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Joint Committee on Privacy
and Injunctions

Privacy and injunctions

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of evidence and appendices*

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The Joint Committee on Privacy and Injunctions

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References in footnotes to the Report are as follows:

Q refers to a question in oral evidence;

Witness names without a question reference refer to written evidence.

EXECUTIVE SUMMARY

A strong, free and vibrant press is essential to the good operation of democracy. Over the past 12 months, the culture and activities of the UK media have become the focus of widespread public concern, particularly in light of the phone hacking scandal. The balance between privacy and freedom of expression is at the heart of these debates about the role of the media.

We have considered how this balance should be struck, who should determine where the balance lies and how decisions, once taken, can be enforced. In making recommendations, we have been guided by the following—

- The fundamental right to freedom of expression lies at the heart of this debate.
- The right to privacy is equally important. It is universal and can only be breached if there is a public interest in doing so.
- Although definitions of public interest change from time to time, an overarching definition of public interest is the people's general welfare and well being; something in which the populace as a whole has a stake. It is not the same as that which is of interest to the public.
- We support the freedom of the press. The vitality of national and local media, in all its forms, is essential to the good operation of democracy.
- The rule of law in protecting the right to privacy should be upheld by all. If a judge has made a decision, based on hearing the full evidence in a case, that decision should be respected by those who have not heard all the evidence.
- Justice should be accessible to all. Protection of the right to privacy should not be available only to the wealthy few.
- The Press Complaints Commission was not equipped to deal with systemic and illegal invasions of privacy. A strong, independent media regulator is essential to balance the competing rights of privacy and freedom of expression.
- The law must apply equally to all forms of media: print, broadcast and online.

It is important that privacy injunctions are obtained in circumstances which justify the intervention of the law; injunctions should not be too freely or easily obtainable. Departures from the principle of open justice should be exceptional. We believe that courts are now striking a better balance when dealing with applications for privacy injunctions.

We conclude that a privacy statute would not clarify the law. The concepts of privacy and the public interest are not set in stone, and evolve over time. We conclude that the current approach, where judges balance the evidence and make a judgment on a case-by-case basis, provides the best mechanism for balancing article 8 and article 10 rights.

Interim injunctions granted in one of the legal jurisdictions in the United Kingdom should be enforceable in the other two UK jurisdictions in the same way as final injunctions are.

It is important that court orders apply to all forms of media equally. The growth of the internet and social networking platforms is a positive development for freedom

of expression, but new media cannot be seen to be outside the reach of the law. We recommend that the courts should be proactive in directing the claimant to serve notice on social networking platforms and major web publishers when granting injunctions. We also recommend that major corporations, such as Google, take practical steps to limit the potential for breaches of court orders through use of their products and, if they fail to do so, legislation should be introduced to force them to. An effective deterrent against future breaches of injunctions online would be for the Attorney General to be more willing to bring actions for civil contempt of court for such breaches.

If a newspaper is intending to publish a story which concerns the private life of an individual then the subject of the story should be notified in advance unless there are compelling reasons not to. Although this should not be a statutory requirement, it should be included in the media regulator's code of conduct. The courts, when awarding damages in privacy cases, should take into account any unjustified failure to pre-notify.

The ability to protect the right to privacy should not be available only to the wealthy few. We recommend measures to reduce the costs of privacy cases. These include more robust case management by judges and the consideration of cost capping.

The most important step towards improving protection of privacy is to provide for enhanced regulation of the media. We conclude that the Press Complaints Commission lacked the power, sanctions or independence necessary to be truly effective. The new regulator should be demonstrably independent of the industry and of government. It should be cost-free to complainants and should have access to a wider range of sanctions, including the power to fine and more power to require apologies to be published. Sanctions should be developed to ensure that all major news publishers, including digital publishers, come under its jurisdiction. The reformed regulator should develop an alternative dispute resolution process, to provide quicker, cheaper and easier resolution of privacy issues. A standing commission comprising members of both Houses of Parliament should be established to scrutinise industry-led reforms and to report on them to Parliament. However, should the industry fail to establish an independent regulator which commands public confidence, the Government should seriously consider establishing some form of statutory oversight. This could involve giving Ofcom or another body overall statutory responsibility for press regulation, the day-to-day running of which it could then devolve to a self-regulatory body.

Although freedom of speech in Parliament is a fundamental constitutional principle, we do not think that parliamentarians should reveal information subject to injunctions in Parliament unless there is a good reason to do so. We do not think some of the recent revelations of material subject to injunctions yet require a new parliamentary rule to prevent such disclosures; if such disclosures continue, then new rules should be considered. It is important that the media can be confident that they will be legally protected when reporting parliamentary proceedings in good faith. We therefore recommend that qualified privilege should apply to the reporting of all proceedings in Parliament.

Privacy and injunctions

CHAPTER 1: INTRODUCTION

1. In spring 2011, privacy injunctions were the focus of widespread, contentious media coverage. Tabloid newspapers, looking to publish stories about the alleged sexual behaviour of various celebrities, claimed that they had been “gagged” by “super-injunctions” obtained under privacy law, often referred to as “judge-made law”. At the same time, the privacy injunctions in question were being breached on social networking websites. Media coverage highlighted the apparent inequity of laws being applied to print and broadcast media which, it was suggested, could not be enforced in the same way against those publishing online.
2. It was against this backdrop that, on 23 May 2011, the Attorney General announced to the House of Commons that a joint committee would be established to consider the operation of the law concerning privacy and injunctions.¹ Our Committee was appointed in July 2011.
3. In this report we first briefly consider the evolution of the law on privacy, which has developed particularly since the Human Rights Act 1998. We then, in Chapter 3, examine whether the current laws on privacy and injunctions are working. In Chapter 4, we consider some specific issues relating to online enforcement, prior notification, damages and access to justice.
4. Our terms of reference required us to consider issues relating to media regulation. Since our committee was established, the phone hacking scandal has risen to the top of the media and political agenda, with the Leveson Inquiry starting its widespread examination of the culture, practice and ethics of the press in autumn 2011. Its work will continue after we have reported. We believe that the balance between privacy and freedom of expression goes to the heart of the current debates about journalism. In Chapter 5, we recommend changes to provide for a new system of media regulation which is better placed to strike this balance.
5. Finally, in Chapter 6, we look at the use of parliamentary privilege to reveal information subject to injunctions, and the reporting by the media of such revelations in Parliament.
6. In forming conclusions on these issues, we have been guided by the following—
 - The fundamental right to freedom of expression lies at the heart of this debate.
 - The right to privacy is equally important. It is universal and can only be breached if there is a public interest in doing so.
 - Although definitions of public interest change from time to time, an overarching definition of public interest is the people’s general welfare and well being; something in which the populace as a whole has a stake. It is not the same as that which is of interest to the public.

¹ HC Deb, 23 May 2011, cols 633–4.

- We support the freedom of the press. The vitality of national and local media, in all its forms, is essential to the good operation of democracy.
 - The rule of law in protecting the right to privacy should be upheld by all. If a judge has made a decision, based on hearing the full evidence in a case, that decision should be respected by those who have not heard all the evidence.
 - Justice should be accessible to all. Protection of the right to privacy should not be available only to the wealthy few.
 - The Press Complaints Commission was not equipped to deal with systemic and illegal invasions of privacy. A strong, independent form of media regulation is essential to balance the competing rights of privacy and freedom of expression.
 - The law must apply equally to all forms of media: print, broadcast and online.
7. We took evidence from a wide range of witnesses between October 2011 and February 2012, including editors, proprietors, regulators, broadcasters, privacy complainants, bloggers and social media organisations. We are grateful to all our witnesses. We have also been much assisted in our work by our specialist advisers: Professor Eric Barendt, Emeritus Professor of Media Law at University College London; Sir Charles Gray, former High Court judge who specialised in media work; and Paul Potts CBE, Visiting Professor of Journalism at Sheffield University and former chief executive of the Press Association. We thank them.

CHAPTER 2: THE EVOLUTION OF PRIVACY LAW

Privacy and freedom of expression as concepts

8. At the core of the issues covered in this report is how to strike the best balance between an individual's right to privacy and others' (including the media's) right to freedom of expression.
9. Privacy enables individuals to formulate ideas without public scrutiny; it allows people to remove their "public masks" and act differently in private; and it enables them to form intimate relationships, including the freedom to choose with whom they share their private thoughts. It is rooted in a belief in the dignity of the individual human being and the respect that is therefore due to the private sphere or space which belongs to them.
10. Freedom of expression is essential for discovering new truths and thus enabling social progress; it allows for the moral and cultural self-development of individuals; and it is necessary for the flourishing of a healthy democracy. Like privacy it is rooted in a belief in the worth of the individual. Both values are fundamental to democracy and European culture as it has developed, and are reflected in both our way of life and our laws.
11. Freedom of the press (and other media) is often equated with freedom of expression. They are not, however, identical. The press represents an important power block in society, and as such can represent money, vested interests and particular points of view. It sometimes speaks for those interests as well as for its readers. Sometimes, while purporting to defend freedom of expression, the press (or other media) might really be promoting its own commercial freedom. But it has a crucial role in informing the public and providing a platform for the discussion of political and social ideas. The existence of the press is both a form of freedom of expression and a contribution to preventing tyranny. Yet, because the press itself is a power block, it too needs checks on it—checks provided both by the freedom of the press itself in the form of other newspapers and media, and by the law.

Evolution of privacy laws prior to the Human Rights Act 1998

12. English law historically recognised no right to privacy *per se*.² In seeking to protect privacy claimants had to rely primarily on the law of breach of confidence, which allows for the protection of confidential information. Other areas of law which might protect privacy include trespass, nuisance, defamation and malicious falsehood.³

² MoJ and DCMS para 5. The absence of a right to privacy was in 1991 confirmed by the Court of Appeal in *Kaye v Robertson and Sports Newspapers Ltd* [1991] FSR 62 when Bingham LJ said that the "monstrous invasion of privacy" of the claimant did not entitle him to any relief in English law.

³ MoJ and DCMS para 6.

13. In addition, several statutes protect privacy in particular situations. These include the Protection from Harassment Act 1997,⁴ the Data Protection Act 1998⁵ and the Regulation of Investigatory Powers Act 2000.⁶

Privacy and freedom of expression in the Human Rights Act 1998

14. A general right to privacy was for the first time imported into English law by the Human Rights Act 1998. The Act made it unlawful for public authorities, including the courts, to act incompatibly with the articles of the European Convention on Human Rights scheduled to the Act. These include article 8, covering the right to privacy, and article 10, which for the first time brought into the English legal system an explicit right to freedom of expression.

BOX 1

Articles 8 and 10 of the European Convention on Human Rights

Article 8

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

Article 10

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

⁴ Which provides for a criminal offence of harassment and for a civil remedy, including the issuing of an injunction, if someone is harassed by a course of conduct.

⁵ Which implemented the EU Data Protection Directive (95/46/EC) and imposes controls on those who process data with the objective of ensuring the individual's right to control the storage and circulation of data about him- or herself. In January 2012 the European Commission published proposals for substantial reform of the Data Protection Directive. For more on the Data Protection Act 1998 please see the written evidence of Dr David Erdos, the principal investigator of the Data Protection and Open Society project based at the University of Oxford.

⁶ Which regulates the interception of communications, the acquisition and disclosure of data related to communications, the carrying out of surveillance and the decryption of electronic data. Alastair Brett, solicitor and media law consultant, appends to his written evidence a list of other statutes which prohibit disclosure of information.

15. It can be seen from paragraph (2) of article 8 that the right to privacy is qualified within the article itself. The right to freedom of expression in article 10 is also qualified within that article. More importantly, the rights contained in articles 8 and 10 will by their nature often come into conflict: one person's right freely to express details of a private matter may conflict with another's desire for that private matter not to be published. To deal with concerns about how the courts would approach this conflict in relation to applications for injunctions section 12 of the Human Rights Act 1998 was passed. Section 12 is covered in more detail in the next chapter.

Privacy and freedom of expression after the Human Rights Act 1998

16. Following the commencement of the Human Rights Act in October 2000 the courts began determining cases in which the parties sought to rely on the competing rights to privacy and freedom of expression. The law of confidence was adapted and a tort of misuse of private information gradually developed.⁷
17. There is now a two-stage test for determining cases where an infringement of the right to privacy is alleged—
- (1) The court must decide whether the information is in principle protected by article 8 in that the claimant has a “reasonable expectation of privacy” in respect of the information. If that is not so then the claimant's case fails.
 - (2) If there is a reasonable expectation of privacy, the court balances the article 8 rights of the claimant against the defendant's article 10 rights.⁸
18. In determining, for the purpose of the first stage, whether there is a reasonable expectation of privacy the court will take account of all the circumstances of the case.
19. Once a reasonable expectation of privacy is established, the court must consider the second stage, commonly referred to as the “balancing exercise”. Lord Steyn set out the approach—
- “First, neither article has *as such* precedence over the other. Secondly, where the values under the two articles are in conflict, an intense focus on the comparative importance of the specific rights being claimed in the individual case is necessary. Thirdly, the justifications for interfering with or restricting each right must be taken into account. Finally, the proportionality test must be applied to each.”⁹
20. The courts have not sought to give precedence to either article, but rather have looked closely at the facts of each case, and how the rights apply to them. They will take into account many factors in attributing relative weight to the competing claims. There are “different degrees of privacy”;¹⁰ the more intimate the aspect of private life which is engaged, the more serious the reasons must be for interference. Also relevant to the balancing exercise are

⁷ See, in particular, *A v B & C* [2002] EWCA Civ 337; and *Campbell v MGN* [2004] UKHL 22, which concerned a *Daily Mirror* story about the model Naomi Campbell attending Narcotics Anonymous meetings.

⁸ *Murray v Express Newspapers plc* [2008] 3 WLR 1360.

⁹ *Re S (A Child)* [2005] 1 AC 593 at [17].

¹⁰ *Campbell v MGN*, *op. cit.* at [118].

the level of detail and format of the publication and the value accorded by the individual to the privacy of the material.

Recent cases on privacy

21. Recent high-profile court cases have further developed the law of privacy. In January 2010 the then England football captain John Terry applied for an anonymised injunction against “persons unknown” in respect of an affair he allegedly had with the ex-girlfriend of a teammate. The injunction was not granted.¹¹ The judge held that notice of the injunction was not given to any newspaper when it should have been; that the information covered by the injunction was not considered particularly sensitive by the claimant as he had talked to the press about it; and that the primary objective of the claimant was to protect his commercial reputation rather than his privacy. In the furore surrounding the judgment John Terry was removed as England captain, with the then England manager making public statements about the responsibilities that came with the position. This case was seen by the press as the first step in redressing the lack of open justice when claimants bring privacy actions.
22. On 25 April 2010 the *Sunday Mirror* published an article under the headline “My Affair with England Captain Rio”. It contained an account of the footballer Rio Ferdinand’s relationship with Carly Storey over 13 years, including details of text messages exchanged in the months up to him becoming England captain in 2010 and whilst he was married with a child. The article recalled an interview in the *News of the World* in 2006 in which Rio Ferdinand had talked about being a reformed character and a “family man”. The *Sunday Mirror* article referred to the reasons why John Terry was removed as England captain and statements made by the then England manager about the captain being a role model. Ms Storey was paid £16,000 for the story.
23. Rio Ferdinand sued for breach of privacy. He lost, with the judge saying that “it was a “kiss and paid for telling” story, but stories may be in the public interest even if the reasons behind the informant providing the information are less than noble.”¹² The England captaincy was “a job that carried with it an expectation of high standards. In the views of many, the captain was expected to maintain those standards off, as well as on, the pitch.” In the interview with the *News of the World* the claimant “quite clearly wish[ed] to portray himself as a reformed character.” The interview was followed by an autobiography and other articles on the same theme.
24. In 2005 the European Court of Human Rights ruled that photographs of Princess Caroline of Monaco taken by German paparazzi in public places breached her privacy.¹³ It is unclear whether this decision would be followed in the United Kingdom in a comparable case. In February 2012, however, the European Court of Human Rights ruled¹⁴ that photos of her and her husband on a skiing holiday, published alongside an article about the health of her father Prince Rainier III of Monaco, did not infringe her privacy. The court held that the health of the reigning prince was a subject of general

¹¹ *Terry (previously referred to as “LNS”) v Persons Unknown* [2010] EWHC 119 (QB).

¹² *Rio Ferdinand v MGN Limited* [2011] EWHC 2454 (QB) at [84].

¹³ *Von Hannover v Germany* (2005) 40 EHRR 1.

¹⁴ *Von Hannover v Germany (no. 2)* [2012] ECHR 228.

interest and the press was entitled to report on “the manner in which his children reconciled their obligations of family solidarity with the legitimate needs of their private life, among which was the desire to go on holiday”.

Master of the Rolls’ Committee on Super-Injunctions

25. In April 2010, in response to the *Trafigura*¹⁵ and *Terry* cases amongst others, the Master of the Rolls, the Rt Hon Lord Neuberger of Abbotsbury, established a Committee on Super-Injunctions. Its report¹⁶ focused on the procedural aspects of the granting of injunctions and open justice. It did not deal with the substantive issues of how the balance between freedom of expression and the right to privacy should be struck, saying those were issues for Parliament and the courts.¹⁷
26. The report offered definitions of the terms “super-injunction” and “anonymised injunction”. The media tended (and to an extent still tend) to refer to an injunction where the names of either or both parties are anonymised as a “super-injunction”. The correct term for an injunction where the name of one or both parties is anonymised (typically letters are used to represent names) is an “anonymised injunction”. A “super-injunction” is an injunction which not only imposes a restraint on publishing certain information but also on disclosing the very existence of the injunction.
27. Aspects of the committee’s findings are commented on later in this report. A brief summary of some of the main findings is in Appendix 3.

¹⁵ The *Trafigura* injunction, obtained in autumn 2009, prevented the publication of a report on the alleged dumping of toxic waste in the Ivory Coast. Subsequently, a parliamentary question about the injunction was tabled. *Trafigura*’s solicitors, on learning of the question, informed the *Guardian* that it would be a breach of the injunction if the newspaper reported the question. The *Guardian* subsequently published a front-page story saying it was unable to publish a parliamentary question.

¹⁶ *Report of the Committee on Super-Injunctions: Super-Injunctions, Anonymised Injunctions and Open Justice*, May 2011.

¹⁷ *Ibid.*, p ii.

CHAPTER 3: IS THE LAW WORKING?

The balance between articles 8 and 10

28. The courts have interpreted articles 8 and 10 of the European Convention on Human Rights as being rights of equal standing; neither party bears a burden of proof to show that his or her right (privacy or freedom of expression) trumps the other. Cases in which both rights are engaged are decided following an intense focus on the facts of the case and how each right applies to those facts.
29. Some witnesses thought that the courts have given too much weight to the right to privacy in article 8, and insufficient weight to freedom of expression, especially as that right is exercised by the press. Witnesses from the press thought judges had become defenders of privacy and that their judgments had tilted towards that in recent years and months.¹⁸ It was thought that it had been too easy to get through the article 8 gateway and too hard to get through the article 10 gateway.¹⁹
30. Some witnesses thought that the balance may have previously tilted too far towards privacy, but that following recent judgments it had become more appropriately balanced.²⁰
31. The majority who commented on this point said that they thought the courts were striking the balance between the two rights correctly. The Lord Chancellor, the Rt Hon Kenneth Clarke QC MP, thought the balancing exercise had been about right,²¹ as did a number of other witnesses.²²
32. **We believe that the courts are now striking a better balance between the right to privacy and the right to freedom of expression, based on the facts of the individual case.**

A privacy statute

33. In recent years there have been suggestions that the courts are creating a privacy law “through the back door”. The point was made forcefully by Paul Dacre, Editor-in-Chief of Associated Newspapers, in 2008—

“inexorably, and insidiously, the British press is having a privacy law imposed on it, which—apart from allowing the corrupt and the crooked to sleep easily in their beds—is, I would argue, undermining the ability of mass-circulation newspapers to sell newspapers in an ever more difficult market.

The law is not coming from Parliament—no, that would smack of democracy—but from the arrogant and amoral judgements ...

¹⁸ QQ 889 and 892.

¹⁹ QQ 39, 49 and 1234.

²⁰ QQ 405 and 1234; Lord Lester of Herne Hill QC.

²¹ Q 1027.

²² For example, Hugh Tomlinson QC from Matrix Chambers in his written evidence and at Q 65; Alasdair Pepper from Carter-Ruck solicitors (Q 68); Schillings; Lewis Silkin LLP; the Law Society; Hugh Grant para 14; Paul Ashford, editorial director at Northern & Shell Network Ltd (Q 589); Professor Steven Barnett, Professor of Communications at Westminster University (Q 119); and Professor Brian Cathcart, Founder of Hacked Off and Professor of Journalism at Kingston University London (Q 119).

[of] Justice David Eady who has, again and again, under the privacy clause of the Human Rights Act, found against newspapers and their age-old freedom to expose the moral shortcomings of those in high places.”²³

34. The alternative to “judge-made” law suggested by some witnesses²⁴ is for Parliament to enact a privacy statute. That might help to counter such accusations by giving the law clear democratic authority. The Lord Chancellor said that the Government have an open mind about new legislation on privacy, but that clarity was needed as to what was meant by a statutory law of privacy.²⁵

A statute defining privacy

35. A statutory definition of privacy would have the advantage of perhaps creating more certainty in the law: editors might be able better to assess whether a proposed article is likely to infringe privacy or not; similarly, potential claimants may have a better chance of knowing whether they will be successful before proceeding to court. Time and money spent on going to court might be saved. Examples of what counts as private information could be listed in the statute, making the right to privacy more accessible. In addition, any defects in the current law could be corrected.
36. Any law that sought to define what is private would, in order to remain compliant with the European Convention on Human Rights, also have to set out that the right to privacy is balanced against the right to freedom of expression (and, potentially, other rights). There would then be pressure to spell out in more detail those rights and to define the public interest. There is a risk that definitions will not keep pace with developments in society. There is danger that any list will be treated as exhaustive, and so fail to cover information which should be protected as private.²⁶ Any list that purports to be exhaustive will imply that anything not in the list should not be covered. There would no doubt be litigation over the interpretation of the new provisions.²⁷
37. **We believe that any statutory definition of privacy would risk becoming outdated quickly, would not allow for flexibility on a case-by-case basis and would lead to even more litigation over its interpretation. For these reasons we do not recommend one.**

A statute reaffirming the right to privacy

38. It has been suggested that, while it would be extremely difficult to draw up a detailed legislative definition of privacy, there is value in a statute which

²³ Speech to the Society of Editors, 9 November 2008: <http://www.pressgazette.co.uk/story.asp?storycode=42394>. Mr Dacre repeated the suggestion at a seminar at the Leveson Inquiry on 12 October 2011, saying that “the Human Rights Act is resulting in the creation of a privacy law by judges”.

²⁴ Professor Julian Petley, Professor of Journalism and Screen Media at Brunel University and Chair of the Campaign for Press and Broadcasting Freedom (Q 405); Barnett (Q 119); Steve Coogan (Q 714); Max Mosley in his written evidence.

²⁵ Q 1031. Evgeny Lebedev, chairman of Independent Print Ltd and Evening Standard Ltd, also said there was a case for Parliament examining whether to have a new law (Q 1137).

²⁶ Q 519.

²⁷ Lewis Silkin LLP.

restates the right to privacy in broad terms, giving it the clear imprimatur of Parliament and thus the democratic process. No longer would elements of the media be able to rail against “judge-made law”, as it would have been endorsed by Parliament. If such a scheme were followed judges would still decide how to strike the balance in each case—the difference being that in so doing they would be interpreting a statute with clear and recent parliamentary approval.²⁸

39. However, the utility of going through the time-consuming process of legislating when it is not intended to change the substantive law could be questioned. The purpose of an Act of Parliament is to change the law; not to make a declaration. There would be the likelihood of satellite litigation on the effect of the new statute.²⁹
40. The laws around privacy already have statutory foundation. They have developed following the passing of the Human Rights Act 1998, which Parliament enacted in full knowledge that the common law would gradually develop a right to privacy in UK law.³⁰ During the passage of the Human Rights Bill through the House of Lords the then chairman of the Press Complaints Commission, the Rt Hon Lord Wakeham, moved an amendment which aimed “to stop the development of a common law of privacy”.³¹ The amendment was withdrawn. Replying to the debate on it the Lord Chancellor, the Rt Hon Lord Irvine of Lairg, said—

“I repeat my view that any privacy law developed by the judges will be a better law after incorporation of the convention because the judges will have to balance and have regard to articles 10 and 8, giving article 10 its due high value. What I have said is in accord with European jurisprudence.”³²

41. **We do not recommend a statute declaring in broad terms the right to privacy. We disagree with criticisms that privacy law has been “judge made” and does not have parliamentary authority; it has evolved from the Human Rights Act 1998.**

Determining the public interest in private lives

42. Defining the public interest is no easier than defining privacy. The concept of the public interest is mentioned in a number of statutes, including ones concerning privacy,³³ but there is no comprehensive statutory definition. Witnesses cited instances where the courts have considered there to be a public interest in disclosure in cases based on

²⁸ Max Mosley supported such legislation (Q 702), as did Hugh Tomlinson QC. Zac Goldsmith MP thought that the process of passing a privacy law would enable Parliament and the country to have a proper discussion about the issues (Q 714).

²⁹ Q 119.

³⁰ Andrew Marr; Schillings. The Law Society said, “Parliament already effectively enacted a statutory privacy law when it introduced the Human Rights Act 1998.”

³¹ HL Deb, 24 November 1997, col 772. In evidence to us Lord Wakeham suggested that both the Government of the day and the Conservative Opposition said they did not want to create a privacy law (Q 1).

³² *Ibid.*, col 785.

