refuse to do work that is in breach of the code.

9. *Publication of ethical codes:* The Commission would mandate all publications to display the Code of Ethical Practice online, alongside information on right of reply, via a simple and visible button at the bottom of every article (alongside the Twitter and Facebook icons). An appropriate URL should also be included on the leader page of the print version of a publication and alongside the Corrections column.

10. *News Ombudsman:* The Commission board would appoint an independent Ombudsman who can operate as a first port of call for members of the public about right of reply or breaches of the code. The Ombudsman would have the power to demand an instant 'right of reply' at the top of the comment section of the relevant website within a specified time frame (hours rather than days). The right of reply would be of a specified length and contain a Commission logo to make it clear that a complaint had been made. The object would be to rectify any egregious abuse of power by news media as fast as possible in the hope that, in most cases, that would be the end of the matter. The secondary hope would be that news organisations rapidly institute their own 'right of reply' unit to avoid such a sanction.

11. *News Tribunals*: Operating on the same basis as employment tribunals, they would adjudicate on cases that are not resolved by the Ombudsman. The Tribunals would be constituted from a panel representing the media and a panel representing the public and would be chaired by a legally qualified person.

12. *Prior notification:* Under the PCC, where a news organisation is about to publish information which they know to be in breach of the privacy of an individual, they are encouraged to alert the Commission. If it is judged not to be in the public interest, the Commission may issue a 'desist' notice to that effect. If the publication were to go ahead under those circumstances, then the breach of such a notice would be taken into consideration in any future privacy action. The new Commission would operate a similar policy.

13. *Investigations on behalf of groups:* In the case of an article that clearly breaches the code of ethics, but does not impugn a particular named person, the Board would be empowered to investigate and, where appropriate, insist on a right of reply.

14. *Libel:* The use of the Ombudsman and the Right of Reply mechanism should be taken into account in libel cases as PCC adjudications are currently taken into consideration in privacy cases under the Human Rights Act. Where it is clear that the publication involved has made serious and immediate attempts to correct erroneous or unfair statements this should be used in mitigation in any future libel action. While there would be no attempt to prevent further legal action being taken, there should be a presumption that the courts would only be used if other avenues have failed. This should provide a useful *quid pro quo* for the news media who would stand to gain a great deal in freedom of expression in return for offering a fairer say to those who have been damaged.

15. *Privacy:* Breaches of privacy law should be subject to larger fines but a defence of 'prior advice' and 'public interest' should be clearly drafted and recognised, to protect press freedom.

16. *Transparency:* the Commission would provide expert help on technical innovations to improve transparency and would consult and recommend on new standards of transparency using meta-data.

17. *A whistle blowers code* should be established and the commission would be empowered to intercede on behalf of any journalist who feels pressurised into breaking the code.

18. *A harassment help-line* for those suffering press intrusion is one of the current examples of good practice which would be incorporated into the new organisation

19. *Funding*: Publications (on or off line) registered with the Commission would pay a levy based on their turnover. All registered news organisations would be able to apply for VAT exemption. Additional statutory funding would be required in recognition of the public service performed by the Commission.

Promoting Transparency

20. Journalists, once employed by other organisations, must not retain office space nor receive payments or other inducements from their previous news employer.

21. Public servants should be barred from receiving payment from journalists for any information related to their work unless they are themselves the author of the work and are credited for it.

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