³³ For example, sections 58(7) (and other provisions) of the Regulation of Investigatory Powers Act 2000; section 31(3)(c) (and other provisions) of the Data Protection Act 1998. It is also referred to but left undefined in the draft Defamation Bill. By contrast, the Bribery Act 2010 contains no public interest defence, despite the Lord Chancellor being pressed to include one (Q 1025).

copyright, defamation and breach of confidence. The issues cited include the business of government and political conduct; the protection of public health and safety; the fair and proper administration of justice; the conduct of the police; cheating and corruption in sport; involvement in serious crimes; corporate malpractice; the sympathy of a public figure with extremist dogma; and the correction of prior statements or misrepresentations by others.³⁴

43. If a public interest can be demonstrated in the revelation of private information, that will often lead to the courts striking the balance in favour of freedom of expression in that case.³⁵

Guidance on the public interest in media codes

BOX 2

Press Complaints Commission guidance on the public interest

- (1) The public interest includes, but is not confined to:
- i) Detecting or exposing crime or serious impropriety.
 - ii) Protecting public health and safety.
 - iii) Preventing the public from being misled by an action or statement of an individual or organisation.
- (2) There is a public interest in freedom of expression itself.
- (3) Whenever the public interest is invoked, the PCC will require editors to demonstrate fully that they reasonably believed that publication, or journalistic activity undertaken with a view to publication, would be in the public interest and how, and with whom, that was established at the time.
- (4) The PCC will consider the extent to which material is already in the public domain, or will become so.
- (5) In cases involving children under 16, editors must demonstrate an exceptional public interest to over-ride the normally paramount interest of the child.

44. The Press Complaints Commission's Editors' Code of Practice's guidance on the public interest is in Box 2. The requirement in paragraph (3) for editors to demonstrate how and with whom they established that the public interest is invoked was added in December 2011.
45. The Ofcom Broadcasting Code also contains examples of what may be in the public interest as a defence to its clause on privacy. Privacy in television and radio programmes is protected under section 8 of the Broadcasting Code, the principle of which is to ensure that broadcasters avoid any unwarranted infringement of privacy in programmes and in connection with obtaining material included in programmes. The relevant provision, rule 8.1, is in Box 3.

³⁴ Scott. Lord Grabiner QC and Dr Kirsty Hughes of Cambridge University also cite cases where public interest arguments have succeeded and failed.

³⁵ The contribution which publication of information in an article would make to a debate of general interest was described as the "decisive factor" in balancing freedom of expression against privacy in *ETK v News Group Newspapers* [2011] EWCA Civ 439 at [23]. The European Court of Human Rights used similar language in the first *Von Hannover v Germany* (*op. cit.*, para 76).

BOX 3**Rule 8.1 of the Ofcom Broadcasting Code**

8.1 Any infringement of privacy in programmes, or in connection with obtaining material included in programmes, must be warranted.

Meaning of “warranted”:

In this section “warranted” has a particular meaning. It means that where broadcasters wish to justify an infringement of privacy as warranted, they should be able to demonstrate why in the particular circumstances of the case, it is warranted. If the reason is that it is in the public interest, then the broadcaster should be able to demonstrate that the public interest outweighs the right to privacy. Examples of public interest would include revealing or detecting crime, protecting public health or safety, exposing misleading claims made by individuals or organisations or disclosing incompetence that affects the public.

46. Neither the PCC nor the Ofcom codes’ definitions purport to be exhaustive. Both contain examples that are themselves open to interpretation. Both allow for the publication of material that may not itself demonstrably be in the public interest: the PCC’s code by way of the statement that “there is a public interest in freedom of expression itself”;³⁶ the Ofcom code by allowing a broadcaster to justify material as “warranted” on grounds other than because it is in the public interest.

Defining the public interest

47. Most witnesses who favoured a statutory privacy law favoured a statutory definition of the public interest, to be included as part of the same law.³⁷ Some thought that a definition could easily be drawn from existing codes that tend to differ in length and scale rather than substance, such as the BBC Editorial Guidelines, the Ofcom Broadcasting Code and the Press Complaints Commission’s Editors’ Code of Practice.³⁸ A statutory definition could aide clarity and enable Parliament to set out what constitutes the public interest.³⁹ It would give greater certainty to individuals and the media, and potentially head off litigation.
48. Similarly, most witnesses who were against a privacy law were not in favour of a statutory definition of the public interest.⁴⁰ The arguments against them are largely the same: that any definition would either be so rigid that it could not keep pace with social mores or so loose as to make it almost meaningless;⁴¹ that the current interpretation of the public interest used by

³⁶ Described by Professor Steven Barnett as “weasel words ... a get-out clause for essentially anything you want to publish” (Q 143). Steven Abell, then Director of the PCC, thought the words did not seek to create a “trump card” for freedom of expression, and that to cite that clause and say “everything is therefore fair game ... would be ridiculous” (Q 777).

³⁷ For example, Tomlinson; Lebedev (Q 1137).

³⁸ Barnett.

³⁹ Q 700.

⁴⁰ For example, the Media Standards Trust; the Society of Editors; Lester.

⁴¹ Berrymans Lace Mawer LLP.

the courts is adequate and reasonably clear;⁴² that cases would still have to be determined by judges based on the specific facts;⁴³ and that any new definition is likely to lead to satellite litigation.⁴⁴

49. The worst excesses of the press have stemmed from the fact that the public interest test has been too elastic and has all too often meant what newspaper editors want it to mean. We heard that both Ofcom and the BBC Trust use more detailed definitions of the public interest and apply their public interest test with greater consistency.⁴⁵ We believe that all relevant regulatory bodies should now adopt a common definition of what is meant by the public interest that should be reviewed and updated regularly.
50. **We do not recommend a statutory definition of the public interest, as the decision of where the public interest lies in a particular case is a matter of judgment, and is best taken by the courts in privacy cases. As an alternative, we expect the reformed media regulator, in conjunction with other regulators, to publish clear guidelines as to what constitutes the public interest, and to update them where necessary.**

Injunctions and section 12 of the Human Rights Act 1998

51. Interim injunctions are an important remedy in privacy actions, since once information is public, its private nature cannot be restored; it is not possible to undo a breach of privacy. Preventing a story appearing in the first place will usually be more important to a claimant than obtaining damages after the event. The situation can be contrasted with defamation, where injunctions are virtually impossible to obtain⁴⁶ and where a claimant's reputation may be vindicated by an award of damages, unless the defendant proves the truth of the defamatory allegations or succeeds with some other defence.
52. The conflict between articles 8 and 10 was of concern during the passage of the Human Rights Bill in 1997–98. There was speculation about how the courts might interpret the right to privacy without further guidance. In particular, there were concerns that the courts might be too ready to grant claimants injunctions to prevent publication of a story which the claimant alleges infringes their right to privacy. There was unease about the effect on the media if injunctions were too readily obtainable, leading to the media not pursuing stories which may be in the public interest for fear of having an injunction issued on them. In response the Government introduced what became section 12 of the Human Rights Act 1998. The text of section 12 is in Box 4.

⁴² Lewis Silkin LLP.

⁴³ Grabiner and Hughes.

⁴⁴ Q 296; Channel 5.

⁴⁵ QQ 273 and 773.

⁴⁶ The rule in *Bonnard v Perryman* provides that an interim injunction will not be granted unless it is clear that no defence will succeed at trial.

BOX 4**Section 12 of the Human Rights Act 1998****12 Freedom of expression**

- (1) This section applies if a court is considering whether to grant any relief which, if granted, might affect the exercise of the Convention right to freedom of expression.
- (2) If the person against whom the application for relief is made (“the respondent”) is neither present nor represented, no such relief is to be granted unless the court is satisfied—
 - (a) that the applicant has taken all practicable steps to notify the respondent; or
 - (b) that there are compelling reasons why the respondent should not be notified.
- (3) No such relief is to be granted so as to restrain publication before trial unless the court is satisfied that the applicant is likely to establish that publication should not be allowed.
- (4) The court must have particular regard to the importance of the Convention right to freedom of expression and, where the proceedings relate to material which the respondent claims, or which appears to the court, to be journalistic, literary or artistic material (or to conduct connected with such material), to—
 - (a) the extent to which—
 - (i) the material has, or is about to, become available to the public; or
 - (ii) it is, or would be, in the public interest for the material to be published;
 - (b) any relevant privacy code.
- (5) In this section—
 “court” includes a tribunal; and
 “relief” includes any remedy or order (other than in criminal proceedings).

53. Section 12 has four features: subsection (2) seeks to ensure that defendants are notified of an application for an injunction (and thus can be represented at the hearing) unless there are compelling reasons not to. Subsection (3) requires the court to be satisfied that the claimant will establish at full trial that the right to privacy outweighs the freedom of expression in publishing. Subsection (4) requires the court to “have particular regard to the importance of the Convention right to freedom of expression”. Finally, subsection (4)(b) requires the court to have regard to “any relevant privacy code”. In a case concerning a newspaper this can mean the Press Complaints Commission’s Editors’ Code of Practice.

Requirement to have “particular regard to the importance of freedom of expression”

54. Subsection (4) of section 12 (was thought by some to make clear that freedom of expression should normally take precedence over the right to privacy.⁴⁷ Some witnesses were disappointed this had not happened in practice.⁴⁸

⁴⁷ Society of Editors; QQ 890 and 908.

⁴⁸ Q 2.

55. Others thought that it was never intended to have any real meaning.⁴⁹ Professor Gavin Phillipson of Durham Law School, Durham University, thought it did not attempt to establish priority for freedom of expression; had Parliament wished to do that it would have used more explicit language. Rather, he suggested that it made more sense to read it as requiring judges to give as much weight to freedom of expression as the Convention itself allows.⁵⁰
56. Section 12 has to be interpreted in the light of section 3 of the Human Rights Act 1998, which requires that so far as possible primary legislation, including the Human Rights Act itself, has to be interpreted compatibly with Convention rights. Therefore, as the Convention rights in articles 8 and 10 are of equal weight, section 12 has to be interpreted in accordance with that principle. Sir Stephen Sedley, a former Court of Appeal judge, said that section 12 requires the courts to have “particular regard”; “it does not say “overriding regard”. The courts have had particular regard, in fact, to all the Convention rights when they have applied them.”⁵¹
57. Some witnesses thought section 12(4) an “anomaly” because it sought to create an imbalance between the two rights⁵² and advocated its removal.⁵³ Other witnesses thought that it was appropriately balanced and was being correctly applied.⁵⁴ The Rt Hon Jack Straw MP, Home Secretary during the passage of the Human Rights Bill, said “there was never any question” that section 12 would give the courts a trump card in respect of one article over the other.⁵⁵
58. David Price QC said “If the purpose of section 12 was to give the benefit of the doubt to freedom of expression it has certainly failed.”⁵⁶ However, if that was the purpose it would arguably be incompatible with the jurisprudence on the articles, which states that the two have equal weight.
59. **We do not think that section 12(4) of the Human Rights Act 1998, in requiring the courts to “have particular regard to the importance of the Convention right to freedom of expression” when considering whether to grant any relief, means that article 10 has precedence over article 8. The practical effect of the claimant satisfying section 12(3) (see below) means that article 8 does not have precedence over article 10. However, we support the decision of Parliament to make clear in law the fundamental importance of freedom of expression and would be concerned that removing section 12(4) might suggest that this is no longer the case. We do not recommend any alteration to the law in this area.**

Courts’ willingness to grant injunctions

60. Section 12(3) requires the courts to grant interim injunctions only when “satisfied that the applicant is likely to establish that publication should not

⁴⁹ Q 119.

⁵⁰ Phillipson.

⁵¹ Q 3. Section 13 of the Human Rights Act 1998 requires the courts to have “particular regard to the importance” of the right to freedom of thought, conscience and religion when determining any question which might affect the exercise by a religious organisation of that right.

⁵² Barnett; Petley.

⁵³ Petley.

⁵⁴ Carter-Ruck para 20; Berrymans Lace Mawer LLP; Tomlinson; Lewis Silkin; Schillings; Mosley.

⁵⁵ Q 2.

⁵⁶ Q 50.

be allowed.” The courts have interpreted this as meaning that the applicant will usually have to demonstrate that they are “more likely than not” to succeed at trial.⁵⁷ That is a higher threshold than in hearings for interim injunctions in respect of other causes of action.⁵⁸ In introducing the amendment that became section 12 Jack Straw MP said that “it is intended overall to ensure *ex parte* injunctions are granted only in exceptional circumstances. Even where both parties are represented, we expect that injunctions will continue to be rare, as they are at present.”⁵⁹

61. Some witnesses thought the courts had been too willing to grant injunctions, especially anonymised or super-injunctions, or had granted them in the wrong circumstances. The Newspaper Society was “strongly concerned by the growth in the use and application” of them as they had “directly affected regional media coverage of issues of legitimate public interest.”⁶⁰
62. By contrast, other witnesses thought they were not granted excessively or lightly.⁶¹ Withers LLP thought the media created the impression “that they are handed out by judges as if they were sweets from a sweet shop.”⁶² Witnesses cited the media tendency to report all privacy injunctions, or at least all anonymised injunctions, as “super-injunctions”.⁶³ Such descriptions do not match those proposed by the Master of the Rolls’ committee.⁶⁴
63. The Master of the Rolls’ committee stated that since the *Terry* case in early 2010 only two super-injunctions had been granted to protect private information, so far as they were aware. The committee sought to tighten up procedures for granting anonymised and super-injunctions, ensuring they were granted only when strictly necessary; requiring that they be kept under review, with a date set for the case to return to court; recommending that Practice Guidance be issued on the approach to them;⁶⁵ and requiring that when they are issued they are recorded and the data on them collated.⁶⁶ The committee also said that “anyone aware of a case where a super-injunction was granted without a return date, and/or where the proceedings have not been pursued, should raise the issue with the applicant’s solicitors”.⁶⁷ Since the publication of the Master of the Rolls’ committee’s report in May 2011 there appears to be less public concern about the prevalence of injunctions.
64. **Departures from the principle of open justice should be exceptional and should only happen when they are essential. We strongly welcome the arrangements made by the Master of the Rolls to monitor and publish figures on the number of anonymised and super-injunctions granted and the circumstances in which they are granted.**

⁵⁷ *Cream Holdings v Banerjee* [2004] UKHL 44.

⁵⁸ *American Cyanamid Co v Ethicon Ltd* [1975] AC 396.

⁵⁹ HC Deb, 2 July 1998, col 536.

⁶⁰ Newspaper Society para 1.

⁶¹ Carter-Ruck; Dr Andrew Scott; Schillings; Tomlinson.

⁶² Withers LLP.

⁶³ Phillipson.

⁶⁴ See Chapter 1.

⁶⁵ Practice Guidance was issued by the Master of the Rolls with effect from 1 August 2011.

⁶⁶ Practice Direction 51F provides for a pilot scheme for the recording of data relating to non-disclosure injunctions with effect from 1 August 2011.

⁶⁷ *Op. cit.*, p v.

65. **We recommend that super-injunctions and anonymised injunctions that were granted before the Master of the Rolls' committee's report and are still in force are reviewed by the courts to ensure they are still necessary and are compatible with that committee's conclusions on open justice. Those reviews should be prompted by the courts writing to the parties concerned. Once reviewed figures on them should be published.**

Effects of injunctions upon individuals

66. Many injunctions have been taken out by celebrities, largely because they are more able to afford them than most people.⁶⁸ The press are often the defendants to injunctions, or at least are served with them. However, there can be other parties to injunctions: individuals who are enjoined by an injunction not to discuss private information.
67. We heard evidence about the effect an injunction can have on such individuals. Alex Hall, the ex-wife of TV presenter Jeremy Clarkson, spoke about how “terrified” she was when she received an email with a 20-page injunction that had been obtained by her ex-husband against her.⁶⁹ She had no idea what an injunction was and had been given no notice of the application for one, even though section 12(2) of the Human Rights Act 1998 requires the claimant to notify other parties to the claim of their intention to seek an injunction unless there are “compelling reasons” not to notify.⁷⁰ She felt prevented from approaching publishers⁷¹ about the material subject to the injunction; that meant there was no possibility of her obtaining advice from a publisher's legal team.⁷²
68. There are also concerns that super-injunctions can impede individuals from gaining access to funding for legal representation and from reporting malpractice or criminality to the relevant authorities.
69. **When an injunction is granted the court should consider fully its effect on individuals restrained by the injunction, such as the effect on their ability to seek legal advice or funding for legal representation, or to report relevant matters to the authorities. Guidance on this should form part of the Practice Guidance issued by the Master of the Rolls.**

Cross-border enforcement of injunctions within the United Kingdom

70. The United Kingdom has three separate legal systems: those of England and Wales, Northern Ireland and Scotland. Section 18(5)(d) of the Civil Jurisdiction and Judgments Act 1982 provides that an interim measure (including an injunction) obtained in one of the UK's jurisdictions is not enforceable in the other jurisdictions. Thus, an interim injunction obtained in the High Court in London is not enforceable in Scotland or Northern Ireland; separate orders would have to be obtained from those jurisdictions. However, final injunctions granted in one jurisdiction in the UK can be enforced in the other jurisdictions, by virtue of that same Act.

⁶⁸ The costs of bringing and defending privacy actions are discussed in the next chapter.

⁶⁹ Q 1672.

⁷⁰ Q 1629.

⁷¹ “The injunction was in respect of a book Alex Hall proposed to write.”

⁷² QQ 1695–7.

71. This issue arose in the Ryan Giggs case,⁷³ where in the absence of a Scottish interim injunction (an interdict) the claimant’s identity was published in the *Sunday Herald*, a Scottish newspaper, on 22 May 2011. The editor of that newspaper said that they had not breached the interim injunction because it did not apply in Scotland.⁷⁴
72. The Attorney General did not think there was a problem with cross-border enforcement; because separate legal systems are a fundamental part of the UK’s national make-up, there was no way around the issue.⁷⁵ Others thought that the issue undermined respect for the law.⁷⁶
73. Witnesses drew attention to the cost of applying for an injunction in up to three separate jurisdictions.⁷⁷ It was suggested that a streamlined system for registering English interim injunctions in Scotland may assist.⁷⁸
74. **We recommend that interim injunctions granted in one jurisdiction in the United Kingdom are enforceable in the other two jurisdictions in the same way as final injunctions are.**

Privacy, celebrities and public figures

75. An argument often advanced in the media is that certain individuals—particularly celebrities, sportsmen and politicians—make a living out of publicity and therefore should not be able to pick and choose when the media report on their private lives.⁷⁹ It is argued that some people open their private life to the media when it suits them (e.g. in order to promote a new film or album), so should not complain when other aspects of their private life are reported on. Other people by the nature of their work or position find themselves in the public eye, so should expect there to be interest in their private lives.
76. Marcus Partington, Deputy Secretary/Group Legal Director at Trinity Mirror plc, thought there were categories of people who had less privacy rights than others, and that this was recognised by the judiciary and in the PCC code.⁸⁰ He pointed to the J K Rowling case, where a photograph was taken of her son. She had deliberately decided not to put him in the public domain; the court upheld his right to privacy but said the position would be different if she had decided otherwise. Richard Wallace, editor of the *Daily Mirror*, said that there were gradients of privacy and exposure to publicity that needed to be accounted for. He compared J K Rowling with Katie Price—aka Jordan—who “regularly commoditises” her privacy and that of her children.⁸¹ Max Clifford, founder of Max Clifford Associates, agreed, citing the same example—

“You have to look at every situation on its own merits. A celebrity or a star who uses every means to promote themselves and their private lives

⁷³ *CTB v News Group Newspapers Ltd and Imogen Thomas* [2011] EWHC 1232 (QB).

⁷⁴ Q 223.

⁷⁵ Q 1086.

⁷⁶ Society of Editors; Lawyers for Media Standards.

⁷⁷ Law Society; Schillings.

⁷⁸ Law Society; Carter-Ruck.

⁷⁹ Chartered Institute for Journalists.

⁸⁰ Q 1242.

⁸¹ QQ 1251 and 1257.

to the public as part of their career—someone like Katie Price—does not deserve the same protection as a star who generally tries to keep his or her private life out of the media.”⁸²

77. Some thought an individual did not waive their right to privacy by occupying a public role, but could have a reduced expectation of privacy if, for example, they parade their family before the cameras or invite magazine photographers into their homes.⁸³
78. Other witnesses stressed the importance of there being a universal right to privacy which is respected by the media. It should be a firmly established principle that article 8 applies to everyone, whether or not they are public figures.⁸⁴ However, it is largely accepted that there is a public interest in exposing hypocrisy if the creation of a false image enabled the individual to benefit financially or obtain a post they might otherwise not have.⁸⁵
79. Linked to the issue of disclosure of details of celebrities’ private lives is the question of whether the courts are giving appropriate weight to the value of freedom of expression in celebrity gossip. The courts have held that there is a scale of freedom of expression, with political expression at the top end to pornography or the right of blackmailers to freedom of speech at the bottom.⁸⁶ The comments of the Rt Hon Baroness Hale of Richmond about “the most vapid tittle-tattle about the activities of footballers’ wives and girlfriends [which interest] large sections of the public but [in which] no-one could claim any real public interest in our being told all about it”⁸⁷ suggests that gossip is towards the bottom of the scale.
80. **We believe that those who actively seek publicity, especially for gain, should accept that this will mean enhanced interest in their private lives by the media. This should not, however, mean that they sacrifice all rights to privacy. The degree of public exposure of an individual, and the extent to which they have sought it and gained from it, are relevant factors for the courts to take into account in determining a privacy claim. This will depend on the facts of the particular case.**
81. **We reject the view that because an individual exposes his or her children to publicity the children become fair game for the media. We believe that parents who expose their children to public gaze for their own commercial gain or publicity are irresponsible and make it harder for them to defend their children’s right to privacy in other circumstances. However, even in those instances there must be exceptional reasons for it to be in the public interest for the media to publish information affecting the privacy of children.**

Commercial viability of the press

82. As gossip in newspapers can help sales and thus enable journalism to continue to perform its essential role in a democracy, it might follow that the commercial viability of the press should be a factor when balancing the

⁸² Q 1470.

⁸³ Tomlinson; Q 48.

⁸⁴ Barnett.

⁸⁵ Mosley; Marr.

⁸⁶ Tomlinson.

⁸⁷ *Jameel v Wall Street Journal Europe Sprl* [2006] UKHL 44 at [147].

- public interest in a story against an individual's right to privacy. If newspapers do not exist they cannot report on issues obviously in the public interest. This is a line of reasoning that has been acknowledged in some cases. For example, the Rt Hon Lord Woolf when Lord Chief Justice stated that "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".⁸⁸ Baroness Hale of Richmond has said that "one reason why press freedom is so important is that we need newspapers to sell in order to ensure that we still have newspapers at all".⁸⁹
83. The Chartered Institute for Journalists said that the commercial viability of newspapers should be taken into account "because good investigative journalism is expensive and has to be funded in some way."⁹⁰ Others agreed, observing that the UK press was financially independent from the state and thereby not at risk of state control by way of penalties or withdrawal of state funds. The press therefore relied on revenues from sales and advertising, which required the widest possible circulation.⁹¹
84. Other witnesses did not think the commercial viability of the press was a valid factor in determining the public interest in stories. Max Mosley thought that it should never be a consideration as "the idea of breaching someone's privacy, with all the pain this can cause, for commercial gain is abhorrent and inhumane."⁹² Schillings said that "The press would also be more "commercially viable" if (to give an extreme example) it had to pay no corporation tax, or could renege on an unprofitable contractual obligation."⁹³ Others thought that the newspapers which devoted most space to scandal devoted least to matters of genuine public interest.⁹⁴
85. Representatives of newspapers stressed that privacy was a factor they took seriously in considering whether to publish a story.⁹⁵ They did not claim that the financial situation of the press should give them *carte blanche* to publish what they like.⁹⁶ Some newspapers argued that if they started to publish lurid or excessively intrusive material that would put off their readers, and therefore worsen their financial situation.⁹⁷
86. Other witnesses did not think privacy issues played as prominent a role in editorial decision making in some newspapers as it should. Max Clifford said that the "British public desperately need protection from the excesses of the

⁸⁸ *A v B plc and C* [2002] EWCA Civ 337 at [11(xii)]. However in *McKennitt v Ash* [2008] QB 73 at [62] the Court of Appeal held that Lord Woolf's statements in *A v B plc* cannot be reconciled with the decision of the European Court of Human Rights in the first *Von Hannover v Germany* (*op. cit.*) and so "cannot be read as any sort of binding authority on the content of articles 8 and 10" (at [64]).

⁸⁹ *Campbell v MGN* (*op. cit.*) at [143]. Lester cites other judicial commentary on the matter at paras 34 to 36.

⁹⁰ Chartered Institute for Journalists.

⁹¹ Newspaper Society para 30.

⁹² Mosley.

⁹³ Schillings.

⁹⁴ Petley.

⁹⁵ Q 851 (Viscount Rothermere, chairman, Daily Mail & General Trust plc); Q 1275 (Richard Wallace, editor, *Daily Mirror*).

⁹⁶ Q 271 (Matt McKenzie, editor, *The Sunday Sun*); Q 893 (Peter Wright, editor, *The Mail on Sunday*).

⁹⁷ Q 605 (Paul Ashford, editorial director, Northern & Shell Network Ltd); Q 215 (Alastair Machray, editor, *Liverpool Echo*).

media”.⁹⁸ Witnesses suggested that the majority of privacy cases are uncontested by newspapers.⁹⁹ Whilst the costs of doing so will be a factor, the implication could be that newspapers do not think they have a strong enough defence.

87. We heard conflicting views about the role of proprietors and boards in ensuring privacy is respected through the culture and corporate governance arrangements of newspapers. Evgeny Lebedev, chairman of Independent Print Ltd and Evening Standard Ltd, felt that proprietors should take an active role in ensuring that news publishers uphold high standards;¹⁰⁰ other proprietors and boards were reluctant to be seen to be interfering in the editorial process.¹⁰¹
88. Few newspapers consist solely of serious news stories. Most of them rely, to varying degrees, on some form of light-hearted reportage or gossip. It may not be easy to present a clear explanation as to why such articles are of themselves in the public interest, but it can be argued that without them readership of newspapers would decline even further.¹⁰²
89. **The media play a vital role in furthering public debate, exposing wrongdoing and enhancing democracy. Whilst there is clearly demand for scandal and gossip, this should not stray into intrusion into people’s private lives without good reason. Chief executives and boards of holding companies should take responsibility for ensuring that news publishers uphold high standards, with processes for protecting privacy firmly adhered to.**

⁹⁸ Q 1495.

⁹⁹ Tomlinson (Q 66); Mr Justice Tugendhat (Q 487).

¹⁰⁰ Q 1110.

¹⁰¹ Q 876.

¹⁰² Barnett.

CHAPTER 4: IMPROVING PROTECTION OF PRIVACY

90. There are a series of distinct areas in which the current operation of the law could be further improved. We discuss these in this chapter.

Online enforcement

91. New and digital media present many challenges for enforcing and maintaining privacy injunctions. Injunctions, where appropriately granted, are necessary to protect individual privacy; indeed, they are often the only means of protecting it. If injunctions are to provide adequate protection, it is essential that there are no avoidable barriers to their enforcement. The Giggs case, and other cases, demonstrate that steps should be taken to limit the capacity for online breaches.
92. New media have greatly increased the range and availability of information sources; in addition, technological developments have allowed citizens to become “publishers”. Anyone can make his or her views known to the world, or can break their own news. This has obvious benefits for freedom of expression—the role of Twitter in fostering the exchange of ideas and the organisational capability that led to the Arab Spring, for example, is widely documented. At the same time, the internet is also acknowledged to have had far-reaching effects on individual privacy.
93. The removal of the traditional publisher’s role of “gatekeeper” gives everyone, through new media, the opportunity to disseminate information, and to express their views. Views on privacy, on the boundaries of private life, and on the nature of the public interest are not universally shared. The internet allows those who have competing views to give effect to them, and to publish information which would not ordinarily be published in traditional media.
94. The global nature of the internet also poses jurisdictional challenges, as much of the material accessed from the United Kingdom is published on servers hosted in foreign domains. We heard from UK-based bloggers whose blogs are physically hosted in the United States, in order to benefit from First Amendment protections there.¹⁰³ This is done in order to protect the blog against legal action in the UK which, whilst still possible, would become more difficult and expensive as a result of the overseas hosting.¹⁰⁴
95. Max Mosley explained how, since his successful privacy action against the *News of the World*, he had sought to remove videos which breached his privacy from the internet, which required repeated action in numerous different jurisdictions. He had spent over £500,000 on actions in 23 different countries to try to remove offending material from the internet.¹⁰⁵ Nonetheless the offending material can still be found on the web.
96. The proliferation of online media outlets increases the possibility for injunctions to be breached, and offers the potential for injuncted information to be spread quickly around the world. The challenges posed to injunctions were demonstrated in May 2011 when the Giggs injunction was broken by at

¹⁰³ Q 398.

¹⁰⁴ QQ 398–400.

¹⁰⁵ Q 731.

least one Twitter user and the information repeated as many as 75,000 times. Whilst there are unlikely to be easy solutions to this problem, we have considered a number of practical steps which can be taken to limit the potential for online breaches of privacy and privacy injunctions.

Contempt of court

97. Mainstream newspapers are invariably served with the terms of injunctions granted against newspapers and so usually take care not to breach them.¹⁰⁶ Individuals who reveal information subject to an injunction usually have not been served with it. However, if they publish injuncted information online knowing there is an injunction in place, in principle they run the risk of being held to be in contempt of court.¹⁰⁷
98. The onus for bringing contempt proceedings in privacy cases lies with the party who sought the injunction in the first place. This is as it should be; having requested the injunction it is primarily for the claimant to enforce it. However, for reasons of cost and practicality claimants are unlikely to pursue every breach of an injunction on the internet. Moreover, an action for contempt of court will add to the publicity about the case, which after all concerns a matter the claimant considers private.
99. There can be difficulties in bringing action in respect of breaches of injunctions online. In the main, these difficulties are due to the cross-jurisdictional nature of the internet, as well as the capacity for anonymous posting from internet service providers which do not easily identify their end-user. However, these difficulties are not always insurmountable.
100. Action can be taken to determine the identity of individuals behind Twitter accounts, and Twitter will hand over the information of account holders when presented with a valid court order.¹⁰⁸ Personal data cannot otherwise be handed over without risk of breaching data protection law. Action has been taken against identifiable Twitter users in a number of recent cases including, for example, prosecutions for racist abuse and hoax bomb threats. Action has also been taken against Facebook users recently, for example, for incitement to riot. The internet is not, therefore, ungoverned by the law, or without enforcement options.
101. Information obtained from content platforms such as these might not always easily identify the end-user responsible for publishing breaches. In addition, action taken to obtain such disclosures of information will add to the cost of the injunctive process, as would any subsequent action for contempt of court.
102. Proceedings for civil contempt of court (the vast majority of proceedings concerning privacy injunctions will be civil claims) can also be brought by the Attorney General in his role as Guardian of the Public Interest. The Attorney General, the Rt Hon Dominic Grieve QC MP, said this is a “reserve power” which would be used only in exceptional circumstances as he is not a party to the proceedings and will not normally have knowledge of individual cases.¹⁰⁹

¹⁰⁶ Though we have heard evidence about “jigsaw identification” by publishers whereby a story about an anonymised injunction is juxtaposed with pictures of or a story about the individual who is thought to have obtained the injunction, so as to give a strong impression to the reader of who has obtained the injunction.

¹⁰⁷ Q 1078.

¹⁰⁸ Q 107–10.

¹⁰⁹ Q 1070.

103. Whilst not wishing to spend public funds on enforcing civil litigation as a matter of course, the Attorney General said that he might consider bringing proceedings in exceptional circumstances, where there is a clear public interest in doing so and where it is unlikely that anybody else would initiate such proceedings. The examples he gave of when that might happen were if a breach of a civil order was endangering somebody's life, seriously endangering their welfare or if there was a "systematic conspiracy ... to undermine the ability of the civil courts to carry out their work."¹¹⁰ It was suggested that the single most effective measure for enforcing an injunction which had been widely flouted would be for the Attorney General to bring an action for contempt.¹¹¹
104. **We believe the Attorney General should be more willing to exercise his power as Guardian of the Public Interest to bring actions for civil contempt of court in respect of breaches of injunctions online. The threshold for him intervening should be lower. Such action would provide a strong deterrent against future such breaches.**

Notice and take down

105. Internet access providers, hosting providers, content platforms and publishers¹¹² typically operate on a notice and take-down basis. That is, they take down illegal material once they have been notified by a complainant that the material is, for example, defamatory or breaches copyright, otherwise they may be exposed to liability. The same principle applies to material infringing privacy. Companies managing information publication and distribution on a global basis might not always know whether or not information breaches the law in a particular jurisdiction. They therefore await notice from a court or other official entity before reactively taking down prohibited material.
106. Such an approach allows compliance with court orders, whilst also complying with the European Electronic Commerce Directive¹¹³ and preventing internet service providers (ISPs) from having to vet content on the internet.¹¹⁴ Witnesses representing ISPs and social networks were clear they would remove infringing content if they were to receive a notice alerting them to it.¹¹⁵ Wikipedia pages can be amended by anyone, and are governed by a community with well-developed policies and guidelines,¹¹⁶ including compliance with the site's local law in Florida—though we heard evidence that the process is not perfect.¹¹⁷
107. Notice and take down is not without difficulties, mainly because of jurisdictional issues.¹¹⁸ Paul Staines hosts the Guido Fawkes blog in the United States. While hosting in the US may provide some protection for the

¹¹⁰ Q 1070.

¹¹¹ Q 117.

¹¹² For explanations of these terms see the evidence of Nicholas Lansman, secretary general of the Internet Service Providers Association (Q 557).

¹¹³ 2000/31/EC.

¹¹⁴ Q 565.

¹¹⁵ QQ 566–7 and 1436.

¹¹⁶ Q 575.

¹¹⁷ Cohen; Kolbe and Buckner.

¹¹⁸ Q 567.

content on the website owing to the First Amendment, the individual authors and publishers of material can still be subject to the jurisdiction of UK courts. The Attorney General suggested that action might be possible, for example, against an individual blogging in the United States, in defiance of court orders, who subsequently visited the United Kingdom.¹¹⁹

108. A new Twitter policy allows the company to filter content on an “in-country” basis. Upon receipt of a court order or notice from an “authorised entity”, Twitter can selectively block content in one country, whilst leaving it available to users in other parts of the world.¹²⁰ But a careful balance must be struck between protecting privacy and freedom, and Britain should only participate very reluctantly in any restriction on the freedom to communicate over the internet, which is proving such a vital weapon against dictatorship. The “Chilling Effects” website will keep a log of all tweets restricted; viewers in the country where it is blocked will see a grey box displayed in place of the tweet. The intention is to allow Twitter to remain compliant with the law in the domains in which it operates, whilst also providing transparency around the way in which the new policy is operating.¹²¹ In oral evidence to the Leveson Inquiry Twitter appeared to suggest that a ruling from the Press Complaints Commission, as currently established, would not trigger Twitter to remove a tweet.¹²²
109. **We recommend that, when granting an injunction, courts should be proactive in directing the claimant to serve notice on internet content platforms, such as Twitter and Facebook. Beyond that, claimants in privacy cases should make full use of notice and take-down procedures operated by responsible internet service and social media providers, who should also seek to disseminate best practice and discourage illegality amongst users and other providers.**

The role of search engines

110. A weakness of notice and take-down procedures is that some content providers and hosting companies may require separate notice for each individual offending item. In cases where there are many offending items, obtaining such notices could well become a costly and time-consuming procedure.
111. Max Mosley explained the difficulties he had faced in trying to press Google to remove offending pictures from its image search facility—
- “Every time an obscure, tiny site in the Andes puts it up, you have to put your lawyers into action to take it down. We had a very high-level meeting with Google in which I said, “Here are the pictures. We know which ones they are. Simply programme your search engine so they don’t appear.” That is demonstrably technically feasible. They refused to do it as a matter of principle.”¹²³
112. In response Daphne Keller, Associate General Counsel at Google, said—

¹¹⁹ Q 1077.

¹²⁰ Q 1418.

¹²¹ Q 1447.

¹²² 7 February 2012.

¹²³ Q 739.

“We do not have a mechanism that finds duplicates of pictures or text and makes them disappear from our Web Search results. As a policy matter, I do not think that would be a good idea, simply because an algorithm or a computer programme that tried to do something like that would not have the ability that a judge does or any person does to see the context, to see if a particular phrase is actually appearing in a news report or in political commentary.”¹²⁴

113. Ms Keller acknowledged that it might be technically possible to develop algorithms that allow Google to filter in the manner suggested by Mr Mosley in future, but argued that this would not be desirable from a policy point of view, as it would require Google as an intermediary proactively to monitor content on the internet.¹²⁵ In addition, she said the European Court of Justice in *Scarlet v SABAM*¹²⁶ had ruled that pro-active monitoring was not required under the Electronic Commerce Directive, and an attempt to require them pro-actively to monitor may not be consistent with the Directive.¹²⁷
114. **Where an individual has obtained a clear court order that certain material infringes their privacy and so should not be published we do not find it acceptable that he or she should have to return to court repeatedly in order to remove the same material from internet searches.**
115. **Google acknowledged that it was possible to develop the technology proactively to monitor websites for such material in order that the material does not appear in the results of searches. We find their objections in principle to developing such technology totally unconvincing. Google and other search engines should take steps to ensure that their websites are not used as vehicles to breach the law and should actively develop and use such technology. We recommend that if legislation is necessary to require them to do so it should be introduced.**

Limiting the circulation of injunction notices

116. In order to appear online, information breaching an injunction may originate from someone who has knowledge of the injunction. At present, it would be difficult to know who the source of the “leak” might be—the options could include a friend of either party, the parties themselves, those involved in the legal process, notified media parties and a multitude of others.
117. Steps could be taken to limit the distribution of injunction notices and consequently limit the number of people who know of an injunction. When issued with an injunction, media bodies will internally distribute it, in order that the injunction is not breached. Circulation of the notice within newsrooms could be limited to senior editors and the legal department.¹²⁸
118. Measures which help to restrict knowledge of injuncted material are to be welcomed, as they reduce the potential for breaches at a later date. We

¹²⁴ Q 1403.

¹²⁵ Q 1421–2.

¹²⁶ Case C-70/10.

¹²⁷ Q 1409.

¹²⁸ Q 106; Schillings; Grabiner and Hughes.

understand, however, that a certain level of knowledge is required in each newsroom in order to ensure that an injunction is not inadvertently breached.

119. **When issued with an injunction, media organisations should only circulate the notice to those employees who have authority to publish. An up-to-date list of these individuals should be maintained by each organisation, and made available to the court upon request.**

Remedies

120. Once privacy has been breached, it can be difficult to provide a satisfactory remedy, as it is not possible to make the information “private” again. For this reason most individuals would prefer to prevent a breach of privacy occurring in the first place. Injunctions are, of course, one means of doing this; mediation and arbitration may provide another (this is discussed further in the next chapter). Other remedies are available to the courts when someone’s privacy has already been infringed.

Prior notification

121. Some witnesses argued that when a newspaper plans to write about something which concerns a person’s privacy, there should be a legal requirement to inform that person, so that he or she has the opportunity, if appropriate, to seek to prevent its publication, perhaps by obtaining an injunction.¹²⁹ This is known as “prior notification”.
122. Max Mosley took a case to the European Court of Human Rights claiming that his article 8 right to privacy was infringed by the failure of the UK government to require by law prior notification where a story concerns intimate or sexual details about someone’s private life. In May 2011 the Court found that the European Convention on Human Rights did not oblige such a measure, and said that compulsory prior notification would be unworkable and have a disproportionate “chilling effect” on the media.¹³⁰
123. We heard widespread support for prior notification becoming a requirement for editors intending to run a story which compromises an individual’s private life.¹³¹ As with other civil actions, the primary remedy once an individual’s privacy has been breached is damages. It was suggested that a failure to pre-notify could be considered to be a factor which might justify an award of aggravated damages when they are subsequently assessed by a court.¹³²
124. At present claimants seeking a privacy injunction are required by section 12(2) of the Human Rights Act 1998 to notify other parties to the claim of their intention unless there are “compelling reasons” not to notify. It might be considered ironic that such notification is required by the individual, but a newspaper is not required to notify an individual when it intends to publish something about that person’s private life.¹³³

¹²⁹ QQ 697 and 707.

¹³⁰ *Mosley v United Kingdom* [2011] ECHR 774.

¹³¹ Q 708.

¹³² Carter-Ruck.

¹³³ Q 102.

125. Prior notification is, however, the norm across the newspaper industry. We heard that the times when prior notification is not given are “minuscule”.¹³⁴ The reasons for not providing prior notification could include preventing the “tipping off” of criminals, and reducing the risk that the story in question might be run by another newspaper.¹³⁵ Clearly, in some cases, such as the criminal cases cited by newspapers, there is a public interest in not providing prior notification, though the risk of being “scooped” by a rival publication does not seem to us a relevant public interest consideration.¹³⁶
126. It was suggested that a requirement for prior notification should be contained in the Press Complaints Commission’s Editors’ Code of Practice.¹³⁷ Such a measure was recommended by the House of Commons Culture, Media and Sport Committee in its 2010 report *Press standards, privacy and libel*, which expressed surprise that prior notification was nowhere mentioned in the Code.¹³⁸
127. **We reject the case for a statutory requirement to pre-notify. However, the reformed media regulator’s code of practice must include a requirement that journalists should notify the subject of articles that may constitute an intrusion into privacy prior to publication, unless there are compelling reasons not to.**
128. **If a complaint is made to the new regulator about an individual’s right to privacy having been infringed and that individual was not given prior notification of the story, the publication should be required to explain why they did not do so. If it was because it was in the public interest not to, the publication should state how, and with whom, the public interest was established at the time.**
129. **Courts should take account of any unjustified failure to pre-notify when assessing damages in any subsequent proceedings for breach of article 8.**

Level of damages and exemplary damages

130. The *News of the World* was required to pay Max Mosley damages of £60,000, along with a proportion of Mr Mosley’s legal costs. This was the largest sum ever paid out in a privacy claim.¹³⁹ Naomi Campbell was awarded damages of £3,500 for her successful privacy claim; Michael Douglas and Catherine Zeta Jones £14,600.¹⁴⁰ These sums are small in comparison to awards in other fields of civil law, notably defamation. Mr Mosley was still left significantly out of pocket despite the success of his legal case.¹⁴¹

¹³⁴ Q 1262.

¹³⁵ QQ 1262–5 and 1561–2.

¹³⁶ Scott.

¹³⁷ Brett.

¹³⁸ Culture, Media and Sport Committee, 2nd Report (2009–10): *Press standards, privacy and libel* (HC 362-I), paras 91 to 93.

¹³⁹ Mosley.

¹⁴⁰ *Douglas v Hello Ltd* [2005] EWCA Civ 595 at [25]. This comprised only £3,750 each solely for breach of privacy. £7,000 was awarded between them for the cost and inconvenience of hurriedly making a selection of authorised photos for *OK!* magazine, and nominal damages of £50 each were awarded for infringement of the Data Protection Act 1998.

¹⁴¹ Q 733.

131. Some witnesses suggested that exemplary damages should be able to be awarded in privacy cases.¹⁴² Such damages would not necessarily reflect the harm caused to the claimant, but would be set at such a high level as to deter future privacy breaches. It is doubtful, however, whether on the present law the courts have the power to award exemplary damages for misuse of private information.¹⁴³
132. We heard concerns that the award of exemplary damages might limit the capacity of newspapers to contest a legal action when they believed that they had a clear public interest defence. The threat of exemplary damages could make newspapers, particularly local and regional newspapers, cautious about contesting a case.¹⁴⁴ This would negatively affect their ability to pursue investigative journalism. Moreover, awards of exemplary damages depart from the normal principle that damages should compensate the claimant and not punish the defendant—though they may be awarded in defamation cases.
133. In February 2012, in deciding not to grant an injunction in respect of information about Jonathan Spelman, son of the Secretary of State for Environment, Food and Rural Affairs, the Rt Hon Caroline Spelman MP, Mr Justice Tugendhat suggested that damages awarded in earlier privacy cases, such as Naomi Campbell's, should not be assumed to reflect the limit of the court's powers. He referred to the amounts involved in recent settlements of phone hacking cases.
134. **Whilst damages for breaches of privacy are never as good as preventing the breach in the first place, the maximum level of damages that has been awarded is too low to act as a real deterrent. We recommend that the courts should have the power to award exemplary damages in privacy cases, if necessary by giving the courts that power through legislation. In deciding whether to award exemplary damages the courts should take into account the financial situation of the media organisation concerned.**

Costs and access to justice

135. The costs of bringing and defending privacy actions are both too high. They have largely increased as a result of case law, with increasing amounts of information being required of applicants and respondents. In addition, due to the nature of the matters at hand, and impending publication deadlines, applications are usually drafted and heard at the last minute, which further increases costs.¹⁴⁵
136. For claimants, it is apparent that legal redress is beyond the means of most ordinary citizens. Max Mosley spent £510,000 on legal fees on his case.¹⁴⁶ Keith Mathieson, a partner at Reynolds Porter Chamberlain, estimated the minimum cost of obtaining an interim injunction would be £15,000 to £25,000—more depending on the degree of opposition to it. It costs a lot more to take a privacy case to full trial; he said that Rio Ferdinand's costs in his case were about £270,000 or £280,000.¹⁴⁷

¹⁴² Grabiner and Hughes; Petley; Carter-Ruck.

¹⁴³ *Mosley v NGN* [2008] EWHC 1777.

¹⁴⁴ Newspaper Society; Chartered Institute of Journalists; Society of Editors.

¹⁴⁵ Law Society.

¹⁴⁶ Q 733.

¹⁴⁷ Q 42.

137. The legal costs for respondents can also be significant. Ian Hislop, editor of *Private Eye*, estimated they had spent £350,000 defending one case, and £75,000 on challenging the super-injunction obtained by Andrew Marr.¹⁴⁸ Mirror Group newspapers spent £160,000 defending Rio Ferdinand's case.¹⁴⁹
138. Excessive costs limit the ability of newspapers and broadcasters to respond to threatened legal action and can result in them not challenging an injunction on the ground of cost alone.¹⁵⁰
139. Whilst it is ultimately the approaches taken by the parties to a claim that determines costs, a number of measures can be taken to reduce costs when claims come to court. These include robust case management from judges, limiting the number of hearings and dealing with arguments on paper.¹⁵¹
140. There is a power under the Civil Procedure Rules to cost cap. We heard that a practice direction states that the power should only be used in exceptional cases, meaning it is hardly ever used. The practice direction could be removed to allow for more liberal use of cost capping, for both claimants and defendants.¹⁵²
141. **The costs of a privacy action are prohibitive to many possible claimants, and can also act to stifle the freedom of the press. Judges and legal representatives must take all possible steps to manage costs more effectively. In particular, we recommend that the practice direction which limits cost capping to exceptional cases should be removed for privacy actions.**

Conditional fee agreements

142. Conditional fee agreements (CFAs) allow cases to be pursued on a “no win, no fee” basis. Most commonly, the claimant is legally represented on the basis that if he or she does not win the case they pay no legal fees. If they win a “success fee” is payable in addition to the normal fees. Often insurance is taken out to cover the costs. CFAs have been used by both claimants and defendants in privacy cases.
143. The Government are proposing significant changes to CFAs in the Legal Aid, Sentencing and Punishment of Offenders Bill, which has been proceeding through Parliament during our inquiry. Because the two Houses have been examining the Bill closely, and because CFAs apply in many areas of law other than privacy, we have not sought extensive evidence on them. However, we here offer some general conclusions based on the evidence of how they have been used in privacy cases.
144. Whilst CFAs are of limited use in seeking injunctions, they are often utilised by clients of limited means who are looking to take post-publication privacy action.¹⁵³ They are also used by defendants; Alex Hall explained how, eventually, she had been able to defend her case once she had entered into a conditional fee agreement with a specialist solicitor.¹⁵⁴

¹⁴⁸ Q 196.

¹⁴⁹ Q 42.

¹⁵⁰ Chartered Institute of Journalists; Society of Editors; Newspaper Society; BBC.

¹⁵¹ Carter-Ruck.

¹⁵² QQ 1249–50.

¹⁵³ QQ 78–80.

¹⁵⁴ QQ 1677–81.

145. For newspapers, CFAs increased the likelihood that they would be placed at risk of legal action. This might be considered to affect newspapers' right to freedom of expression, both in terms of not publishing investigative articles which risk provoking litigation, and of settling claims which they would otherwise defend, due to the fear of excessive costs being incurred.¹⁵⁵
146. CFAs are defended because they provide a mechanism for people of limited means to exercise their privacy rights. Concern was expressed that the reforms currently proposed by the Government in this area were likely to leave access to justice "significantly curtailed".¹⁵⁶
147. **Access to justice is essential for those whose privacy is infringed. Conditional fee agreements have provided people of limited means with the ability to take action when their right to privacy has been infringed; they have also been used by defendants in privacy cases. We have not sought to enter the wider debate on the future of CFAs, but stress that following the reforms to them it is important that access to justice is maintained for all citizens when seeking to protect their right to privacy.**

Better regulation

148. Most known privacy cases involve wealthy figures, who are often in the public eye. That perhaps is predictable, as these are the types of individuals whom newspapers wish to write about, and the types of person who can afford to go to court to protect their privacy.¹⁵⁷ However, the impact of a privacy invasion for those who are not in the public eye can be just as severe.
149. If individuals who have suffered, or might suffer, an invasion of privacy do not have the means for recourse to legal action, it is essential that there are other avenues for redress available to them. There is a case for a reformed media regulator to play a much greater role in protecting privacy.¹⁵⁸
150. **Many individuals cannot seek redress for a breach of privacy because the legal costs are beyond their means. It is essential that a reformed media regulator provides an alternative route, which is cost free, to prevent and redress breaches of privacy.**
151. The following chapter discusses in more detail how a reformed regulator can do that.

¹⁵⁵ Foot Anstey.

¹⁵⁶ Supplementary evidence from Pepper.

¹⁵⁷ QQ 42 and 76.

¹⁵⁸ Media Standards Trust.

CHAPTER 5: BETTER REGULATION OF NEWS PUBLICATIONS

152. A key part of the process of ensuring the correct balance is struck between privacy and freedom of expression, and of ensuring that where injunctions are granted they are upheld, is played by the media themselves. Often it is the decisions of editors on whether to publish a story that are argued in court; and the media who are parties to injunctions. To prevent cases going to court it is in their interests to have robust procedures in place to ensure individuals' rights to privacy are respected, and that where they rely on the public interest in justifying publication of a story there is sound evidence for that.

The Press Complaints Commission

153. The Press Complaints Commission (PCC) was established by the industry in 1991. The Commission has 17 members: 10 lay members¹⁵⁹ and seven editors. The PCC is funded by newspapers and magazines paying an annual levy to the Press Standards Board of Finance (Pressbof). The chair of the PCC is appointed by Pressbof. During our inquiry the Rt Hon Lord Hunt of Wirral was appointed as chair of the PCC.
154. The PCC has two main functions. The first is to maintain and promote the Editors' Code of Practice, which is written and revised by the Editors' Code Committee. The Committee comprises editors of national, regional and local newspapers, alongside the chair and director of the PCC (though the chair of the Commission is not chair of the Editors' Code Committee). The second function is to deal with complaints from members of the public about potential breaches of the Code by newspapers and magazines.
155. Clause 3 of the Editors' Code of Practice is about privacy (see Box 5). Other clauses, such as those relating to intrusion into grief and harassment, also have privacy aspects to them. Clause 3, and other privacy-related clauses, are subject to exceptions where they can be demonstrated to be in the public interest. The Code's guidance on the public interest is in Box 2 in Chapter 3.

BOX 5

PCC Editors' Code of Practice clause on privacy

3. 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 consent. Account will be taken of the complainant's own public disclosures of information.
- iii) It is unacceptable to photograph individuals in private places without their consent.

Note—Private places are public or private property where there is a reasonable expectation of privacy.

¹⁵⁹ Lay members are appointed by a nominations committee of the Press Complaints Commission, comprising three lay members and an independent assessor who monitors the process.

156. The PCC is not a statutory body. The Government have no control over its powers, procedures or membership. There are no legal means of enforcing its rulings or compelling membership. Rather, its remit is given to it by the industry.

The need for reform of the PCC

157. On 13 July 2011 the Prime Minister announced that an independent public inquiry, led by the Rt Hon Lord Justice Leveson, would be set up to consider the culture, practice and ethics of the press. This followed ongoing revelations about phone hacking at the *News of the World*. In setting out the remit of the inquiry, the Prime Minister said—

“He [Lord Justice Leveson] will make recommendations for a new, more effective way of regulating the press—one that supports its freedom, plurality and independence from Government, but which also demands the highest ethical and professional standards.”¹⁶⁰

158. It is expected that Lord Justice Leveson will report on the first half of his inquiry in autumn 2012.
159. It is almost universally recognised that the system of oversight or regulation of the press needs major reform. It was a point repeatedly recognised by our witnesses.¹⁶¹ The PCC recognises the pressure for it to change.¹⁶² In March 2012, shortly before we reported, its chair announced that the PCC had agreed to disband, to be replaced by a successor body. In this chapter we consider how privacy issues are managed by the PCC, and offer recommendations on how the future system of regulation can best be equipped to provide protection of privacy and redress when it is infringed.
160. **The Press Complaints Commission was not equipped to deal with systemic and illegal invasions of privacy. In this chapter we set out what a reformed media regulator should look like and do.**

Privacy and the PCC

161. Witnesses from the press offered a strong defence of the PCC. Arguments in its favour include the fact it is well known to the public and its services are well used.¹⁶³ It was suggested that the vast majority of the PCC’s work goes unseen, except to the public who are involved in cases with the PCC and to the press. The PCC’s role in arbitration was said to be effective.¹⁶⁴
162. Several editors of regional newspapers explained that they used the PCC for pre-publication advice, on an informal basis, on privacy issues.¹⁶⁵ Regional newspapers viewed it as a mark of shame to have a PCC ruling against them, and would do everything possible to avoid one.¹⁶⁶ They also explained that

¹⁶⁰ HC Deb, 13 July 2011, col 312.

¹⁶¹ For example, Professor Steven Barnett said that the PCC has “completely failed as a regulator, as a self-regulator.” (Q 136)

¹⁶² Q 1594.

¹⁶³ Newspaper Society.

¹⁶⁴ Q 228.

¹⁶⁵ QQ 211–2 and 228.

¹⁶⁶ Q 226.

they were not typically interested in the “celebrity” privacy stories which have been the subject of much of the debate in this area.¹⁶⁷

163. However, a significant body of opinion believes that the PCC ineffectively deals with privacy issues. This increases the likelihood of legal options being pursued. For some individuals, legal options are not affordable; a better regulatory provision is therefore required.
164. **The reformed media regulator needs to play a leading role in resolving privacy complaints. For this to happen, the regulator needs to have recourse to far more effective and timely sanctions than the PCC has. It needs to be, and be seen to be, independent of the newspaper industry. All major news publishers, including online publishers, should come under its jurisdiction. These views inform our subsequent recommendations.**

Independent regulation

165. The PCC is perceived as not independent of the press.
166. At the start of 2011 Northern & Shell Ltd, which owns the *Express* and *Star* newspapers, withdrew from the PCC. This technically happened by it ceasing to pay subscriptions to Pressbof. Since then its newspapers have no longer been regulated by the PCC. One of the main reasons behind their decision to withdraw was their lack of confidence in the independence of adjudications. Richard Desmond, chairman of Northern & Shell, suggested that some members of the PCC were “hypocritical” and that Northern & Shell had been unfairly singled out for criticism by competitors.¹⁶⁸ *Private Eye* has also not subscribed to the PCC, partly because it views it as lacking independence.¹⁶⁹
167. There is a strong argument for the industry having high-level representation on any new regulatory body. Knowledge and experience of the industry is important for any new regulator. One suggestion was to divide the whole concept of the Press Complaints Commission into two sections, the section that makes the rules and the section that enforces them. There would be no objection to an editor being on the part that makes the rules, but the part that enforces them should be entirely independent.¹⁷⁰
168. Lord Hunt of Wirral outlined to us his emerging proposals for reform of the PCC. In addition to the complaints-handling function currently undertaken by the Commission, a second standards or compliance arm would be added, proactively to uphold standards across the industry. Where severe breaches of the Code were found to have occurred, it would be possible for the Commission to issue fines against publications.¹⁷¹
169. The management board of the new commission would have an independent majority but, Lord Hunt suggested, would still need close knowledge of the industry.¹⁷² The board would comprise around five people, three of them

¹⁶⁷ Q 210.

¹⁶⁸ Q 623.

¹⁶⁹ *Private Eye* para 1.

¹⁷⁰ Q 720.

¹⁷¹ Q 1617.

¹⁷² Q 1618.

independent of the industry. The complaints-handling function of the Commission would be delivered in much the same way as at present.

170. **We believe that the reformed media regulator must be demonstrably independent of the industry and of government.**
171. **Knowledge of the industry, however, will be essential to the good operation of the reformed regulator. We recommend that industry representatives form a substantial minority of the body that determines complaints. These representatives should have considerable experience of working in the print media, but should not be a full-time employee of any news publisher or have a demonstrable conflict of interest.**
172. Lord Hunt suggested that, under his proposals, the body which sets the rules—currently the Editors’ Code Committee—would continue to comprise mainly editors, but with some independent members.¹⁷³ The importance of journalistic representation on this body was referred to by witnesses.¹⁷⁴ Adherence to the Code is often included in contracts of employment for journalists.
173. **It is important that the body that draws up the code of practice of the reformed regulator benefits from the knowledge of those working in the industry. There should be some members, including its chairman, drawn from outside the industry.**

Inclusion of all major publishers

174. As outlined above, Northern & Shell publications are not part of the PCC structure. Richard Desmond indicated to us that Northern & Shell publications could re-join the reformed regulator.¹⁷⁵ It is notable, however, that Northern & Shell were able to leave the PCC unilaterally and without any sanction. It undermines the credibility of the regulator if major publishers are able to opt out of regulation.
175. Proposals have been made for a “kite-mark” system, which would denote that publications are members of the new regulator. Such a kite-mark would be a symbol of quality and standards, demonstrate that there are established grievance procedures for subscriber publications and perhaps confer benefits on subscribers. Publications that are not kite-marked could be penalised in terms of their advertising rates.¹⁷⁶
176. Lord Hunt of Wirral suggested that “there could be a badge of respectability, of accuracy”, and suggested that he would consider how a kite-mark system could be tied into advertising rates.¹⁷⁷ A way to achieve that might be found through working with the Incorporated Society of British Advertisers, the representative body for British advertisers.
177. Other benefits could flow from voluntarily signing up to the regulator, or to a kite-mark system. It was suggested that only those who sign up would receive analyses by the Audit Bureau of Circulations (an industry body that

¹⁷³ Q 1619.

¹⁷⁴ Q 828.

¹⁷⁵ QQ 624 and 689.

¹⁷⁶ Q 1593.

¹⁷⁷ QQ 1604–5.

independently verifies and reports on media performance, including circulation figures).¹⁷⁸ There might also be incentives in terms of privileged access to information, such as membership of the parliamentary lobby or government press accreditation.¹⁷⁹

178. We discussed in the last chapter the difficulties of enforcing injunctions against bloggers and users of social media compared to the relative ease with which they can be enforced against print newspapers and their online editions. It might be possible in future for bloggers voluntarily to sign up to a code of practice.¹⁸⁰ However, Martin Clarke, publisher of Mail Online, thought that it would not be possible to compel bloggers to join a regulatory system without requiring it by law.¹⁸¹ Theoretically, a kite-mark system could be a means of bringing major bloggers into a system of regulation in future, given that some bloggers obtain around 50% of their income from advertising.¹⁸²
179. **It is essential that membership of the reformed media regulator extends to all major newspaper publishers. It should no longer be possible for a title unilaterally to opt out of regulation with no sanction forthcoming.**
180. **We recommend that significant penalties be imposed on news publishers who are not members of the reformed media regulator. For example, major advertisers should require membership as a condition of advertising in news publications, including on blogs.**

Status of the regulator

181. The most certain way to compel membership of the regulator would be to require it by statute.¹⁸³ An Act could grant the reformed media regulator legal powers over all publishers, thereby not allowing the possibility of opting out of regulation. A statute would also give full force to the sanctions levied by the regulator.
182. There is concern about the notion of a statutory regulator of newspapers. Some fear that a statutory regulator would overly encumber freedom of expression.¹⁸⁴ Some fear it would chill the free press and even put newspapers out of business.¹⁸⁵ There is concern that any Bill proposing statutory regulation could be a vehicle for political interference with the press.¹⁸⁶
183. The status of the successor to the PCC under Lord Hunt of Wirral's reforms would be underpinned by a series of rolling commercial contracts signed with publishers, lasting perhaps for five or ten years.¹⁸⁷ He was confident that all major publishers would sign the contracts. Once they sign they would be

¹⁷⁸ Q 422.

¹⁷⁹ Q 428.

¹⁸⁰ Q 1294.

¹⁸¹ QQ 1348 and 1353–4.

¹⁸² QQ 329–35.

¹⁸³ Q 420.

¹⁸⁴ Newspaper Society.

¹⁸⁵ Q 1599.

¹⁸⁶ Q 1601.

¹⁸⁷ Q 1609.

legally bound by the new system. That would involve having to comply with the sanctions of the regulator, including fines.

184. Comparisons can be drawn between the PCC and Ofcom, a statutory body established by the Communications Act 2003. Some thought that the regulatory functions of the PCC should be vested in Ofcom.¹⁸⁸ Broadcasters, however, opposed having the same regulatory framework for broadcasting and print media, arguing that different media provide different offerings to the public, so should be regulated differently.¹⁸⁹
185. An option short of a full-blown statutory regulator would be to have a self-regulating body undertaking day-to-day regulation, but backed up by a statutory body with overall responsibility for regulation.¹⁹⁰ This is a regulatory model used in other fields. The Solicitors Regulation Authority exercises day-to-day self-regulation of solicitors, but is backed up by the Legal Services Board, an independent statutory body.¹⁹¹ Similarly, Ofcom has a statutory duty to maintain standards in broadcast advertising, but has devolved to the Advertising Standards Authority day-to-day responsibility for broadcast advertising content standards, including responsibility for writing the relevant code.¹⁹²
186. **Regulation of the press must be independent of government. But it is clear that the current system of self-regulation is broken and needs fixing. The industry must play a key role in establishing reformed structures, and we welcome the initiative taken by Lord Hunt of Wirral in bringing forward industry-led proposals for replacing the Press Complaints Commission.**
187. **To be successful Lord Hunt of Wirral's proposals must create an independent, powerful regulator which governs all major publishers and has the confidence of the public. However, decisions on the future of media regulation cannot be left to the industry alone to determine. At this stage we do not recommend statutory backing for the new regulator. Instead, assuming Lord Hunt's proposals are adopted by all publishers, we recommend that a standing commission comprising members of both Houses of Parliament be established to scrutinise the process of reform over the coming years. The standing commission will report annually to Parliament on the progress of reform and the effectiveness of the reformed regulator. The annual report should be debated in both Houses. The standing commission must have the power to call for papers and summon witnesses.**
188. **However, should the industry fail to establish an independent regulator which commands public confidence, the Government should seriously consider establishing some form of statutory oversight. This could involve giving Ofcom or another body overall statutory responsibility for press regulation, the day-to-day running of which it could then devolve to a self-regulatory body, in a similar manner to the arrangements for regulating broadcast advertising.**

¹⁸⁸ Carter-Ruck.

¹⁸⁹ Sky; ITV; Channel 5; QQ 305 and 309.

¹⁹⁰ Barnett.

¹⁹¹ QQ 136–7. A similar arrangement operates for the Bar.

¹⁹² Q 413.

189. Whatever form of regulation there is, the regulator must be able to be held to account. It is common practice for bodies exercising a public function to publish an annual report. In many cases an annual report enables the relevant parliamentary body to examine the effectiveness of the institution and to question those responsible for running it. The reformed media regulator should adhere to such corporate governance standards.
190. **The reformed media regulator must publish an annual report. In order to provide an appropriate level of ongoing accountability, the chairman should appear before the standing commission at regular intervals.**

Access for complainants

191. One of the key strengths of the PCC is that it is free of charge for complainants.¹⁹³ Access is easy, and a 24-hour hotline is available for those wanting to raise urgent concerns with the Commission. The PCC thought that the response rate for complaints was fast.¹⁹⁴ Witnesses from the newspaper industry highlighted the advantages offered by a service that is free of charge to users.¹⁹⁵
192. **The fact that the PCC offers a cost-free service is one of its biggest strengths. The reformed regulator should ensure the service is free of charge for users.**

Effective sanctions

Apologies

193. Apologies are one of the principal tools available to the PCC when seeking to remedy grievances. In any cases where a published apology is negotiated, prominence must be agreed in advance by the Commission. The PCC stated, “The vast majority of all corrections and apologies negotiated by the Commission are published on the same page or further forward than the original transgression.”¹⁹⁶ Whilst this may be so, one of the complaints we heard was that apologies were usually of a much smaller size than the original offending article.¹⁹⁷
194. In most cases, it is difficult to provide an appropriate remedy for a breach of privacy through an apology. Whilst an apology may satisfy those who have been the victims of inaccuracy or defamation, it cannot make private information private once again.¹⁹⁸
195. **Where the reformed regulator is involved in negotiating an apology, it should have the power to determine the location and size of the apology the newspaper is required to publish, and the day of publication.**

Adjudications

196. If the PCC finds there has been a breach of the Code and is unable to negotiate an appropriate remedy with the offending publication it may issue a

¹⁹³ Q 826.

¹⁹⁴ PCC para 5.

¹⁹⁵ Q 246.

¹⁹⁶ PCC.

¹⁹⁷ QQ 707 and 744.

¹⁹⁸ Q 707.

critical adjudication. As well as the PCC publishing the ruling itself, it requires the newspaper concerned to publish the adjudication in full, with due prominence and a headline reference to the PCC.

197. We were told that regional editors saw it as a matter of professional pride not to have a PCC adjudication against them and that most editors would seek to avoid a referral to the PCC.¹⁹⁹ Richard Desmond's withdrawal of Northern & Shell newspapers from the PCC following criticism from the Commission over stories regarding Madeline McCann illustrates that criticism from the regulator, whether by published adjudication or other public means, can have an effect upon newspaper editors and proprietors.
198. **Where a newspaper has been found to be in breach of the industry code, we consider public criticism from the regulator, including negative adjudications, to have a significant effect in providing rebuke and modifying behaviour. However, we do not believe this is sufficient.**

Financial sanctions

199. The PCC does not at present have the power to fine newspapers or to require them to pay damages to victims of breaches of the Code. It can, in some circumstances, negotiate donations to charities or *ex gratia* payments, but only if the publication in question wishes to do so. This is in contrast to the broadcast regulator Ofcom, which can levy significant fines²⁰⁰ and, *in extremis*, can revoke a broadcasting licence.
200. It has been suggested that giving the reformed regulator the power to fine publications would imperil the current cost-free service, as it would add complexity to the system. Disputes would become more protracted, and more time would be taken to resolve them. Lawyers could become involved, and newspapers might have to take out insurance.²⁰¹
201. However, there was widespread support amongst our witnesses for the reformed regulator to be able to levy fines upon those who breached the Code.²⁰² Lord Hunt of Wirral said that fines should form a part of the new regulatory system, being set at a proportionate level and perhaps added to publications' annual subscriptions.²⁰³ The power to levy fines would give the regulator considerably more leverage pre-publication.²⁰⁴
202. **We recommend that the reformed regulator should have the power to fine newspapers for unwarranted breaches of privacy. This will encourage publishers to consult the regulator on potentially controversial stories before publication.**

Arbitration and mediation

203. As it is costly to pursue privacy claims in the courts, it has been suggested that they could be more quickly and cheaply resolved through arbitration or

¹⁹⁹ Q 226.

²⁰⁰ Up to £250,000 or 5% of a licensee's "qualifying revenue", whichever is greater.

²⁰¹ Q 246.

²⁰² Q 1120; Barnett; Petley; National Union of Journalists.

²⁰³ Q 1609.

²⁰⁴ Media Standards Trust.

mediation—a process sometimes known as alternative dispute resolution. The new regulator could provide pre-publication mediation of privacy issues. Another (not necessarily incompatible) suggestion was for a mediation or arbitration body to carry out a similar function to that of the courts when considering applications for privacy injunctions.

204. An arbitration body, comprised of independent assessors, could receive representations from the media party looking to publish a story, and from the party claiming their privacy would be infringed by publication. The body would weigh and analyse the claims, before giving a ruling as to whether publication should go ahead. The process would be conducted in private, and would be less formal than court processes.²⁰⁵
205. Lord Hunt of Wirral explained that he was contemplating a mediation or arbitration body as part of his own proposals for reform, but that further work was needed. He compared the likely work of such a body with that of the financial ombudsman service.²⁰⁶
206. It might be possible for a formally established arbitration body (for example as part of the reformed media regulator) to be recognised as part of the legal process. Failure to seek resolution through arbitration prior to litigation might be taken into account by the court in awarding damages or costs.
207. There might however be some practical difficulties with a new arbitration body. Newspapers are usually in a race against rivals to publish stories. They may find it very difficult to wait until the arbitration is over because of the risk of a leak.²⁰⁷
208. There are other issues to address in establishing any new arbitration body that has jurisdiction pre-publication. These include the question of whether the decisions of the body will be binding and, if so, how that could be done without ousting the jurisdiction of the courts. Editors may understandably be reluctant to allow another body to decide on what can appear in their publications. It would be necessary for them to have confidence in the body.
209. **One of the principal tasks of the reformed regulator should be to play an increased role in arbitrating and mediating privacy disputes. This would reduce the likelihood of recourse to the courts, with all the attendant costs, and will therefore benefit newspapers and claimants. It will also help achieve the other objectives set out in this report.**

²⁰⁵ The establishment of such a body was supported by Alex Hall, Alastair Brett, Max Mosley (Q 748) and Gillian Phillips, Director of Editorial Legal Services at the *Guardian* (Q 44).

²⁰⁶ Q 1608.

²⁰⁷ Q 102.

CHAPTER 6: PARLIAMENTARY PRIVILEGE AND INJUNCTIONS

210. One of the issues that led to our inquiry was the revelation of information protected by anonymised injunctions during parliamentary proceedings. The day after Ryan Giggs was named as the claimant in *CTB v Imogen Thomas and News Group Newspapers* by the *Sunday Herald* in Scotland, and amidst much media reporting of the widespread availability of his name on Twitter and other internet sites, John Hemming MP revealed his name in the House of Commons.²⁰⁸ The revelation was widely covered in the media.
211. In recent years there have been other examples of information subject to anonymised injunctions being revealed in Parliament. In October 2009 Paul Farrelly MP tabled a written parliamentary question which concerned a super-injunction obtained by Trafigura. Trafigura's solicitors informed the *Guardian* that it would breach the injunction if it reported the question. The *Guardian* then reported that it was unable to report a parliamentary question.²⁰⁹ In March 2011 John Hemming MP revealed that Fred Goodwin had obtained a super-injunction.²¹⁰ In April 2011 Mr Hemming named Vicky Haigh as the subject of an injunction which had been granted by the Family Division of the High Court and which prevented the names of the parties being identified.²¹¹ In May 2011 further details about Fred Goodwin's injunction were revealed in the House of Lords by Lord Stoneham of Droxford.²¹²
212. The revelation of material subject to an injunction is not a daily occurrence in Parliament; it is in fact quite rare.²¹³ There is however a possibility that it may happen more often in future, especially if the media orchestrates action against injunctions.²¹⁴

Freedom of speech in Parliament and injunctions

213. Article IX of the Bill of Rights 1688 states "That the Freedom of Speech and Debates or Proceedings in Parliament ought not to be impeached or questioned in any Court or Place out of Parliament." Article IX is fundamental to our constitution and to the workings of Parliament. It allows members to debate what they wish without fear of redress by the courts, the executive or anyone else. It is jealously guarded.
214. Article IX means that it would not be constitutionally possible for a court order, including an injunction, to apply to Parliament.²¹⁵ It follows that it is

²⁰⁸ HC Deb, 23 May 2011, col 638.

²⁰⁹ For more details see Culture, Media and Sport Committee, 2nd Report (2009–10): *Press standards, privacy and libel* (HC 362-I), paras 94 to 102.

²¹⁰ HC Deb, 10 March 2011, col 1069. Using the terminology of the Master of the Rolls' committee's report, it was an anonymised injunction rather than a super-injunction.

²¹¹ HC Deb, 26 April 2011, col 58.

²¹² HL Deb, 19 May 2011, col 1490.

²¹³ Q 997.

²¹⁴ Q 955.

²¹⁵ Clerk of the House of Commons written evidence; Master of the Rolls, *Report of the Committee on Super-Injunctions: Super-Injunctions, Anonymised Injunctions and Open Justice*, p vii; Joint Committee on Parliamentary Privilege, Report (1998–99, HL Paper 43-I, HC 214-I), para 204; Judiciary of England and Wales, *Statement of the Lord Chief Justice*, 20 October 2009.

not a contempt of court for a parliamentarian to reveal in parliamentary proceedings information subject to an injunction.

215. Whilst it may be legal for parliamentarians to reveal information in this way, some witnesses suggested it was not appropriate to do so.²¹⁶ Injunctions are granted by a judge after hearing evidence and representations from both sides. A parliamentarian who does not conform to the injunction can be seen as in effect placing him- or herself in the shoes of the judge, and overruling the decision to grant anonymity.²¹⁷ Once the name has been revealed in Parliament, and subsequently reported in the media, anonymity cannot be regained: the effect of the anonymity order is set at nought. Moreover, there is no redress for the individual whose identity or private information has been revealed; Article IX prevents them taking proceedings against the member.

Comity between Parliament and the courts

216. The long-standing constitutional principle of comity between Parliament and the courts means that each takes care not to intrude on the other's territory, or to undermine the other. A key means through which that principle is exercised on Parliament's side is through each House's *sub judice* resolutions. These prevent references to cases before the courts in questions, motions or debates. They contain exemptions for when the Houses are considering legislation; and allow for the Speakers to waive the application of the *sub judice* rule.²¹⁸ In addition to preserving the principle of comity the *sub judice* rule prevents parliamentarians influencing, or appearing to influence, courts. In return, the courts do not question the proceedings of Parliament or routinely criticise parliamentarians.
217. As evidenced by the Speakers' powers to waive the *sub judice* rule, the principle of comity is not absolute. There may be occasions when it is appropriate for reference to be made to active court proceedings in Parliament. Similarly, there may be occasions when it is appropriate to reveal in Parliament information subject to an injunction. Most would accept that it should only be done when in the public interest.²¹⁹ However, determining what is in the public interest leaves room for individual judgment, and there may be disagreement on the outcome.
218. As things stand, it is a matter for each parliamentarian to decide, if they come across information that is subject to an injunction, whether to reveal that information in parliamentary proceedings. There is an obvious tension here. Parliamentary privilege belongs to each House as a whole, and not to the individual member.²²⁰ If the privilege is abused it follows that Parliament as a whole may be affected by that abuse.
219. **The absolute privilege for freedom of speech granted by Article IX of the Bill of Rights 1688 is part of the very foundation of our parliamentary democracy. This privilege places a significant**

²¹⁶ Q 19. Grabiner and Hughes, Mosley and the Law Society referred to the effect on the rule of law if those who are legislators disregard the law as it applies outside Parliament.

²¹⁷ Grabiner and Hughes; Mosley; Schillings; Berryman Lacey Mawer LLP.

²¹⁸ To assist each House's authorities (principally the Table Offices) in easily identifying cases which are *sub judice* a list of cases which may be referred to in parliamentary proceedings is drawn up.

²¹⁹ See, for example, the evidence of the Clerk of the House of Commons and the Clerk of the Parliaments (Q 988), and Tomlinson.

²²⁰ Q 945.

responsibility on parliamentarians to exercise it in the public interest. The presumption should be that court orders are respected in Parliament; and that when a member does not comply with one he or she can demonstrate that is in the public interest or enables the parliamentarian to discharge his or her parliamentary duties (such as representing constituents).

Compliance with injunctions in Parliament

220. Given our concern about the scope for parliamentarians to set court orders at nought, with no redress or right of appeal possible, we have considered whether either or both Houses should make arrangements themselves for preventing reference to material subject to injunctions.
221. Previous parliamentary inquiries have considered this matter. In 1996 the Procedure Committee of the House of Commons thought that if breaches of court orders represented a serious challenge to the due process of law there should be a further limitation on the rights of free speech enjoyed by members, whatever the practical difficulties. However, it was not necessary to take action as a result of one specific case, given the importance the House attaches to protecting the right of Parliament to freedom of speech.²²¹ The committee said that if there were a number of instances of such breaches the House would be advised to adopt a resolution prohibiting it.²²² The Joint Committee on Parliamentary Privilege in 1999 took a similar view.²²³
222. The question of whether to institute a new parliamentary rule arose during our inquiry. It would be possible for each House to pass a self-denying ordinance, on the pattern of the resolutions on matters *sub judice*. The rule could subsequently be modified in the light of experience or waived on occasion, though only where the Speaker judged it necessary. It would be for each House through its own self-regulating processes to take any necessary disciplinary action where a member chose deliberately to break the rule.²²⁴
223. The advantage of a new resolution, or an adaptation of the *sub judice* rule such that it covers material subject to injunctions, is that it would be in keeping with Parliament's approach to other matters within the domain of the courts. It would allow for exemptions, and the power of waiver would not impede members' ability to raise issues when it is genuinely in the public interest to do so.²²⁵
224. Some witnesses cautioned against any new resolution going wider than cases involving the misuse of private information, citing examples of when Parliament has taken an interest in confidentiality clauses drawn up when an employee leaves an organisation. It was also suggested that a new resolution should only seek to protect interim injunctions, as a resolution of wider scope

²²¹ Select Committee on Procedure, 2nd Report (1995–96, HC 252), para 16.

²²² *Ibid.* A draft resolution was in the annex to the committee's report.

²²³ *Op. cit.*, para 210.

²²⁴ Clerk of the House of Commons. Sir William McKay, a former Clerk of the Commons, suggested a similar approach, as did Tomlinson, Lawyers for Media Standards and Professor Anthony Bradley QC.

²²⁵ As an analogy, the *sub judice* rules in each House do not apply to proceedings on bills, Church of England measures or delegated legislation; and the Speaker in each House exercises a general power of waiver and a power of waiver in cases where, in the opinion of the Speaker, "a case concerns issues of national importance such as the economy, public order or the essential services".

would be seen as protecting the outcome of court proceedings, not as safeguarding the judicial process.²²⁶

225. In addition, if the Speakers were granted a power of waiver (as they are in the *sub judice* resolutions), they would potentially be put in an invidious position when approached with an application to exercise that power. Presumably in most instances the application would advance reasons why it would be in the public interest to allow the waiver. However, the public interest in allowing freedom of expression to be exercised in relation to the injunctioned material would have been considered by the judge; and in order for the judge to have granted the injunction he or she would have determined that the right to privacy in that case outweighed the public interest in revealing the information. The Speaker, therefore, would in effect be substituting his or her interpretation of the public interest for that of the judge—in most cases with fewer facts to hand than the judge and no ability to test the evidence.
226. That said, at present the individual member in revealing injunctioned information in effect substitutes his or her interpretation of the public interest for that of the judge. Giving that task to the Speaker allows for a more objective view; more so if the suggestion that the Speaker consult two or so senior members before reaching his or her decision is followed.²²⁷ In addition, the Speaker of the House of Commons in particular is used to exercising judgment in sensitive situations. The Speakers' powers of waiver in the *sub judice* resolutions do not appear to have caused difficulties with the courts.
227. The practicality of enforcing any new rule would be an issue. It would only take a moment for a member to reveal a name and so negate the order; often the Speaker would not be able to anticipate it.²²⁸ There could also be particular difficulties in implementing any new resolution in the self-regulating House of Lords, where the Lord Speaker has no power to rule on matters of order.²²⁹ However, it would not be necessary for the two Houses to have equivalent procedures on this matter.²³⁰
228. For any new resolution to work, it is important that the parliamentary authorities are aware of injunctions. One of the issues with the Trafigura injunction was that the House of Commons Table Office was unable to ascertain whether the case was *sub judice* because no details were held on it either by the Table Office or by Her Majesty's Court Service (as it then was), whose internal database simply recorded the applicants as RJW and SJW. The Master of the Rolls' committee therefore discussed the creation of a secure database maintained by Her Majesty's Courts and Tribunals Service (HMCTS) which would contain details of all relevant anonymised injunctions and super-injunctions, and which would be searchable by party name. The parliamentary authorities could approach HMCTS to enquire about a case. Discussions are under way about creating such a system.²³¹

²²⁶ Howarth. The *sub judice* rule is intended to protect the process of cases, not their outcomes.

²²⁷ QQ 959 and 1018. Sir William McKay referred to the Parliament Act 1911, which requires the Speaker to consult two members of the Chairman's Panel, if appropriate, before designating a bill as a money bill.

²²⁸ Q 1000; Howarth.

²²⁹ Clerk of the Parliaments.

²³⁰ QQ 1003 and 1004.

²³¹ Q 992.

229. Regardless of whether there is a new rule thought should be given to alternative ways that members can raise concerns about open justice and injunctions without having to discuss them on the floor of the House. At present the only way members can be certain that they will not be pursued for contempt of court if they discuss information subject to an injunction is to raise it during parliamentary proceedings, which are almost always held in public and recorded. An alternative approach would be for the member to raise it with a select committee, sitting in private.²³²
230. **We regard freedom of speech in Parliament as a fundamental constitutional principle. Over the last couple of years a few members have revealed in Parliament information covered by injunctions. We have considered carefully proposals for each House to instigate procedures to prevent members from revealing information subject to privacy injunctions. The threshold for restricting what members can say during parliamentary proceedings should be high. We do not believe that the threshold has yet been crossed.**
231. **If the revelation of injuncted information becomes more commonplace, if injunctions are being breached gratuitously, or if there is evidence that parliamentarians are routinely being “fed” injuncted material with the intention of it being revealed in Parliament, then we recommend that the Procedure Committees in each House should examine the proposals made to us for new restrictions with a view to implementing them.**

Media reporting of parliamentary proceedings

232. The freedom of the press to report what is said in Parliament is an essential link in the chain between those who make law and those affected by it.²³³ Parliamentary freedom of speech would be of little value if what is said in Parliament could not be freely communicated outside Parliament. However, the freedom of the media to report parliamentary proceedings is not part of the privilege of Parliament, but derives from the common law and statute.
233. The Parliamentary Papers Act 1840 gives absolute privilege to Hansard and any document ordered to be printed by either House of Parliament. It gives qualified privilege to extracts or abstracts from Hansard or other parliamentary papers. Such extracts or abstracts will be protected if they are published *bona fide* and without malice. The Master of the Rolls’ committee concluded—

“Qualified privilege arises where such a summary is published in good faith and without malice. There is no judicial decision as to whether a summary of material published in Hansard which intentionally had the effect of frustrating a court order would be in good faith and without malice.

Where media reporting of Parliamentary proceedings does not simply reprint copies of Hansard or amount to summaries of Hansard or parliamentary proceedings they may well not attract qualified privilege.

²³² As an analogy, the Intelligence and Security Committee examines the policy, administration and expenditure of the Security Service (MI 5), the Secret Intelligence Service (MI 6), and the Government Communications Headquarters (GCHQ). It has access to highly classified material and normally meets in private. It is composed of parliamentarians but is not a committee of either House.

²³³ McKay, para 3.

Where media reporting of Parliamentary proceedings does not attract qualified privilege, it is unclear whether it would be protected at common law from contempt proceedings if it breached a court order. There is such protection in defamation proceedings for honest, fair and accurate reporting of Parliamentary proceedings. There is no reported case which decides whether the common law protection from contempt applies. There is an argument that the common law should adopt the same position in respect of reports of Parliamentary proceedings as it does in respect of reports of court proceedings.”²³⁴

234. Perhaps in view of these uncertainties the Government in their announcement about the draft parliamentary privilege bill and green paper said that the green paper will discuss “whether there should be changes to the law on reporting of parliamentary proceedings in the media.”²³⁵
235. There is qualified privilege in defamation for a “fair and accurate report” of parliamentary proceedings.²³⁶ There is no requirement to demonstrate that the report is *bona fide*. The Attorney General has stated that it is “an open question as to whether something said in Parliament in breach of a court order may be repeated in the press.”²³⁷ The question becomes particularly pertinent if the media report parliamentary proceedings knowing them to breach a court order.²³⁸
236. This can mean uncertainty for the media in what they may report. Broadcasters had to think carefully before broadcasting John Hemming MP’s naming of Ryan Giggs in May 2011.²³⁹ There was also uncertainty at the time about whether the *Guardian* would be in contempt of court for revealing the existence of the *Trafigura* super-injunction. There was support for the law being clarified.²⁴⁰
237. We received evidence cautioning against granting absolute immunity for all reports of parliamentary proceedings that are fair and accurate.²⁴¹ In particular, there is the possibility of the media passing private information covered by a court injunction to members, encouraging them to use the information in parliamentary proceedings, and then reporting on those proceedings in the knowledge that no legal consequences can follow. Anecdote suggests that may already have happened;²⁴² the temptation for it to become more common would surely be greater if the requirement to act in good faith was absent.

²³⁴ *Op. cit.*, page vii.

²³⁵ HC Deb, 19 December 2011, 144-5WS.

²³⁶ Paragraph 1 of Schedule 1 to the Defamation Act 1996.

²³⁷ Speech to City University school of journalism, 1 December 2011.

²³⁸ Legal advice given to the House of Commons Committee of Privileges in 1978 by Mr Harry Woolf (now Lord Woolf) suggested that “it was probable that a court would come to the conclusion that if an extract from Hansard were to be used with the deliberate intention of frustrating the arrangements which the court had made to preserve a person’s anonymity this was not a publication which was *bona fide* and without malice, for the purposes of section 3 of the Parliamentary Papers Act 1840.” (HC 667 of session 1977–78, page xi.)

²³⁹ Q 294; B SkyB.

²⁴⁰ *Guardian News Media Ltd; Newspaper Society*.

²⁴¹ Q 1008.

²⁴² Clerk of the Parliaments para 8.

238. The 1840 Act was drafted so as to apply to reporting of parliamentary proceedings as they existed at that time.²⁴³ That often consisted of (lengthy) abstracts from Hansard. It does not expressly apply to the more modern approach of reporting what occurs in Parliament rather than quoting from it.
239. Unless they are publishing an extract or abstract of Hansard, the media in reporting the revelation of injuncted information would have to rely on the protection of the common law. There is limited common law protection for the media in defamation proceedings,²⁴⁴ but there is no authority as to whether there is common law protection against proceedings for contempt of court in respect of a fair and accurate report of parliamentary proceedings.²⁴⁵
240. This situation might be considered unsatisfactory in light of the fact that within three hours of the making of a speech on the floor of the House of Commons the Hansard text is available on line and there is live coverage on line of floor and committee proceedings. The law does not reflect the reality of modern communications.²⁴⁶
241. **The free and fair reporting of proceedings in Parliament is a cornerstone of our democracy. The publication of fair extracts of reports of proceedings in Parliament made without malice is protected by the Parliamentary Papers Act 1840. This cannot be fettered by court order. However, there has been a degree of confusion that causes us the very gravest concern that this freedom is being undermined. The media must know whether or not they are liable to proceedings for contempt in reporting parliamentary proceedings. We therefore recommend that qualified privilege should apply to media reports of parliamentary proceedings in the same way as to abstracts and extracts from Hansard. If legislation is introduced the opportunity should be taken to update the 1840 Act in a clear and comprehensible way.**

²⁴³ Though section 3 has since been widened so as to allow equivalent protection for radio and television broadcasts.

²⁴⁴ Established in *Wason v Walter* (1868) 4 QB 73.

²⁴⁵ Master of the Rolls' committee's report, *op. cit.*, para 6.28. The Joint Committee on Parliamentary Privilege thought it was "doubtful" such protection existed (*op. cit.*, para 364); Mr Harry Woolf in his 1978 advice to the Commons Procedure Committee thought there was no reason that the common law protection would not extend to contempt proceedings; Lord Denning when Master of the Rolls concluded the same, though by way of *obiter*.

²⁴⁶ McKay.

CHAPTER 7: CONCLUSIONS AND RECOMMENDATIONS

The following is a list of the conclusions and recommendations that appear in the report. Their place in the main text is indicated in the reference at the end of each paragraph.

Is the law working?

The balance between articles 8 and 10

We believe that the courts are now striking a better balance between the right to privacy and the right to freedom of expression, based on the facts of the individual case (para 32).

A privacy statute

We believe that any statutory definition of privacy would risk becoming outdated quickly, would not allow for flexibility on a case-by-case basis and would lead to even more litigation over its interpretation. For these reasons we do not recommend one (para 37).

We do not recommend a statute declaring in broad terms the right to privacy. We disagree with criticisms that privacy law has been “judge made” and does not have parliamentary authority; it has evolved from the Human Rights Act 1998 (para 41).

Determining the public interest in private lives

We do not recommend a statutory definition of the public interest, as the decision of where the public interest lies in a particular case is a matter of judgment, and is best taken by the courts in privacy cases. As an alternative, we expect the reformed media regulator, in conjunction with other regulators, to publish clear guidelines as to what constitutes the public interest, and to update them where necessary (para 50).

Injunctions and section 12 of the Human Rights Act 1998

We do not think that section 12(4) of the Human Rights Act 1998, in requiring the courts to “have particular regard to the importance of the Convention right to freedom of expression” when considering whether to grant any relief, means that article 10 has precedence over article 8. The practical effect of the claimant satisfying section 12(3) (see below) means that article 8 does not have precedence over article 10. However, we support the decision of Parliament to make clear in law the fundamental importance of freedom of expression and would be concerned that removing section 12(4) might suggest that this is no longer the case. We do not recommend any alteration to the law in this area (para 59).

Departures from the principle of open justice should be exceptional and should only happen when they are essential. We strongly welcome the arrangements made by the Master of the Rolls to monitor and publish figures on the number of anonymised and super-injunctions granted and the circumstances in which they are granted (para 64).

We recommend that super-injunctions and anonymised injunctions that were granted before the Master of the Rolls’ committee’s report and are still in

force are reviewed by the courts to ensure they are still necessary and are compatible with that committee's conclusions on open justice. Those reviews should be prompted by the courts writing to the parties concerned. Once reviewed figures on them should be published (para 65).

When an injunction is granted the court should consider fully its effect on individuals restrained by the injunction, such as the effect on their ability to seek legal advice or funding for legal representation, or to report relevant matters to the authorities. Guidance on this should form part of the Practice Guidance issued by the Master of the Rolls (para 69).

We recommend that interim injunctions granted in one jurisdiction in the United Kingdom are enforceable in the other two jurisdictions in the same way as final injunctions are (para 74).

Privacy, celebrities and public figures

We believe that those who actively seek publicity, especially for gain, should accept that this will mean enhanced interest in their private lives by the media. This should not, however, mean that they sacrifice all rights to privacy. The degree of public exposure of an individual, and the extent to which they have sought it and gained from it, are relevant factors for the courts to take into account in determining a privacy claim. This will depend on the facts of the particular case (para 80).

We reject the view that because an individual exposes his or her children to publicity the children become fair game for the media. We believe that parents who expose their children to public gaze for their own commercial gain or publicity are irresponsible and make it harder for them to defend their children's right to privacy in other circumstances. However, even in those instances there must be exceptional reasons for it to be in the public interest for the media to publish information affecting the privacy of children (para 81).

Commercial viability of the press

The media play a vital role in furthering public debate, exposing wrongdoing and enhancing democracy. Whilst there is clearly demand for scandal and gossip, this should not stray into intrusion into people's private lives without good reason. Chief executives and boards of holding companies should take responsibility for ensuring that news publishers uphold high standards, with processes for protecting privacy firmly adhered to (para 89).

Improving protection of privacy

Online enforcement

We believe the Attorney General should be more willing to exercise his power as Guardian of the Public Interest to bring actions for civil contempt of court in respect of breaches of injunctions online. The threshold for him intervening should be lower. Such action would provide a strong deterrent against future such breaches (para 104).

We recommend that, when granting an injunction, courts should be proactive in directing the claimant to serve notice on internet content platforms, such as Twitter and Facebook. Beyond that, claimants in privacy

cases should make full use of notice and take-down procedures operated by responsible internet service and social media providers, who should also seek to disseminate best practice and discourage illegality amongst users and other providers (para 109).

Where an individual has obtained a clear court order that certain material infringes their privacy and so should not be published we do not find it acceptable that he or she should have to return to court repeatedly in order to remove the same material from internet searches (para 114).

Google acknowledged that it was possible to develop the technology proactively to monitor websites for such material in order that the material does not appear in the results of searches. We find their objections in principle to developing such technology totally unconvincing. Google and other search engines should take steps to ensure that their websites are not used as vehicles to breach the law and should actively develop and use such technology. We recommend that if legislation is necessary to require them to do so it should be introduced (para 115).

When issued with an injunction, media organisations should only circulate the notice to those employees who have authority to publish. An up-to-date list of these individuals should be maintained by each organisation, and made available to the court upon request (para 119).

Remedies

We reject the case for a statutory requirement to pre-notify. However, the reformed media regulator's code of practice must include a requirement that journalists should notify the subject of articles that may constitute an intrusion into privacy prior to publication, unless there are compelling reasons not to (para 127).

If a complaint is made to the new regulator about an individual's right to privacy having been infringed and that individual was not given prior notification of the story, the publication should be required to explain why they did not do so. If it was because it was in the public interest not to, the publication should state how, and with whom, the public interest was established at the time (para 128).

Courts should take account of any unjustified failure to pre-notify when assessing damages in any subsequent proceedings for breach of article 8 (para 129).

Whilst damages for breaches of privacy are never as good as preventing the breach in the first place, the maximum level of damages that has been awarded is too low to act as a real deterrent. We recommend that the courts should have the power to award exemplary damages in privacy cases, if necessary by giving the courts that power through legislation. In deciding whether to award exemplary damages the courts should take into account the financial situation of the media organisation concerned (para 134).

Costs and access to justice

The costs of a privacy action are prohibitive to many possible claimants, and can also act to stifle the freedom of the press. Judges and legal representatives must take all possible steps to manage costs more effectively. In particular,

we recommend that the practice direction which limits cost capping to exceptional cases should be removed for privacy actions (para 141).

Access to justice is essential for those whose privacy is infringed. Conditional fee agreements have provided people of limited means with the ability to take action when their right to privacy has been infringed; they have also been used by defendants in privacy cases. We have not sought to enter the wider debate on the future of CFAs, but stress that following the reforms to them it is important that access to justice is maintained for all citizens when seeking to protect their right to privacy (para 147).

Many individuals cannot seek redress for a breach of privacy because the legal costs are beyond their means. It is essential that a reformed media regulator provides an alternative route, which is cost free, to prevent and redress breaches of privacy (para 150).

Better regulation of news publications

The need for reform of the PCC

The Press Complaints Commission was not equipped to deal with systemic and illegal invasions of privacy. In this chapter we set out what a reformed media regulator should look like and do (para 160).

Privacy and the PCC

The reformed media regulator needs to play a leading role in resolving privacy complaints. For this to happen, the regulator needs to have recourse to far more effective and timely sanctions than the PCC has. It needs to be, and be seen to be, independent of the newspaper industry. All major news publishers, including online publishers, should come under its jurisdiction. These views inform our subsequent recommendations (para 164).

Independent regulation

We believe that the reformed media regulator must be demonstrably independent of the industry and of government (para 170).

Knowledge of the industry, however, will be essential to the good operation of the reformed regulator. We recommend that industry representatives form a substantial minority of the body that determines complaints. These representatives should have considerable experience of working in the print media, but should not be a full-time employee of any news publisher or have a demonstrable conflict of interest (para 171).

It is important that the body that draws up the code of practice of the reformed regulator benefits from the knowledge of those working in the industry. There should be some members, including its chairman, drawn from outside the industry (para 173).

Inclusion of all major publishers

It is essential that membership of the reformed media regulator extends to all major newspaper publishers. It should no longer be possible for a title unilaterally to opt out of regulation with no sanction forthcoming (para 179).

We recommend that significant penalties be imposed on news publishers who are not members of the reformed media regulator. For example, major advertisers should require membership as a condition of advertising in news publications, including on blogs (para 180).

Status of the regulator

Regulation of the press must be independent of government. But it is clear that the current system of self-regulation is broken and needs fixing. The industry must play a key role in establishing reformed structures, and we welcome the initiative taken by Lord Hunt of Wirral in bringing forward industry-led proposals for replacing the Press Complaints Commission (para 186).

To be successful Lord Hunt of Wirral's proposals must create an independent, powerful regulator which governs all major publishers and has the confidence of the public. However, decisions on the future of media regulation cannot be left to the industry alone to determine. At this stage we do not recommend statutory backing for the new regulator. Instead, assuming Lord Hunt's proposals are adopted by all publishers, we recommend that a standing commission comprising members of both Houses of Parliament be established to scrutinise the process of reform over the coming years. The standing commission will report annually to Parliament on the progress of reform and the effectiveness of the reformed regulator. The annual report should be debated in both Houses. The standing commission must have the power to call for papers and summon witnesses (para 187).

However, should the industry fail to establish an independent regulator which commands public confidence, the Government should seriously consider establishing some form of statutory oversight. This could involve giving Ofcom or another body overall statutory responsibility for press regulation, the day-to-day running of which it could then devolve to a self-regulatory body, in a similar manner to the arrangements for regulating broadcast advertising (para 188).

The reformed media regulator must publish an annual report. In order to provide an appropriate level of ongoing accountability, the chairman should appear before the standing commission at regular intervals (para 190).

Access for complainants

The fact that the PCC offers a cost-free service is one of its biggest strengths. The reformed regulator should ensure the service is free of charge for users (para 192).

Effective sanctions

Where the reformed regulator is involved in negotiating an apology, it should have the power to determine the location and size of the apology the newspaper is required to publish, and the day of publication (para 195).

Where a newspaper has been found to be in breach of the industry code, we consider public criticism from the regulator, including negative adjudications, to have a significant effect in providing rebuke and modifying behaviour. However, we do not believe this is sufficient (para 198).

We recommend that the reformed regulator should have the power to fine newspapers for unwarranted breaches of privacy. This will encourage publishers to consult the regulator on potentially controversial stories before publication (para 202).

Arbitration and mediation

One of the principal tasks of the reformed regulator should be to play an increased role in arbitrating and mediating privacy disputes. This would reduce the likelihood of recourse to the courts, with all the attendant costs, and will therefore benefit newspapers and claimants. It will also help achieve the other objectives set out in this report (para 209).

Parliamentary privilege and injunctions

Freedom of speech in Parliament and injunctions

The absolute privilege for freedom of speech granted by Article IX of the Bill of Rights 1688 is part of the very foundation of our parliamentary democracy. This privilege places a significant responsibility on parliamentarians to exercise it in the public interest. The presumption should be that court orders are respected in Parliament; and that when a member does not comply with one he or she can demonstrate that is in the public interest or enables the parliamentarian to discharge his or her parliamentary duties (such as representing constituents) (para 219).

Compliance with injunctions in Parliament

We regard freedom of speech in Parliament as a fundamental constitutional principle. Over the last couple of years a few members have revealed in Parliament information covered by injunctions. We have considered carefully proposals for each House to instigate procedures to prevent members from revealing information subject to privacy injunctions. The threshold for restricting what members can say during parliamentary proceedings should be high. We do not believe that the threshold has yet been crossed (para 230).

If the revelation of injuncted information becomes more commonplace, if injunctions are being breached gratuitously, or if there is evidence that parliamentarians are routinely being “fed” injuncted material with the intention of it being revealed in Parliament, then we recommend that the Procedure Committees in each House should examine the proposals made to us for new restrictions with a view to implementing them (para 231).

Media reporting of parliamentary proceedings

The free and fair reporting of proceedings in Parliament is a cornerstone of our democracy. The publication of fair extracts of reports of proceedings in Parliament made without malice is protected by the Parliamentary Papers Act 1840. This cannot be fettered by court order. However, there has been a degree of confusion that causes us the very gravest concern that this freedom is being undermined. The media must know whether or not they are liable to proceedings for contempt in reporting parliamentary proceedings. We therefore recommend that qualified privilege should apply to media reports of parliamentary proceedings in the same way as to abstracts and extracts from Hansard. If legislation is introduced the opportunity should be taken to update the 1840 Act in a clear and comprehensible way (para 241).

APPENDIX 1: JOINT COMMITTEE ON PRIVACY AND INJUNCTIONS

The members of the Joint Committee that conducted this inquiry were—

Lord Black of Brentwood
 Lord Boateng
 Baroness Bonham-Carter of Yarnbury
 Mr Ben Bradshaw MP
 Mr Robert Buckland MP
 The Lord Bishop of Chester
 Baroness Corston
 Philip Davies MP
 Lord Dobbs
 George Eustice MP
 Paul Farrelly MP
 Lord Gold
 Lord Harries of Pentregarth
 Lord Hollick
 Martin Horwood MP
 Lord Janvrin
 Eric Joyce MP
 Mr Elwyn Llwyd MP
 Lord Mawhinney
 Penny Mordaunt MP
 Lord Myners
 Yasmin Qureshi MP
 Ms Gisela Stuart MP
 Lord Thomas of Gresford
 Mr John Whittingdale MP (Chair)
 Nadhim Zahawi MP

Professor Eric Barendt, Emeritus Professor of Media Law at University College London, Sir Charles Gray, former High Court judge who specialised in media work, and Paul Potts CBE, former chief executive of the Press Association, were specialist advisers.

Declarations of interests

The following interests were declared—

Lord Black of Brentwood
Executive Director, Telegraph Media Group—remunerated
Chairman, Press Standards Board of Finance—remunerated
Chairman, Commonwealth press Union Media Trust—non-remunerated

Lord Boateng
Occasional reviews of newspapers for BSkyB and Sky News—honorarium
Occasional remunerated writing and broadcasting (various organisations)

Lord Dobbs
Income from writing and broadcasting—Daily Express, Associated Newspapers, BBC and Others

Lord Gold
Director, David Gold & Associates LLP

Lord Harries of Pentregarth
Occasional articles for the press and some regular broadcasting

Lord Hollick

Chief Executive Officer, United News Media plc (owner of Express newspapers) 1996–2000

Lord Janvrin

Name and private contact details found in notebooks examined by Operation Weeting police team as part of their enquiries into phone hacking

Lord Mawhinney

*Patron, Peterborough United Football Club—non-remunerated
Until 30 September 2011, non-executive director, Evans Easyspace (property development)*

Lord Myners

Former Chairman of Guardian Media Group plc

Sir Charles Gray, specialist adviser

Appointed by News International in June 2011 as “adjudicator” (re arbitration) in relation to claims to those whose phones have been “hacked”

Paul Potts CBE, specialist adviser

Personal friendship: John Whittingdale MP, Lord Black of Brentwood and Lord Dobbs

*Occasional administrative support provided by The Daily Telegraph
Visiting Professor of Journalism, Department of Journalism, Sheffield University*

Non-Executive Director of Channel 4

A full list of members’ interests can be found in the Register of Lords’ Interests: <http://www.parliament.uk/mps-lords-and-offices/standards-and-interests/register-of-lords-interests/> and in the House of Commons Register of Members’ Financial Interests: <http://www.publications.parliament.uk/pa/cm/cmregmem/contents.htm>

APPENDIX 2: LIST OF WITNESSES

Evidence is published online at www.parliament.uk/jcpi and available for inspection at the Parliamentary Archives (020 7219 5314)

Evidence received by the Committee is listed below in chronological order of oral evidence session and in alphabetical order. Those witnesses with * gave both oral evidence and written evidence. Those marked with ** gave oral evidence and did not submit any written evidence. All other witnesses submitted written evidence only.

Oral evidence in chronological order

**	(QQ 1–32)	The Rt Hon. Jack Straw MP
*		The Rt Hon. Lord Wakeham
**		The Rt Hon. Sir Stephen Sedley
*		Professor Gavin Phillipson
**	(QQ 33–64)	David Price QC
**		Gavin Millar QC
*		Gillian Phillips, solicitor and Director of Editorial Legal Services, <i>The Guardian</i>
**		Reynolds Porter Chamberlain
*	(QQ 65–118)	Hugh Tomlinson QC
*		Schillings
*		Carter-Ruck
**	(QQ 119–161)	Joshua Rozenberg
*		Professor Steven Barnett
*		Professor Brian Cathcart
**	(QQ 162–209)	Alan Rusbridger, editor, <i>The Guardian</i>
*		Ian Hislop, editor, <i>Private Eye</i>
**		John Witherow, editor, <i>The Sunday Times</i>
**		Jonathan Grun
**	(QQ 210–272)	Richard Walker, editor, <i>Sunday Herald</i>
**		John McLellan, editor, <i>The Scotsman</i>
**		Matt McKenzie, editor, <i>The Sunday Sun</i>
**		Alastair Machray, editor, <i>Liverpool Echo</i>
**		Neil Fowler, Nuffield College, Oxford
*	(QQ 273–325)	Channel 4
*		BBC

- ** (QQ 326–403) Paul Staines
- ** Jamie East
- ** David Allen Green
- * Richard Wilson
- * (QQ 404–444) Sir Christopher Meyer
- ** Martin Moore
- * Julian Petley
- ** John Kampfner
- ** (QQ 445–485) The Rt Hon. Sir Nicholas Wall
- ** Mr Justice Baker
- ** (QQ 486–535) The Rt Hon. Lord Neuberger of Abbotsbury
- ** Mr Justice Tugendhat
- ** (QQ 536–583) Professor Andrew Murray
- ** Dr Ian Brown
- ** Ashley Van Haeften
- ** Nicholas Lansman
- ** (QQ 584–696) Richard Desmond, chairman, Northern & Shell Network Ltd
- ** Paul Ashford, editorial director, Northern & Shell Network Ltd
- ** Hugh Whittow, editor, *Daily Express*
- * (QQ 697–753) Max Mosley
- ** Steve Coogan
- ** Zac Goldsmith MP
- * Hugh Grant
- * (QQ 754–818) Press Complaints Commission
- * Ofcom
- ** Authority for Television on Demand
- ** (QQ 819–888) Viscount Rothermere, chairman, Daily Mail & General Trust plc
- ** Kevin Beatty, chief executive, A&N Media
- ** Liz Hartley, Head of Editorial Legal Services, Associated Newspapers
- ** (QQ 889–936) James Harding, editor, *The Times*
- ** Peter Wright, editor, *Mail on Sunday*
- * Society of Editors
- * (QQ 937–987) Professor Anthony Bradley QC
- ** David Howarth
- * Sir William McKay KCB

- * (QQ 988–1020) David Beamish, Clerk of the Parliaments
- ** Peter Milledge, Deputy Counsel to the Chairman of Committees, House of Lords
- * Robert Rogers, Clerk of the House of Commons
- ** Michael Carpenter, Speaker’s Counsel, House of Commons
- * (QQ 1021–1069) The Rt Hon. Kenneth Clarke QC MP, Lord Chancellor and Secretary of State for Justice, Ministry of Justice
- * The Rt Hon. Jeremy Hunt MP, Secretary of State for Culture, Olympics, Media and Sport, Department for Culture, Media and Sport
- ** (QQ 1070–1102) The Rt Hon. Dominic Grieve QC MP, Attorney General
- ** (QQ 1103–1154) Chris Blackhurst, editor, *The Independent*
- ** Evgeny Lebedev, chairman, Independent Print Ltd and Evening Standard Ltd
- ** Andrew Mullins, managing director, Evening Standard Ltd and Independent Print Ltd
- ** (QQ 1233–1305) Trinity Mirror Plc
- ** Richard Wallace, editor, *Daily Mirror*
- ** (QQ 1306–1383) Martin Clarke, publisher, Mail Online
- ** Edward Roussel, Digital Editor, Telegraph Media
- ** Philip Webster, editor, Times Online
- ** (QQ 1384–1455) Facebook
- ** Google
- ** Twitter
- ** (QQ 1456–1510) Phil Hall
- ** Max Clifford
- ** (QQ 1511–1593) News Group Newspapers
- ** Dominic Mohan, editor, *The Sun*
- * (QQ 1594–1628) The Rt Hon. Lord Hunt of Wirral, chair, Press Complaints Commission
- * (QQ 1629–1731) Alex Hall
- ** Charlotte Harris

Alphabetical list of all witnesses

- ** Kevin Beatty, chief executive, A&N Media (QQ 819–888)
- ** Liz Hartley, Head of Editorial Legal Services, Associated Newspapers (QQ 819–888)
- ** The Rt Hon. Dominic Grieve QC MP, Attorney General (QQ 1070–1102)
- * Authority for Television on Demand (QQ 754–818)

- * BBC (QQ 273–325)
- ** Mr Justice Baker (QQ 445–485)
- * Professor Steven Barnett (QQ 119–161)
Monica Bhogal and Rachel Donoghue, Berrymans Lace Mawer LLP
- * Professor Anthony Bradley QC (QQ 937–987)
Alastair Brett
British Sky Broadcasting Limited (‘Sky’)
- ** Dr Ian Brown (QQ 536–583)
Dr Edward Buckner and Andreas Kolbe
Mark Burby
- * Carter Ruck Solicitors (QQ 65–118)
- * Professor Brian Cathcart (QQ 119–161)
- * Channel 4 (QQ 273–325)
Channel 5
Chartered Institute of Journalists
- * Clerk of the House of Commons (QQ 988–1020)
- * Clerk of the Parliaments (QQ 988–1020)
- ** Max Clifford (QQ 1456–1510)
Peter Cohen
- ** Steve Coogan (QQ 697–753)
- ** Department for Culture, Media and Sport and Ministry of Justice (QQ 1021–1069)
- ** Hugh Whittow, editor, *Daily Express* (QQ 584–696)
- ** Viscount Rothermere, chairman, Daily Mail & General Trust plc (QQ 819–888)
Rachel Donoghue and Monica Bhogal, Berrymans Lace Mawer LLP
Charles Garside, assistant editor, *The Daily Mail*
- ** Richard Wallace, editor, *Daily Mirror* (QQ 1233–1305)
- ** Jamie East (QQ 326–403)
Dr David Erdos
- ** Andrew Mullins, managing director, Evening Standard Ltd and Independent Print Ltd (QQ 1103–1154)
Terence Ewing
- ** Facebook (QQ 1384–1455)
Paul Farrelly MP
Foot Anstey LLP
- ** Neil Fowler (QQ 210–272)
Professor Chris Frost
Global Witness
- ** Zac Goldsmith MP (QQ 697–753)
- ** Google (QQ 1384–1455)

- Lord Grabiner QC and Dr Kirsty Hughes
- * Hugh Grant (QQ 697–753)
 - ** David Allen Green (QQ 326–403)
 - ** Jonathan Grun (QQ 162–209)
 - ** Gillian Phillips, solicitor and Director of Editorial Legal Services, *The Guardian* (QQ 33–64)
 - ** Alan Rusbridger, editor, *The Guardian* (QQ 162–209)
 - Guardian News and Media Limited (GNM)
 - * Alex Hall (QQ 1629–1731)
 - ** Phil Hall (QQ 1456–1510)
 - ** Charlotte Harris (QQ 1629–1731)
 - * David Howarth (QQ 937–987)
 - Dr Kirsty Hughes and Lord Grabiner QC
 - ** Evgeny Lebedev, chairman, Independent Print Ltd and Evening Standard Ltd (QQ 1103–1154)
 - ** Chris Blackhurst, editor, *The Independent* (QQ 1103–1154)
 - ITN
 - ITV
 - ** John Kampfner (QQ 404–444)
 - Andreas Kolbe and Dr Edward Buckner
 - ** Nicholas Lansman (QQ 536–583)
 - Law Society
 - Lawyers for Media Standards
 - Lord Lester of Herne Hill QC
 - Lewis Silkin LLP
 - ** Alastair Machray, editor, *Liverpool Echo* (QQ 210–272)
 - ** Martin Clarke, publisher, Mail Online (QQ 1306–1383)
 - ** Peter Wright, editor, *Mail on Sunday* (QQ 889–936)
 - Mr Andrew Marr
 - * Sir William McKay KCB (QQ 937–987)
 - Media Standards Trust
 - ** Sir Christopher Meyer (QQ 404–444)
 - ** Gavin Millar QC (QQ 33–64)
 - ** Ministry of Justice and Department for Culture, Media and Sport (QQ 1021–1069)
 - ** Martin Moore (QQ 404–444)
 - * Max Mosley (QQ 697–753)
 - ** Professor Andrew Murray (QQ 536–583)
 - National Union of Journalists (NUJ)
 - ** The Rt Hon. Lord Neuberger of Abbotsbury (QQ 486–535)
 - ** News Group Newspapers (QQ 1511–1593)

- The Newspaper Society
- ** Paul Ashford, editorial director, Northern & Shell Network Ltd (QQ 584–696)
 - ** Richard Desmond, chairman, Northern & Shell Network Ltd (QQ 584–696)
 - * Ofcom (QQ 754–818)
- Open Digital Policy Organisation
- * Professor Julian Petley (QQ 404–444)
 - ** Professor Gavin Phillipson (QQ 1–32)
 - * Press Complaints Commission (QQ 754–818)
 - * The Rt Hon. Lord Hunt of Wirral, chair, Press Complaints Commission (QQ 1594–1628)
 - ** David Price QC (QQ 33–64)
 - * Ian Hislop, editor, *Private Eye* (QQ 162–209)
- Professional Negligence Lawyers’ Association
- ** Reynolds Porter Chamberlain (QQ 33–64)
 - ** Joshua Rozenberg (QQ 119–161)
 - * Schillings (QQ 65–118)
 - ** John McLellan, editor, *The Scotsman* (QQ 210–272)
- Dr Andrew Scott
- ** The Rt Hon. Sir Stephen Sedley (QQ 1–32)
 - * Society of Editors (QQ 889–936)
 - ** Paul Staines (QQ 326–403)
 - ** The Rt Hon. Jack Straw MP (QQ 1–32)
 - ** Dominic Mohan, editor, *The Sun* (QQ 1511–1593)
 - ** Richard Walker, editor, *Sunday Herald* (QQ 210–272)
 - ** Matt McKenzie, editor *The Sunday Sun* (QQ 210–272)
 - ** John Witherow editor, *The Sunday Times* (QQ 162–209)
 - ** Edward Roussel, Digital Editor, Telegraph Media Group (QQ 1306–1383)
 - ** James Harding, editor, *The Times* (QQ 889–936)
 - ** Philip Webster, editor, Times Online (QQ 1306–1383)
 - * Hugh Tomlinson QC (QQ 65–118)
 - ** Trinity Mirror plc (QQ 1233–1305)
 - ** Mr Justice Tugendhat (QQ 486–535)
 - ** Twitter (QQ 1384–1455)
 - ** Ashley Van Haefen (QQ 536–583)
 - * The Rt Hon. Lord Wakeham (QQ 1–32)
 - * The Rt Hon. Sir Nicholas Wall (QQ 445–485)
- James and Margaret Watson
- * Richard Wilson (QQ 326–403)
- Withers LLP

APPENDIX 3: MAIN FINDINGS OF THE MASTER OF THE ROLLS' COMMITTEE ON SUPER-INJUNCTIONS

The principle of open justice is a fundamental constitutional principle, although it is not an absolute principle. Derogations from open justice can only properly be made where they are strictly necessary in order to secure the proper administration of justice.

Frequency of super-injunctions: since the *Terry* case, as far as the committee was aware, only two known super-injunctions have been granted to protect information said to be private or confidential.

Super-injunctions in principle: as they incorporate derogations from the principle of open justice, super-injunctions and anonymised injunctions can only be granted when they are strictly necessary.

Practice Guidance should be issued, setting out the procedure to be followed when applying for interim injunctions, with the aim of protecting information said to be private or confidential pending trial. It should stress the importance of properly complying with section 12 of the Human Rights Act 1998.²⁴⁷

Fast-track appeals: it is already possible to seek expedition of appeals from such orders. No new procedures are necessary.

Communications between the courts and Parliament: Parliament's *sub judice* rule supports the rule of law and ensures a citizen's right to fair trial is not compromised. There is no adequate mechanism to enable the relevant parliamentary authorities to ascertain whether there are active proceedings in place. Consideration should be given to establishing a secure database containing details of super-injunctions and anonymised injunctions held by Her Majesty's Courts and Tribunals Service, which could be easily searchable following any query from the House authorities.²⁴⁸

Parliamentary privilege and court orders: No super-injunction, or any other court order, could conceivably restrict or prohibit parliamentary debate or proceedings; it would be unconstitutional.

Media reporting of parliamentary proceedings: media reporting of parliamentary proceedings is protected by the Parliamentary Papers Act 1840, which provides qualified privilege for individuals who publish a summary of material published in Hansard. Qualified privilege arises where such a summary is published in good faith and without malice. There is no judicial decision as to whether a summary of material published in Hansard which intentionally had the effect of frustrating a court order would be in good faith and without malice.

²⁴⁷ Practice Guidance: Interim Non-Disclosure Orders was issued by the Master of the Rolls with effect from 1 August 2011.

²⁴⁸ Practice Direction 51F provides for a pilot scheme for the recording of data relating to non-disclosure injunctions with effect from 1 August 2011.

APPENDIX 4: CALL FOR EVIDENCE

A new joint committee has been appointed by both Houses of Parliament to consider privacy and injunctions. The Joint Committee comprises 13 MPs and 13 peers. It will take oral and written evidence and make recommendations in a report to both Houses. The Joint Committee invites interested organisations and individuals to submit written evidence as part of the inquiry.

The Joint Committee would welcome written submissions on all or any of the following questions:

(1) How the statutory and common law on privacy and the use of anonymity injunctions and super-injunctions has operated in practice

(a) Have anonymous injunctions and super-injunctions been used too frequently, not enough or in the wrong circumstances?

(b) Are the courts making appropriate use of time limitations to injunctions and of injunctions contra mundum (i.e. injunctions which are binding on the whole world) and how are such injunctions working in practice?

(c) What can be done about the cost of obtaining a privacy injunction? Whilst individuals the subject of widespread and persistent media coverage often have the financial means to pursue injunctions, could a cheaper mechanism be created allowing those without similar financial resources access to the same legal protection?

(d) Are injunctions and appeals regarding injunctions being dealt with by the courts sufficiently quickly to minimise either (where the injunction is granted or upheld) prolonged unjustifiable distress for the individual or (where an injunction is overturned or not granted) the risk of news losing its current topical value?

(e) Should steps be taken to penalise newspapers which refuse to give an undertaking not to publish private information but also make no attempt to defend an application for an injunction in respect of that information, thereby wasting the court's time?

(2) How best to strike the balance between privacy and freedom of expression, in particular how best to determine whether there is a public interest in material concerning people's private and family life

(a) Have there been and are there currently any problems with the balance struck in law between freedom of expression and the right to privacy?

(b) Who should decide where the balance between freedom of expression and the right to privacy lies?

(c) Should Parliament enact a statutory privacy law?

(d) Should Parliament prescribe the definition of 'public interest' in statute, or should it be left to the courts?

(e) Is the current definition of 'public interest' inadequate or unclear?

(f) Should the commercial viability of the press be a public interest consideration to be balanced against an individual's right to privacy?

(g) Should it be the case that individuals waive some or all of their right to privacy when they become a celebrity? A politician? A sportsperson? Should it depend on the degree to which that individual uses their image or private life for popularity? For money? To get elected? Does the image the individual relies on

have to relate to the information published in order for there to be a public interest in publishing it (a ‘hypocrisy’ argument)? If so, how directly?

(h) Should any or all individuals in the public eye be considered to be ‘role models’ such that their private lives may be subject to enhanced public scrutiny regardless of whether or not they make public their views on morality or personal conduct (i.e. in the absence of a ‘hypocrisy’ argument)?

(i) Are the courts giving appropriate weight to the value of freedom of expression in ‘celebrity gossip’ and ‘tittle-tattle’?²⁴⁹

(j) In the context of sexual conduct, should it be the case that a person’s conduct in private must constitute a significant breach of the criminal law before it may be disclosed and criticised in the press?

(k) Could different remedies (other than damages) play a role in encouraging an appropriate balance?

(l) Are damages a sufficient remedy for a breach of privacy? Would punitive financial penalties be an effective remedy? Would they adequately deter disproportionate breaches of privacy?

(m) Should we introduce a prior notification requirement, requiring newspapers and other print media to notify an individual before information is published, thereby giving the individual time to seek an injunction if a court agrees the publication is more likely than not to be found a breach of privacy? If so, how would such a requirement function in terms of written content online eg blogs and other media?

(n) Should aggravated damages be payable if a media publisher does not give prior notification to the subject of a publication which a court finds is in breach of that individual’s privacy?

(o) Is section 12 of the Human Rights Act 1998 appropriately balanced? Should the media’s freedom of expression be protected in stronger terms? Or is there a disproportionate emphasis on the media’s freedom of expression over the right to privacy? Has Section 12 of the Human Rights Act 1998 ensured a more favourable press environment than would be the case if Strasbourg jurisprudence and UK injunctions jurisprudence were applied in the absence of Section 12?

(p) Is the test in section 12 for an injunction to be granted too high a threshold? Should that test depend on the type of information about to be published? Has the court struck the right balance in applying section 12?

(q) Is there an anomaly requiring legislative attention between the tests for an injunction for breach of privacy and in defamation?

(3) Issues relating to the enforcement of anonymity injunctions and super-injunctions, including the internet, cross-border jurisdiction within the United Kingdom, parliamentary privilege and the rule of law

(a) How can privacy injunctions be enforced in this age of ‘new media’? Is it practical and/or desirable to prosecute ‘tweeters’ or bloggers? If so, for what kind of behaviour and how many people—where should or could those lines be drawn?

²⁴⁹ The courts have referred to this type of information, eg. “tittle-tattle about the activities of footballers’ wives and girlfriends”. See, for example, *Jameel v Wall Street Journal Europe SPRL* [2006] UKHL 44, [2007] 1 AC 359 at 147, [2006] 4 All ER 1279, at [147], *CTB v Newsgroup Newspapers Ltd and another* [2011] EWHC 1232 (QB) at [33], *ETK v News Group Newspapers Ltd* [2011] EWCA Civ 439, at [11].

(b) Is it possible, practical and/or desirable for print media to be restrained by the law when other forms of ‘new media’ will cover material subject to an injunction anyway? Does the status quo of seeking to restrict press intrusion into individual’s private lives whilst the ‘new media’ users remain unchallenged represent a good compromise?

(c) Is enough being done to tackle ‘jigsaw’ identification by the press and ‘new media’ users? For example see Mr Justice King’s provisional view in *NEJ v Wood* [2011] EWHC 1972 (QB) at [20] that information published in the Daily Mail breached the order of Mr Justice Blake, and the consideration by Mr Justice Tugendhat in *TSE and ELP v News Group Newspapers* [2011] EWHC 1308 (QB) at [33]–[34] as to whether details about TSE published by *The Sun* breached the order of Mrs Justice Sharp.

(d) Are there any concerns regarding enforcement of privacy injunctions across jurisdictional borders within the UK? If so, how should those concerns be dealt with?

(e) **PARLIAMENTARY PRIVILEGE:**

(i) With regard to the enforcement of privacy injunctions and the breaching of them during Parliamentary proceedings, is there a case for reforming the Parliamentary Papers Act 1840 and other aspects of Parliamentary privilege? Should this be addressed by a specific Parliamentary Privilege Bill or is it desirable for this Committee to consider privilege to the extent it is relevant to injunctions?

(ii) Should Parliament consider enforcing ‘proper’ use of Parliamentary Privilege through penalties for ‘abuse’?

(iii) What is ‘proper’ use and what is ‘abuse’ of Parliamentary Privilege?

(iv) Is it desirable to address the situation whereby a Member of either house breaches an injunction using Parliamentary Privilege using privacy law, or is that a situation best left entirely to Parliament to deal with? Indeed, is it possible to address the situation through privacy law or is that constitutionally impermissible? Could the current position in this respect be changed in any significant way? If so, how?

(4) Issues relating to media regulation in this context, including the role of the Press Complaints Commission and the Office of Communications (OFCOM)

PCC

(a) Do the guidelines in section 3 of the Editors’ Code of Practice correctly address the balance between the individual’s right to privacy and press freedom of expression?

(b) How effective has the PCC been in dealing with bad behaviour from the press in relation to injunctions and breaches of privacy?

(c) Does the PCC have sufficient powers to provide remedies for breaches of the Editors’ Code of Practice in relation to privacy complaints?

(d) Should the PCC be able to initiate its own investigations on behalf of someone whose privacy may have been infringed by something published in a newspaper or magazine in the UK?

(e) Should the PCC have the power to consider the balance between an individual's privacy and freedom of expression prior to the publication of material—or should this power remain with the Courts?

(f) Is there sufficient awareness in the general public of the powers and responsibilities of the PCC in the context of privacy and injunctions?

OFCOM

(g) Do the guidelines in section 8 of the Ofcom Broadcasting Code correctly address the balance between the individual's right to privacy and freedom of expression?

(h) How effective has Ofcom been in dealing with breaches of the Ofcom Broadcasting Code in relation to breaches of privacy?

(i) Is there a case that the rules on infringement of privacy should be applied equally across all media content?

You need not address all these questions. Short submissions are preferred.

Submissions, which should be original and not copies of papers written for Government consultations or any other inquiry, must be received by Thursday 6 October 2011.

APPENDIX 5: FORMAL MINUTES

Extract from the House of Lords Minutes of Proceedings of 28 June 2011

Privacy and injunctions—Lord Strathclyde moved that it is expedient that a joint committee of Lords and Commons be appointed to consider privacy and injunctions, including:

- (1) how the statutory and common law on privacy and the use of anonymity injunctions and super-injunctions has operated in practice;
- (2) how best to strike the balance between privacy and freedom of expression, in particular how best to determine whether there is a public interest in material concerning people's private and family life;
- (3) issues relating to the enforcement of anonymity injunctions and super-injunctions, including the internet, cross-border jurisdiction within the United Kingdom, parliamentary privilege and the rule of law; and
- (4) issues relating to media regulation in this context, including the role of the Press Complaints Commission and the Office of Communications (OFCOM);

and that the committee should report by 29 February 2012.

After debate, the motion was agreed to and a message was sent to the Commons.

Extract from the Votes and Proceedings of the House of Commons of 14 July 2011

Privacy and Injunctions (Joint Committee)—*Resolved*, That this House concurs with the Lords Message of 27 June, that it is expedient that a Joint Committee of Lords and Commons be appointed to consider privacy and injunctions, including:

- (1) how the statutory and common law on privacy and the use of anonymity injunctions and super-injunctions has operated in practice;
- (2) how best to strike the balance between privacy and freedom of expression, in particular how best to determine whether there is a public interest in material concerning people's private and family life;
- (3) issues relating to the enforcement of anonymity injunctions and super-injunctions, including the internet, cross-border jurisdiction within the United Kingdom, parliamentary privilege and the rule of law; and
- (4) issues relating to media regulation in this context, including the role of the Press Complaints Commission and the Office of Communications (OFCOM);

That the Committee should report by 29 February 2012;

That a Select Committee of thirteen Members be appointed to join with the Committee appointed by the Lords;

That the Committee shall have power-

- (i) to send for persons, papers and records;
- (ii) to sit notwithstanding any adjournment of the House;
- (iii) to report from time to time;
- (iv) to appoint specialist advisers; and
- (v) to adjourn from place to place within the United Kingdom;

That Mr Ben Bradshaw, Mr Robert Buckland, Philip Davies, George Eustice, Paul Farrelly, Martin Horwood, Eric Joyce, Mr Elfyn Llwyd, Penny Mordaunt, Yasmin Qureshi, Ms Gisela Stuart, Mr John Whittingdale and Nadhim Zahawi be members of the Committee.—(James Duddridge)

Extract from the House of Lords Minutes of Proceedings of 18 July 2011

Privacy and Injunctions—The Chairman of Committees moved that the Commons message of 14 July be considered and that a Committee of thirteen Lords be appointed to join with the Committee appointed by the Commons to consider privacy and injunctions, including:

- (1) how the statutory and common law on privacy and the use of anonymity injunctions and super-injunctions has operated in practice;
- (2) how best to strike the balance between privacy and freedom of expression, in particular how best to determine whether there is a public interest in material concerning people's private and family life;
- (3) issues relating to the enforcement of anonymity injunctions and super-injunctions, including the internet, cross-border jurisdiction within the United Kingdom, parliamentary privilege and the rule of law; and
- (4) issues relating to media regulation in this context, including the role of the Press Complaints Commission and the Office of Communications (OFCOM);

That the Committee should report by 29 February 2012;

That, as proposed by the Committee of Selection, the following members be appointed to the Committee:

L Black of Brentwood	L Harries of Pentregarth
B Bonham-Carter of Yarnbury	L Hollick
Bp of Chester	L Janvrin
B Corston	L Mawhinney
L Dobbs	L Myners
L Gold	L Thomas of Gresford;
L Grabiner	

That the Committee have power to agree with the Committee appointed by the Commons in the appointment of a Chairman;

That the Committee have power to send for persons, papers and records;

That the Committee have power to appoint specialist advisers;

That the Committee have leave to report from time to time;

That the Committee have power to adjourn from place to place within the United Kingdom;

That the reports of the Committee from time to time shall be printed, regardless of any adjournment of the House; and

That the evidence taken by the Committee shall, if the Committee so wishes, be published.

The motion was agreed to and a message was sent to the Commons.

Extract from the House of Lords Minutes of Proceedings of 5 September 2011

Privacy and Injunctions—The Chairman of Committees moved that Lord Boateng be appointed a member of the Joint Committee in place of Lord Grabiner. The motion was agreed to.

Extract from the House of Lords Minutes of Proceedings of 25 January 2012

Privacy and Injunctions—Lord Strathclyde moved that, notwithstanding the Resolution of this House of 27 June 2011, it be an instruction to the Joint Committee on Privacy and Injunctions that it should report by 15 March 2012. The motion was agreed to and a message was sent to the Commons.

Extract from the Votes and Proceedings of the House of Commons of 30 January 2012

Privacy and Injunctions (Joint Committee)—*Resolved*, That this House concurs with the Lords Message of 25 January 2012 and that, notwithstanding the Resolution of this House of 14 July 2011, it be an instruction to the Joint Committee on Privacy and Injunctions that it should report by 15 March 2012.—
(Mr David Heath)

Thursday 8 September 2011

Present:

Lord Black of Brentwood	Mr Ben Bradshaw MP
Baroness Bonham-Carter of Yarnbury	Mr Robert Buckland MP
The Lord Bishop of Chester	Philip Davies MP
Lord Dobbs	George Eustice MP
Lord Gold	Martin Horwood MP
Lord Harries of Pentregarth	Mr Elfyn Llwyd MP
Lord Hollick	Penny Mordaunt MP
Lord Janvrin	Yasmin Qureshi MP
Lord Mawhinney	Ms Gisela Stuart MP
	Mr John Whittingdale MP
	Nadhim Zahawi MP

Members' interests: the full lists of members' interests as recorded in the Commons Register of Members' Interest and the Register of Lords' Interests are noted.

Declared interests are appended to the report.

It is moved that John Whittingdale MP do take the Chair.—(*Lord Hollick*)

The same is agreed to.

Ordered, That the Chair report his election to the House of Commons.

The Orders of Reference are read.

The Joint Committee deliberate.

The Call for Evidence is agreed to.

Ordered, That the public be admitted during the examination of witnesses, unless the Committee orders otherwise.

Ordered, That witnesses have permission to publish memoranda subject always to the discretion of the Chair or where the Committee otherwise orders.

Ordered, That, unless the Committee orders otherwise, written evidence and uncorrected transcripts of oral evidence given to the Committee be published on the internet.

Ordered, That the Joint Committee be adjourned to Thursday 15 September at 10 o'clock.

Thursday 15 September 2011

Present:

Lord Black of Brentwood	Mr Ben Bradshaw MP
The Lord Bishop of Chester	Mr Robert Buckland MP
Lord Gold	Philip Davies MP
Lord Mawhinney	Paul Farrelly MP
Lord Myners	Eric Joyce MP
Lord Thomas of Gresford	Yasmin Qureshi MP

Ms Gisela Stuart MP
 Nadhim Zahawi MP
 Mr John Whittingdale MP (*in the Chair*)

The proceedings of Thursday 8 September are read.

The Joint Committee deliberate.

Ordered, That Professor Eric Barendt, Sir Charles Gray and Paul Potts CBE be appointed specialist advisers.

Ordered, That the Joint Committee be adjourned to Monday 10 October at 2 o'clock.

Monday 10 October 2011

Present:

Lord Black of Brentwood	Mr Ben Bradshaw MP
Baroness Bonham-Carter of Yarnbury	Mr Robert Buckland MP
The Lord Bishop of Chester	Philip Davies MP
Baroness Corston	George Eustice MP
Lord Dobbs	Paul Farrelly MP
Lord Gold	Martin Horwood MP
Lord Harries of Pentregarth	Eric Joyce MP
Lord Hollick	Mr Elfyn Llwyd MP
Lord Janvrin	Yasmin Qureshi MP
Lord Mawhinney	Ms Gisela Stuart MP
Lord Myners	
Lord Thomas of Gresford	

Mr John Whittingdale MP (*in the Chair*)

The proceedings of 15 September are read.

The Joint Committee deliberate.

Ordered, That the Joint Committee be adjourned to Monday 17 October at 2 o'clock.

Monday 17 October 2011

Present:

Lord Black of Brentwood	Mr Ben Bradshaw MP
Lord Boateng	Mr Robert Buckland MP
Baroness Bonham-Carter of Yarnbury	Philip Davies MP
The Lord Bishop of Chester	George Eustice MP
Baroness Corston	Paul Farrelly MP
Lord Dobbs	Martin Horwood MP
Lord Gold	Eric Joyce MP
Lord Harries of Pentregarth	Mr Elfyn Llwyd MP
Lord Hollick	Penny Mordaunt MP

Lord Janvrin
 Lord Mawhinney
 Lord Myners
 Lord Thomas of Gresford

Ms Gisela Stuart MP
 Nadhim Zahawi MP

Mr John Whittingdale MP (*in the Chair*)

The proceedings of 10 October are read.

The Joint Committee deliberate.

The following witnesses are examined:

The Rt Hon. Jack Straw MP, Home Secretary during the passage of the Human Rights Act 1998 through Parliament, the Rt Hon. Lord Wakeham, chairman of the Press Complaints Commission during the passage of the Human Rights Act 1998 through Parliament, the Rt Hon. Sir Stephen Sedley, Lord Justice of Appeal, 1999–2011, and Professor Gavin Phillipson, Durham Law School, University of Durham.

Ordered, That the Joint Committee be adjourned to Monday 24 October at half-past 2 o'clock

Monday 24 October 2011

Present:

Lord Black of Brentwood
 Lord Boateng
 The Lord Bishop of Chester
 Lord Dobbs
 Lord Gold
 Lord Harries of Pentregarth
 Lord Hollick
 Lord Janvrin
 Lord Thomas of Gresford

Mr Ben Bradshaw MP
 Paul Farrelly MP
 Eric Joyce MP
 Penny Mordaunt MP
 Yasmin Qureshi MP
 Ms Gisela Stuart MP

Mr John Whittingdale MP (*in the Chair*)

The proceedings of 17 October are read.

The Joint Committee deliberate.

The following witnesses are examined:

David Price QC, solicitor-advocate, David Price Solicitors and Advocates, Gavin Millar QC, Doughty Street Chambers, Gillian Phillips, Director of Editorial Legal Services, *The Guardian*, and Keith Mathieson, Reynolds Porter Chamberlain;

Hugh Tomlinson QC, Matrix Chambers, Gideon Benaim, Schillings, and Alasdair Pepper, Carter-Ruck.

Ordered, That the Joint Committee be adjourned to Monday 31 October at 2 o'clock.

Monday 31 October 2011

Present:

Lord Black of Brentwood	Mr Ben Bradshaw MP
Lord Boateng	Mr Robert Buckland MP
Baroness Bonham-Carter of Yarnbury	Philip Davies MP
The Lord Bishop of Chester	George Eustice MP
Baroness Corston	Paul Farrelly MP
Lord Dobbs	Martin Horwood MP
Lord Harries of Pentregarth	Eric Joyce MP
Lord Hollick	Mr Elfyn Llwyd MP
Lord Janvrin	Penny Mordaunt MP
Lord Mawhinney	Yasmin Qureshi MP
Lord Thomas of Gresford	Nadhim Zahawi MP

Mr John Whittingdale MP (*in the Chair*)

The proceedings of 24 October are read.

The Joint Committee deliberate.

The following witnesses are examined:

Joshua Rozenberg, legal commentator and journalist, Professor Steven Barnett, Professor of Communications, Westminster University, and Professor Brian Cathcart, Founder of Hacked Off and Professor of Journalism at Kingston University London;

Alan Rusbridger, editor, *The Guardian*, Ian Hislop, editor, *Private Eye*, John Witherow, editor, *Sunday Times*, and Jonathan Grun, editor of the Press Association.

Ordered, That the Joint Committee be adjourned to Monday 7 November at 2 o'clock.

Monday 7 November 2011

Present:

Lord Black of Brentwood	Mr Ben Bradshaw MP
Lord Boateng	George Eustice MP
The Lord Bishop of Chester	Martin Horwood MP
Lord Dobbs	Mr Elfyn Llwyd MP
Lord Gold	Penny Mordaunt MP
Lord Harries of Pentregarth	Ms Gisela Stuart MP
Lord Hollick	Nadhim Zahawi MP
Lord Janvrin	
Lord Mawhinney	
Lord Myners	
Lord Thomas of Gresford	

Mr John Whittingdale MP (*in the Chair*)

The proceedings of 31 October are read.

The Joint Committee deliberate.

The following witnesses are examined:

Richard Walker, editor, *Sunday Herald*, John McLellan, editor, *The Scotsman*, Matt McKenzie, editor, *The Sunday Sun*, Alastair Machray, editor, *Liverpool Echo*, and Neil Fowler, Nuffield College, Oxford, and former editor of five regional newspapers;

Prash Naik, Controller of Legal and Compliance, Channel 4, David Jordan, Director of Editorial Policy and Standards, BBC, and Valerie Nazareth, Head of Programme Legal Advice, BBC.

Ordered, That the Joint Committee be adjourned to Monday 14 November at 2 o'clock.

Monday 14 November 2011

Present:

Baroness Bonham-Carter of Yarnbury	Mr Ben Bradshaw MP
The Lord Bishop of Chester	Mr Robert Buckland MP
Lord Dobbs	Philip Davies MP
Lord Gold	George Eustice MP
Lord Harries of Pentregarth	Martin Horwood MP
Lord Hollick	Mr Elfyn Llwyd MP
Lord Janvrin	Ms Gisela Stuart MP
Lord Mawhinney	
Lord Myners	
Lord Thomas of Gresford	

Mr John Whittingdale MP (*in the Chair*)

The proceedings of 7 November are read.

The Joint Committee deliberate.

The following witnesses are examined:

Paul Staines, editor, "Guido Fawkes" blog, Jamie East, managing editor, "Holy Moly" blog, David Allen Green, "Jack of Kent" blog and legal correspondent of the *New Statesman*, and Richard Wilson, blogger and tweeter, "Don't Get Fooled";

Sir Christopher Meyer, former chair of the Press Complaints Commission, Martin Moore, Director of the Media Standards Trust, Julian Petley, chair of the Campaign for Press and Broadcasting Freedom, and John Kampfner, chief executive, Index on Censorship.

Ordered, That the Joint Committee be adjourned to Monday 21 November at 2 o'clock.

Monday 21 November 2011

Present:

Baroness Bonham-Carter of Yarnbury	Mr Ben Bradshaw MP
The Lord Bishop of Chester	Mr Robert Buckland MP
Lord Black of Brentwood	Paul Farrelly MP
Baroness Corston	Martin Horwood MP
Lord Dobbs	Eric Joyce MP
Lord Gold	Mr Elfyn Llwyd MP
Lord Harries of Pentregarth	Yasmin Qureshi MP
Lord Hollick	Ms Gisela Stuart MP
Lord Janvrin	

Mr John Whittingdale MP (*in the Chair*)

The proceedings of 14 November are read.

The Joint Committee deliberate.

The following witnesses are examined:

The Rt Hon. Sir Nicholas Wall, President of the Family Division of the High Court, and Mr Justice Baker;

The Rt Hon. Lord Neuberger of Abbotsbury, Master of the Rolls, and Mr Justice Tugendhat.

Ordered, That the Joint Committee be adjourned to Monday 28 November at 2 o'clock.

Monday 28 November 2011

Present:

The Lord Bishop of Chester	Mr Ben Bradshaw MP
Lord Black of Brentwood	Mr Robert Buckland MP
Lord Boateng	George Eustice MP
Baroness Corston	Paul Farrelly MP
Lord Dobbs	Eric Joyce MP
Lord Gold	Penny Mordaunt MP
Lord Janvrin	Yasmin Qureshi MP
Lord Mawhinney	Ms Gisela Stuart MP
Lord Thomas of Gresford	Nadhim Zahawi MP

Lord Hollick (*in the Chair*)

The proceedings of 21 November are read.

The Joint Committee deliberate.

The following witnesses are examined:

Professor Andrew Murray, Professor of Law, London School of Economics, Dr Ian Brown, Senior Research Fellow, Oxford Internet Institute, Ashley Van

Haeften, trustee, Wikimedia UK, and Nicholas Lansman, secretary general, Internet Service Providers Association;

Richard Desmond, chairman, Northern & Shell Network Ltd, Paul Ashford, editorial director, Northern & Shell Network Ltd, and Hugh Whittow, editor, *Daily Express*.

Ordered, That the Joint Committee be adjourned to Monday 5 December at 2 o'clock.

Monday 5 December 2011

Present:

The Lord Bishop of Chester	Mr Ben Bradshaw MP
Lord Black of Brentwood	Mr Robert Buckland MP
Lord Boateng	George Eustice MP
Baroness Bonham-Carter of Yarnbury	Eric Joyce MP
Lord Dobbs	Mr Elfyn Llwyd MP
Lord Gold	Penny Mordaunt MP
Lord Harries of Pentregarth	Ms Gisela Stuart MP
Lord Mawhinney	Nadhim Zahawi MP
Lord Thomas of Gresford	

Mr John Whittingdale MP (*in the Chair*)

The proceedings of 28 November are read.

The Joint Committee deliberate.

The following witnesses are examined:

Steve Coogan, Zac Goldsmith MP, Hugh Grant and Max Mosley;

Stephen Abell, director, Press Complaints Commission, Ed Richards, chief executive, Ofcom, Tony Close, Director of Standards, Ofcom, and Pete Johnson, chief executive officer, Authority for Television On Demand.

Ordered, That the written evidence from John Hemming MP and John Mann MP be not published and that witnesses do not have permission to publish as evidence submitted to the Committee.

Ordered, That the Joint Committee be adjourned to Monday 12 December at 2 o'clock.

Monday 12 December 2011

Present:

The Lord Bishop of Chester	Mr Ben Bradshaw MP
Lord Black of Brentwood	Paul Farrelly MP
Lord Boateng	Mr Elfyn Llwyd MP
Baroness Bonham-Carter of Yarnbury	Penny Mordaunt MP
Baroness Corston	Yasmin Qureshi MP
Lord Dobbs	Nadhim Zahawi MP
Lord Gold	

Lord Harries of Pentregarth
 Lord Hollick
 Lord Janvrin
 Lord Mawhinney
 Lord Myners
 Lord Thomas of Gresford

Mr John Whittingdale MP (*in the Chair*)

The proceedings of 5 December are read.

The Joint Committee deliberate.

The following witnesses are examined:

Viscount Rothermere, chairman, Daily Mail & General Trust plc, Kevin Beatty, chief executive, A & N Media, and Liz Hartley, Head of Editorial Legal Services, Associated Newspapers;

James Harding, editor, *The Times*, Peter Wright, editor, *Mail on Sunday*, and Bob Satchwell, executive director, Society of Editors.

Resolved, that the Joint Committee request an extension to its deadline to Thursday 15 March 2012.

Ordered, That the Joint Committee be adjourned to Monday 19 December at 2 o'clock.

Monday 19 December 2011

Present:

Lord Black of Brentwood
 Lord Boateng
 Baroness Corston
 Lord Dobbs
 Lord Gold
 Lord Harries of Pentregarth
 Lord Hollick
 Lord Janvrin
 Lord Mawhinney
 Lord Thomas of Gresford

Mr Robert Buckland MP
 Philip Davies MP
 George Eustice MP
 Martin Horwood MP
 Penny Mordaunt MP
 Yasmin Qureshi MP
 Ms Gisela Stuart MP
 Nadhim Zahawi MP

Mr John Whittingdale MP (*in the Chair*)

The proceedings of 12 December are read.

The Joint Committee deliberate.

The following witnesses are examined:

Professor Anthony Bradley QC, Research Fellow, Institute of European and Comparative Law, University of Oxford, David Howarth, Reader in Law at Cambridge University and former MP, and Sir William McKay, Clerk of the House of Commons, 1998–2002;

David Beamish, Clerk of the Parliaments, Peter Milledge, Deputy Counsel to the Chairman of Committees, House of Lords, Robert Rogers, Clerk of the House of Commons, and Michael Carpenter, Speaker's Counsel.

Ordered, That the Joint Committee be adjourned to Monday 16 January 2012 at 2 o'clock.

Monday 16 January 2012

Present:

Lord Black of Brentwood	Mr Ben Bradshaw MP
Lord Boateng	Mr Robert Buckland MP
The Lord Bishop of Chester	George Eustice MP
Baroness Corston	Paul Farrelly MP
Lord Dobbs	Martin Horwood MP
Lord Gold	Eric Joyce MP
Lord Harries of Pentregarth	Penny Mordaunt MP
Lord Janvrin	Yasmin Qureshi MP
Lord Mawhinney	Nadhim Zahawi MP
Lord Myners	

Mr John Whittingdale MP (*in the Chair*)

The proceedings of 19 December 2011 are read.

The Joint Committee deliberate.

The following witnesses are examined:

The Rt Hon. Kenneth Clarke QC MP, Lord Chancellor and Secretary of State for Justice, and The Rt Hon. Jeremy Hunt MP, Secretary of State for Culture, Olympics, Media and Sport;

The Rt Hon. Dominic Grieve QC MP, Attorney General.

Ordered, That the Joint Committee be adjourned to Thursday 19 January 2012 at 2 o'clock.

Thursday 19 January 2012

Present:

Lord Black of Brentwood	Mr Ben Bradshaw MP
Lord Boateng	Mr Robert Buckland MP
Baroness Bonham-Carter of Yarnbury	Martin Horwood MP
Lord Janvrin	Eric Joyce MP
Lord Myners	Penny Mordaunt MP
Lord Thomas of Gresford	Yasmin Qureshi MP

Mr John Whittingdale MP (*in the Chair*)

The proceedings of 16 January are read.

The Joint Committee deliberate.

The following witnesses are examined:

Evgeny Lebedev, chairman, Independent Print Ltd and Evening Standard Ltd, Andrew Mullins, managing director, Independent Print Ltd and Evening Standard Ltd, and Chris Blackhurst, editor, *The Independent*.

Resolved, That the Committee now take evidence in private.

The following witnesses are examined:

John Mann MP;

John Hemming MP.

Ordered, That the Joint Committee be adjourned to Monday 23 January at 2 o'clock.

Monday 23 January 2012

Present:

Lord Boateng	Mr Robert Buckland MP
Baroness Bonham-Carter of Yarnbury	George Eustice MP
The Lord Bishop of Chester	Paul Farrelly MP
Baroness Corston	Martin Horwood MP
Lord Dobbs	Eric Joyce MP
Lord Gold	Mr Elfyn Llwyd MP
Lord Harries of Pentregarth	Penny Mordaunt MP
Lord Hollick	Yasmin Qureshi MP
Lord Janvrin	Ms Gisela Stuart MP
Lord Thomas of Gresford	Nadhim Zahawi MP

Mr John Whittingdale MP (*in the Chair*)

The proceedings of 19 January are read.

The Joint Committee deliberate.

The following witnesses are examined:

Paul Vickers, Secretary and Group Legal Director, Trinity Mirror plc, Marcus Partington, Deputy Secretary/Group Legal Director, Trinity Mirror plc, and Richard Wallace, editor, *Daily Mirror*;

Martin Clarke, Publisher, Mail Online, Edward Roussel, Digital Editor, Telegraph Media Group, Phillip Webster, editor, Times Online.

Ordered, That the Joint Committee be adjourned to Monday 30 January at 2 o'clock.

Monday 30 January 2012

Present:

Lord Black of Brentwood	Mr Ben Bradshaw MP
Lord Boateng	Mr Robert Buckland MP
Baroness Bonham-Carter of Yarnbury	Philip Davies MP
Baroness Corston	Paul Farrelly MP

Lord Dobbs	Martin Horwood MP
Lord Gold	Eric Joyce MP
Lord Harries of Pentregarth	Penny Mordaunt MP
Lord Janvrin	Yasmin Qureshi MP
Lord Mawhinney	Nadhim Zahawi MP
Lord Myners	

Lord Hollick (*in the Chair*)

The proceedings of 23 January are read.

The Joint Committee deliberate.

The following witnesses are examined:

Lord Allan of Hallam, Director of Policy in Europe, Facebook, David-John (DJ) Collins, vice president, Global Policy and Communications, Google, Daphne Keller, Associate General Counsel, Google, Colin Crowell, Head of Global Public Policy, Twitter;

Max Clifford, managing director, Max Clifford Associates Ltd, and Phil Hall, chairman, PHA Media and former editor of the *News of the World* and *Hello!*.

Ordered, That the Joint Committee be adjourned to Thursday 2 February at 10 o'clock.

Thursday 2 February 2012

Present:

Lord Black of Brentwood	Mr Robert Buckland MP
Baroness Bonham-Carter of Yarnbury	Philip Davies MP
Lord Dobbs	George Eustice MP
Lord Gold	Eric Joyce MP
Lord Janvrin	Penny Mordaunt MP
Lord Thomas of Gresford	Yasmin Qureshi MP
	Nadhim Zahawi MP

The Lord Bishop of Chester (*in the Chair*)

The proceedings of 30 January are read.

The Joint Committee deliberate.

The following witnesses are examined:

Dominic Mohan, editor, *The Sun*, Richard Caseby, Group Managing Editor, News Group Newspapers, and Justin Walford, Editorial Legal Counsel, News Group Newspapers;

Lord Hunt of Wirral, chair, Press Complaints Commission.

Ordered, That the Joint Committee be adjourned to Monday 6 February at 2 o'clock.

Monday 6 February 2012

Present:

Lord Black of Brentwood	Mr Ben Bradshaw MP
Lord Boateng	Mr Robert Buckland MP
Baroness Bonham-Carter of Yarnbury	George Eustice MP
The Lord Bishop of Chester	Martin Horwood MP
Lord Dobbs	Eric Joyce MP
Lord Harries of Pentregarth	Mr Elfin Llwyd MP
Lord Hollick	Penny Mordaunt MP
Lord Janvrin	Yasmin Qureshi MP
Lord Thomas of Gresford	Ms Gisela Stuart MP
	Nadhim Zahawi MP

Mr John Whittingdale MP (*in the Chair*)

The proceedings of 2 February are read.

The Joint Committee deliberate.

The following witnesses are examined:

Alex Hall and Charlotte Harris, partner, Mishcon de Reya solicitors.

Ordered, That the Joint Committee be adjourned to Monday 27 February at 2 o'clock.

Monday 27 February 2012

Present:

Lord Black of Brentwood	Mr Ben Bradshaw MP
Lord Boateng	Mr Robert Buckland MP
Baroness Corston	Philip Davies MP
Lord Dobbs	George Eustice MP
Lord Harries of Pentregarth	Mr Elfyn Llwyd MP
Lord Hollick	Penny Mordaunt MP
Lord Janvrin	Yasmin Qureshi MP
Lord Mawhinney	Nadhim Zahawi MP
Lord Myners	
Lord Thomas of Gresford	

Mr John Whittingdale MP (*in the Chair*)

The proceedings of 6 February are read.

A draft Report is proposed by the Chairman.

The Joint Committee deliberate.

Ordered, That the Joint Committee be adjourned to Monday 5 March at 2 o'clock.

Monday 5 March 2012

Present:

Lord Black of Brentwood	Mr Ben Bradshaw MP
Lord Boateng	Mr Robert Buckland MP
Baroness Bonham-Carter of Yarnbury	Philip Davies MP
The Lord Bishop of Chester	George Eustice MP
Baroness Corston	Paul Farrelly MP
Lord Dobbs	Martin Horwood MP
Lord Gold	Ms Gisela Stuart MP
Lord Harries of Pentregarth	Nadhim Zahawi MP
Lord Hollick	
Lord Janvrin	
Lord Mawhinney	
Lord Myners	

Mr John Whittingdale MP (*in the Chair*)

The proceedings of 27 February are read.

A revised draft Report is proposed by the Chairman.

The Joint Committee deliberate.

Ordered, That the further supplementary written evidence from Mark Burby be not published and that the witness do not have permission to publish as evidence submitted to the Committee.

Ordered, That the Joint Committee be adjourned to Monday 12 March at 2 o'clock.

Monday 12 March 2012

Present:

Lord Black of Brentwood	Mr Ben Bradshaw MP
Lord Boateng	Mr Robert Buckland MP
The Lord Bishop of Chester	Philip Davies MP
Baroness Corston	George Eustice MP
Lord Dobbs	Paul Farrelly MP
Lord Harries of Pentregarth	Martin Horwood MP
Lord Hollick	Mr Elfyn Llwyd MP
Lord Janvrin	Penny Mordaunt MP
Lord Mawhinney	Yasmin Qureshi MP
Lord Myners	Nadhim Zahawi MP
Lord Thomas of Gresford	

Mr John Whittingdale MP (*in the Chair*)

The proceedings of 5 March are read.

A further revised draft Report is proposed by the Chairman.

The Joint Committee deliberate.

Paragraphs 1 to 31 are agreed to.

It is moved by Ben Bradshaw MP in line 1 of paragraph 32 to leave out the words “**now striking a better**” and insert “**striking the right**”.

The Committee divides.

Content, 10

Not content, 10

Lord Boateng

Mr Ben Bradshaw MP

The Lord Bishop of Chester

Baroness Corston

Paul Farrelly MP

Lord Harries of Pentregarth

Lord Hollick

Lord Janvrin

Lord Myners

Yasmin Qureshi MP

Lord Black of Brentwood

Mr Robert Buckland MP

Philip Davies MP

Lord Dobbs

George Eustice MP

Martin Horwood MP

Mr Elfyn Llwyd MP

Lord Mawhinney

Penny Mordaunt MP

Mr John Whittingdale MP

The numbers are equal, so the amendment is disagreed to in accordance with Lords standing order 56.

Question put, That paragraph 32 be agreed to.

The Committee divides.

Content, 16

Not content, 4

Lord Black of Brentwood

Lord Boateng

Mr Ben Bradshaw MP

Mr Robert Buckland MP

The Lord Bishop of Chester

Baroness Corston

Lord Dobbs

Paul Farrelly MP

Lord Harries of Pentregarth

Lord Hollick

Lord Janvrin

Lord Mawhinney

Penny Mordaunt MP

Lord Myners

Yasmin Qureshi MP

Mr John Whittingdale MP

Philip Davies MP

George Eustice MP

Martin Horwood MP

Mr Elfyn Llwyd MP

Paragraph 32 is agreed to accordingly.

Paragraphs 33 to 36 are agreed to.

It is moved by Robert Buckland MP to leave out paragraphs 37 to 41 and insert the following new paragraphs:

“The Human Rights Act 1998 is the basis of the United Kingdom’s privacy law. The issue is whether it could be improved to give clearer definition to the balance between the right to privacy and the right to freedom of expression. We believe that a statutory definition of privacy, based upon the terms of article 8 of the European Convention on Human Rights, is achievable and should be introduced.

A statute of privacy

It has been suggested that, while it would be extremely difficult to draw up a detailed legislative definition of privacy, there is value in a statute which restates the right to privacy in broad terms, giving it the clear imprimatur of Parliament and thus the democratic process. No longer would elements of the media be able to rail against “judge-made law”, as it would have been endorsed by Parliament. If such a scheme were followed judges would still decide how to strike the balance in each case—the difference being that in so doing they would be interpreting a statute with clear and recent parliamentary approval.

We also note that there are aspects of privacy law in a range of different items of legislation, such as the Regulation of Investigatory Powers Act 2000 and the Data Protection Act 1998. There is much uncertainty and confusion in the minds of the public about the extent of rights of individual privacy, so we propose that Parliament acts not merely to re-state the law, but to update it. **We recommend the creation of a statute of privacy that is based upon the rights set out in article 8 of the European Convention on Human Rights, but which also brings together and updates the varying strands of privacy legislation that are contained in other statutes such as the Data Protection Act 1998. A new Privacy Act could include stronger data protection provisions with more severe penalties for criminal offences relating to breaches of data protection law, for example.**

We believe that concerns about the creation of an exhaustive list of categories of private information can be overcome by making it clear on the face of the statute that the list is non-exhaustive.

We believe that now is the time for Parliament to take a lead and to create a statute of privacy that will consolidate and update the law in this area. We do not accept that it is satisfactory for the development of privacy law to be left to the unelected judiciary. We believe that it is the role of Parliament to set out the balance between privacy and freedom of expression, however contentious and difficult this might be.”

The Committee divides.

Content, 6

Not content, 15

Mr Robert Buckland MP
Philip Davies MP
George Eustice MP
Martin Horwood MP
Penny Mordaunt MP
Lord Thomas of Gresford

Lord Black of Brentwood
Lord Boateng
Mr Ben Bradshaw MP
The Lord Bishop of Chester
Baroness Corston
Lord Dobbs
Paul Farrelly MP

Lord Harries of Pentregarth
 Lord Hollick
 Lord Janvrin
 Mr Elfyn Llwyd MP
 Lord Mawhinney
 Lord Myners
 Yasmin Qureshi MP
 Mr John Whittingdale MP

The amendment is disagreed to and paragraphs 37 to 41 are agreed to accordingly.

Paragraphs 42 to 49 are agreed to, with amendments.

Question put, That paragraph 50 be agreed to.

The Committee divides.

Content, 17

Not content, 5

Lord Black of Brentwood
 Lord Boateng
 Mr Ben Bradshaw MP
 The Lord Bishop of Chester
 Baroness Corston
 Philip Davies MP
 Lord Dobbs
 Paul Farrelly MP
 Lord Harries of Pentregarth
 Lord Hollick
 Lord Janvrin
 Mr Elfyn Llwyd MP
 Lord Mawhinney
 Lord Myners
 Yasmin Qureshi MP
 Lord Thomas of Gresford
 Mr John Whittingdale MP

Mr Robert Buckland MP
 George Eustice MP
 Martin Horwood MP
 Penny Mordaunt MP
 Nadim Zahawi MP

Paragraph 50 is agreed to accordingly.

Paragraphs 51 to 58 are agreed to.

It is moved by Philip Davies MP to leave out paragraph 59 and insert the following new paragraph:

“There is a clear tension between articles 8 and 10 of the European Convention of Human Rights; neither right has a priority over the other, creating uncertainty in the law. We believe that there should be a presumption in favour of freedom of expression and we therefore believe that section 12 is an underemphasised but crucial part of the Human

Rights Act 1998. We believe that the courts should give greater weight to section 12 than they currently do, and have greater regard for freedom of expression as set out in section 12 for it to have any meaning at all. Section 12 of the Human Rights Act 1998 is fundamental in protecting the freedom of the press and it is essential that this is recognised by the courts.”

The Committee divides.

Content, 2

Not content, 20

Philip Davies MP

Martin Horwood MP

Lord Black of Brentwood

Lord Boateng

Mr Ben Bradshaw MP

Mr Robert Buckland MP

The Lord Bishop of Chester

Baroness Corston

Lord Dobbs

George Eustice MP

Paul Farrelly MP

Lord Harries of Pentregarth

Lord Hollick

Lord Janvrin

Mr Elfyn Llwyd MP

Lord Mawhinney

Penny Mordaunt MP

Lord Myners

Yasmin Qureshi MP

Lord Thomas of Gresford

Mr John Whittingdale MP

Nadhim Zahawi MP

The amendment is disagreed to accordingly.

It is moved by George Eustice MP to leave out paragraph 59 and insert the following new paragraph:

“In evidence we heard that section 12(4) of the Human Rights Act 1998 had no practical effect and was largely discounted by the courts because all Convention rights must be given equal weight. Other witnesses suggested that, were section 12(4) to have meaning, then the HRA would not be compliant with the European Convention. We do not believe it is a satisfactory state of affairs to have a section of the Human Rights Act 1998 which is largely discounted by the courts and possibly non-compliant with the European Convention on Human Rights and we therefore recommend that the Commission on a Bill of Rights considers whether a better way can be found to balance the competing rights of article 8 and article 10.”

The Committee divides.

Content, 10

Not content, 12

Mr Robert Buckland MP

Lord Black of Brentwood

Philip Davies MP
 George Eustice MP
 Lord Harries of Pentregarth
 Martin Horwood MP
 Lord Mawhinney
 Penny Mordaunt MP
 Lord Thomas of Gresford
 Mr John Whittingdale MP
 Nadhim Zahawi MP

Lord Boateng
 Mr Ben Bradshaw MP
 The Lord Bishop of Chester
 Baroness Corston
 Lord Dobbs
 Paul Farrelly MP
 Lord Hollick
 Lord Janvrin
 Mr Elfyn Llwyd MP
 Lord Myners
 Yasmin Qureshi MP

The amendment is disagreed to and paragraph 59 is agreed to accordingly.

Paragraphs 60 to 92 are agreed to, with amendments.

It is moved by Martin Horwood MP to leave out paragraph 93 and insert the following new paragraph:

“The forms of new media range from news websites and blogs on which organisations and individuals publish news and opinion much as traditional publishers or news broadcasters do, through second generation websites like Facebook and Twitter which act as real-time communication channels used millions of times an hour, to search engines which are largely tools for the efficient and useful location on the web of information and material published by others. New communications and information systems and platforms will inevitably follow. This offers an opportunity for those seeking to invade someone else’s privacy as their initial act can be quickly replicated and discovered by many other web users. This in turn poses an obvious challenge for any authority seeking to protect privacy without unduly restricting the free flow of information.”

The Committee divides.

Content, 8

Not content, 13

Lord Black of Brentwood
 Mr Robert Buckland MP
 Philip Davies MP
 Lord Dobbs
 Lord Harries of Pentregarth
 Martin Horwood MP
 Mr Elfyn Llwyd MP
 Mr John Whittingdale MP

Lord Boateng
 Mr Ben Bradshaw MP
 The Lord Bishop of Chester
 Baroness Corston
 George Eustice MP
 Paul Farrelly MP
 Lord Hollick
 Lord Janvrin
 Lord Mawhinney
 Lord Myners
 Yasmin Qureshi MP
 Lord Thomas of Gresford
 Nadhim Zahawi MP

The amendment is disagreed to and paragraph 93 is agreed to accordingly.

Paragraphs 94 to 103 are agreed to, with amendments.

It is moved by Martin Horwood MP in line 3 of paragraph 104 to leave out the words “**The threshold for him intervening should be lower.**”

The Committee divides.

Content, 6

Not content, 14

Mr Robert Buckland MP
The Lord Bishop of Chester
Philip Davies MP
George Eustice MP
Paul Farrelly MP
Martin Horwood MP

Lord Black of Brentwood
Lord Boateng
Mr Ben Bradshaw MP
Baroness Corston
Lord Dobbs
Lord Harries of Pentregarth
Lord Janvrin
Mr Elfyn Llwyd MP
Lord Mawhinney
Lord Myners
Yasmin Qureshi MP
Lord Thomas of Gresford
Mr John Whittingdale MP
Nadhim Zahawi MP

The amendment is disagreed to accordingly.

Paragraph 104 is agreed to.

It is moved by Martin Horwood MP to insert the following new paragraph after paragraph 104:

“Regulation 17 of the UK’s Electronic Commerce (EC Directive) Regulations 2002 treats providers of ‘information society services’ as ‘mere conduits’, excluding them from liability for information transmitted using their services providing they have played no role in initiating, selecting or modifying the information.”

The Committee divides.

Content, 2

Not content, 19

Philip Davies MP
Martin Horwood MP

Lord Black of Brentwood
Lord Boateng
Mr Ben Bradshaw MP
Mr Robert Buckland MP
The Lord Bishop of Chester
Baroness Corston
Lord Dobbs
George Eustice MP

Paul Farrelly MP
 Lord Harries of Pentregarth
 Lord Hollick
 Lord Janvrin
 Mr Elfyn Llwyd MP
 Lord Mawhinney
 Lord Myners
 Yasmin Qureshi MP
 Lord Thomas of Gresford
 Mr John Whittingdale MP
 Nadhim Zahawi MP

The amendment is disagreed to accordingly.

Paragraphs 105 to 108 are agreed to, with amendments.

It is moved by Martin Horwood MP to leave out paragraph 109 and insert the following new paragraph:

“We recommend that, when granting an injunction, courts should make clear to those on whom the injunction is served that it applies to content posted on websites and blogs or communicated through social media and that enforcement action should be taken against those who breach such injunctions regardless of media. Beyond this, claimants should make full use of notice and take-down procedures operated by responsible internet service and social media providers, who should also seek to disseminate best practice and discourage illegality amongst both users and other providers.”

The Committee divides.

Content, 4

Not content, 15

Mr Robert Buckland MP
 Philip Davies MP
 Martin Horwood MP
 Lord Thomas of Gresford

Lord Black of Brentwood
 Lord Boateng
 Mr Ben Bradshaw MP
 Baroness Corston
 Lord Dobbs
 George Eustice MP
 Paul Farrelly MP
 Lord Harries of Pentregarth
 Lord Hollick
 Lord Janvrin
 Lord Mawhinney
 Lord Myners
 Yasmin Qureshi MP
 Mr John Whittingdale MP
 Nadhim Zahawi MP

The amendment is disagreed to and paragraph 109 is agreed to accordingly, with amendments.

It is moved by Martin Horwood MP to leave out paragraphs 110 to 115 and insert the following new paragraphs:

“A weakness of notice and take-down procedures is that even though links to offending content on particular websites can be removed on request from search engine results within hours, and without fresh court orders each time, new websites can always appear reproducing similar versions of the same content. For anyone to track and attempt to block these sites is likely to be time-consuming and possibly costly.

Max Mosley explained the difficulties he had faced in trying to remove offending pictures from appearing in internet searches—

“Every time an obscure, tiny site in the Andes puts it up, you have to put your lawyers into action to take it down. We had a very high-level meeting with Google in which I said, “Here are the pictures. We know which ones they are. Simply programme your search engine so they don’t appear.” That is demonstrably technically feasible. They refused to do it as a matter of principle.”

In response to that Daphne Keller, Associate General Counsel at Google, said—

“We do not have a mechanism that finds duplicates of pictures or text and makes them disappear from our Web Search results. As a policy matter, I do not think that would be a good idea, simply because an algorithm or a computer programme that tried to do something like that would not have the ability that a judge does or any person does to see the context, to see if a particular phrase is actually appearing in a news report or in political commentary.”

Ms Keller acknowledged that it might be technically possible to develop algorithms that allow Google to filter in the manner suggested by Mr Mosley in future, but argued that this would not be desirable from a policy point of view, as it would require Google as an intermediary proactively to monitor content on the internet. In addition, she said the European Court of Justice in *Scarlet v SABAM* had ruled that pro-active monitoring was not required under the Electronic Commerce Directive, and an attempt to require them pro-actively to monitor may not be consistent with the Directive.

Where an individual has obtained a clear court order that certain material infringes their privacy and so should not be published but multiple websites manage to evade this order, we urge internet service providers, social media providers and search engines to use their best endeavours and co-ordinate effective action to prevent access to content they know to be illegal, at minimum or no cost to the victims of such illegal content.

Google acknowledged that it was possible to develop the technology proactively to monitor websites for such material in order that the material does not appear in the results of searches. There is an obvious risk in urging the use of automated search algorithms to try to remove offending content. In an ideal world, search engines and communications platforms would automatically suppress links to any website with illegal content as soon as it was deemed to be illegal, while ensuring that all legal and legitimate content and communication was protected. In reality, due to the sheer volume of communications and the limitations of automated systems, this would undoubtedly result in the removal of legitimate

websites from search results. If free speech and legitimate comment are to be protected on the internet, the exercise of human judgement is likely to remain essential to the process which involves the suppression of content.”

The Committee divides.

Content, 6

Not content, 13

Lord Black of Brentwood
 Mr Robert Buckland MP
 Philip Davies MP
 Lord Dobbs
 Lord Harries of Pentregarth
 Martin Horwood MP

Lord Boateng
 Mr Ben Bradshaw MP
 The Lord Bishop of Chester
 Baroness Corston
 George Eustice MP
 Paul Farrelly MP
 Lord Hollick
 Lord Janvrin
 Lord Mawhinney
 Lord Myners
 Yasmin Qureshi MP
 Mr John Whittingdale MP
 Nadhim Zahawi MP

The amendment is disagreed to and paragraphs 110 to 115 are agreed to accordingly.

Paragraphs 116 to 118 are agreed to, with amendments.

Question put, That paragraph 119 be agreed to.

The Committee divides.

Content, 9

Not content, 8

Lord Boateng
 Mr Ben Bradshaw MP
 The Lord Bishop of Chester
 Baroness Corston
 Lord Harries of Pentregarth
 Lord Hollick
 Lord Janvrin
 Yasmin Qureshi MP
 Mr John Whittingdale MP

Lord Black of Brentwood
 Mr Robert Buckland MP
 Philip Davies MP
 Lord Dobbs
 George Eustice MP
 Martin Horwood MP
 Lord Mawhinney
 Nadhim Zahawi MP

Paragraph 119 is agreed to accordingly.

Paragraphs 120 to 126 are agreed to.

It is moved by Philip Davies MP at the beginning of paragraph 127 to insert the words **“We reject the case for a statutory requirement to pre-notify. However,”**

The Committee divides.

Content, 11

Not content, 8

Lord Black of Brentwood

Mr Robert Buckland MP

Philip Davies MP

Lord Dobbs

George Eustice MP

Paul Farrelly MP

Lord Harries of Pentregarth

Martin Horwood MP

Lord Janvrin

Mr John Whittingdale MP

Nadhim Zahawi MP

The amendment is agreed to accordingly.

Lord Boateng

Mr Ben Bradshaw MP

The Lord Bishop of Chester

Baroness Corston

Lord Hollick

Lord Mawhinney

Lord Myners

Yasmin Qureshi MP

Paragraph 127, as amended, is agreed to.

Paragraphs 128 to 133 are agreed to, with amendments.

Question put, That paragraph 134 be agreed to.

The Committee divides.

Content, 17

Not content, 2

Lord Boateng

Mr Ben Bradshaw MP

Mr Robert Buckland MP

The Lord Bishop of Chester

Baroness Corston

Lord Dobbs

George Eustice MP

Paul Farrelly MP

Lord Harries of Pentregarth

Lord Hollick

Martin Horwood MP

Lord Janvrin

Lord Mawhinney

Lord Myners

Yasmin Qureshi MP

Mr John Whittingdale MP

Nadhim Zahawi MP

Paragraph 134 is agreed to accordingly.

Lord Black of Brentwood

Philip Davies MP

Paragraphs 135 to 172 are agreed to, with amendments.

It is moved by Lord Black of Brentwood in line 3 of paragraph 173 to leave out the words “, **including its chairman,**”.

The Committee divides.

Content, 1

Not content, 19

Lord Black of Brentwood

Lord Boateng
 Mr Ben Bradshaw MP
 Mr Robert Buckland MP
 The Lord Bishop of Chester
 Baroness Corston
 Philip Davies MP
 Lord Dobbs
 George Eustice MP
 Paul Farrelly MP
 Lord Harries of Pentregarth
 Lord Hollick
 Martin Horwood MP
 Lord Janvrin
 Lord Mawhinney
 Penny Mordaunt MP
 Lord Myners
 Yasmin Qureshi MP
 Mr John Whittingdale MP
 Nadhim Zahawi MP

The amendment is disagreed to accordingly.

Paragraph 173 is agreed to.

Paragraphs 174 to 184 are agreed to, with amendments.

It is moved by Philip Davies MP to leave out paragraphs 185 to 187 and insert the following new paragraph:

“A cardinal principle of a free press is that it is independent of government in all its forms. It is clear that the current system of self-regulation is broken and needs fixing. This does not mean that a statute creating a press regulator is the right answer. Such a statute would be a vehicle for political interference. Even if it began its life as a light-touch regulator the temptation would be for governments gradually to become more involved, and for it to accrue more powers over the news media. The industry must play a key role in establishing reformed structures, and we welcome the initiative taken by Lord Hunt of Wirral in bringing forward industry-led proposals for substantial reform of the Press Complaints Commission. We believe that these form the basis for the creation of an independent, powerful regulator which should govern all major publishers and command the confidence of the public.”

The Committee divides.

Content, 2

Not content, 16

Philip Davies MP

Lord Dobbs

Lord Boateng

Mr Ben Bradshaw MP

Mr Robert Buckland MP

The Lord Bishop of Chester

Baroness Corston

George Eustice MP

Paul Farrelly MP

Lord Harries of Pentregarth

Lord Hollick

Lord Janvrin

Lord Mawhinney

Penny Mordaunt MP

Lord Myners

Yasmin Qureshi MP

Mr John Whittingdale MP

Nadhim Zahawi MP

The amendment is disagreed to accordingly.

Paragraph 185 is agreed to.

It is moved by George Eustice MP to leave out paragraphs 186 and 187 and insert the following new paragraphs:

“The current Editors’ Code addresses at one end of the spectrum general standards of journalism such as accuracy right through to breaches of privacy law at the other end of the spectrum. We also note that the majority of the work of the Press Complaints Commission deals with accuracy and general standards of journalism rather than potential breaches of the law.

Regulation of the press must be independent of government. But it is clear that the current system of self-regulation is broken and needs fixing. We welcome the initiative taken by Lord Hunt of Wirral in bringing forward industry-led proposals for substantial reform of the Press Complaints Commission to address general press standards and do not support statutory backing to the role of the independent regulator in this area of its work. However, we do believe that cases relating to breaches of privacy, where an assessment of the public interest is required, represent a different category of complaint because they relate to possible breaches of the law already set out in statute. We therefore recommend that, in such cases, complainants who are not satisfied with an adjudication delivered by the new press regulator should have the opportunity to appeal to a tribunal which is established in statute. One option is that Ofcom be given responsibility for arbitrating such appeals.”

The Committee divides.

Content, 8

Not content, 10

Mr Ben Bradshaw MP
 Mr Robert Buckland MP
 George Eustice MP
 Paul Farrelly MP
 Martin Horwood MP
 Lord Janvrin
 Penny Mordaunt MP
 Lord Myners

Lord Black of Brentwood
 Lord Boateng
 The Lord Bishop of Chester
 Baroness Corston
 Philip Davies MP
 Lord Dobbs
 Lord Harries of Pentregarth
 Lord Hollick
 Lord Mawhinney
 Mr John Whittingdale MP

The amendment is disagreed to accordingly.

It is moved by Lord Hollick to leave out paragraphs 186 and 187 and insert the following new paragraphs:

“Different forms of media are converging; the websites of national newspapers now carry videos and film, whilst some already have far higher levels of readership than their print counterparts. Investing overall responsibility and a statutory duty for regulation in one body would help to achieve consistency in applying the broad framework of regulation to all forms of media. Ofcom has established itself as a respected regulator in its field, and we are confident that it could take on overall responsibility for ensuring news publishers are well regulated. As in other sectors, it would delegate day-to-day responsibilities to a self-regulatory body, and only intervene where that body fails or requires more powers than it has. Such an arrangement would ensure press regulation is not within the control of government.

Regulation of the press must be independent of government. But it is clear that the current system of self-regulation is broken and needs fixing. We welcome the initiative taken by Lord Hunt of Wirral in bringing forward industry-led proposals for substantial reform of the Press Complaints Commission. However, we think that statutory oversight of the reformed regulator is desirable. Otherwise major publishers could opt out of its regulation. Statutory oversight of the regulator would give it more authority over the industry and give the public greater confidence in it.”

The Committee divides.

Content, 8

Not content, 12

Lord Boateng
 Mr Ben Bradshaw MP
 Baroness Corston
 George Eustice MP
 Lord Hollick
 Lord Janvrin
 Yasmin Qureshi MP
 Nadhim Zahawi MP

Lord Black of Brentwood
 Mr Robert Buckland MP
 The Lord Bishop of Chester
 Philip Davies MP
 Lord Dobbs
 Paul Farrelly MP
 Lord Harries of Pentregarth
 Martin Horwood MP

Lord Mawhinney
 Penny Mordaunt MP
 Lord Myners
 Mr John Whittingdale MP

The amendment is disagreed to accordingly.

Paragraphs 186 and 187 are agreed to, with amendments.

It is moved by Ben Bradshaw MP to insert the following new paragraph after paragraph 187:

“However, should the industry fail to establish an independent regulator which commands public confidence, the Government should seriously consider establishing some form of statutory oversight. This could involve giving Ofcom or another body overall statutory responsibility for press regulation, the day-to-day running of which it could then devolve to a self-regulatory body, in a similar manner to the arrangements for regulating broadcast advertising.”

The Committee divides.

Content, 10

Not content, 7

Mr Ben Bradshaw MP
 The Lord Bishop of Chester
 Baroness Corston
 George Eustice MP
 Lord Hollick
 Martin Horwood MP
 Lord Janvrin
 Penny Mordaunt MP
 Lord Myners
 Mr John Whittingdale MP

Lord Black of Brentwood
 Lord Boateng
 Philip Davies MP
 Lord Dobbs
 Paul Farrelly MP
 Lord Harries of Pentregarth
 Lord Mawhinney

The amendment is agreed to accordingly.

Paragraphs 189 to 194 are agreed to.

It is moved by Lord Black of Brentwood in line 2 of paragraph 195 to leave out the words **“determine the location and the size of the apology the newspaper is required to publish, and the day of publication”** and insert **“negotiate the location, size and prominence of a published apology to the satisfaction of the complainant”**.

The Committee divides.

Content, 2

Not content, 14

Lord Black of Brentwood
 Mr John Whittingdale MP

Lord Boateng
 Mr Ben Bradshaw MP

The Lord Bishop of Chester
 Baroness Corston
 Philip Davies MP
 Lord Dobbs
 George Eustice MP
 Paul Farrelly MP
 Lord Hollick
 Martin Horwood MP
 Lord Janvrin
 Lord Mawhinney
 Penny Mordaunt MP
 Lord Myners

The amendment is disagreed to accordingly.

Paragraph 195 is agreed to.

Paragraphs 196 to 241 are agreed to, with amendments.

The Executive Summary is agreed to, with amendments.

The Appendices to the Report are agreed to.

Question put, That the draft Report, as amended, be the Report of the Joint Committee.

The Committee divides.

Content, 10

Not content, 7

Lord Boateng
 Mr Ben Bradshaw MP
 The Lord Bishop of Chester
 Baroness Corston
 Paul Farrelly MP
 Lord Hollick
 Lord Janvrin
 Penny Mordaunt MP
 Lord Myners
 Mr John Whittingdale MP

Lord Black of Brentwood
 Robert Buckland MP
 Philip Davies MP
 Lord Dobbs
 George Eustice MP
 Martin Horwood MP
 Lord Mawhinney

The Committee accordingly agrees that the draft Report, as amended, be the Report of the Joint Committee.

Ordered, That certain papers be appended to the Minutes of Evidence.

Ordered, That embargoed copies of the Report be made available, in accordance with the provisions of Standing Order No. 134 of the House of Commons.

Ordered, That the Joint Committee be now adjourned.