

## PROVIDING A FAIR MEANS OF RESOLVING COMPLAINTS AGAINST THE PRESS, AND ONE WHICH ACCORDS WITH THE ASPIRATIONS OF THE PUBLIC FOR A PRESS REGULATOR

### 1. The Unrestrained Power of the Press

- i. In his book "*The Insider*" Piers Morgan (who edited both *the News of the World* and *the Mirror*) told us that the press was becoming progressively more powerful and aggressive. In his evidence to the Culture Media and Sport Committee on 25 September 2003, Max Clifford stated that "*Paul Dacre is virtually a law unto himself.*" In a recent speech a judge of the European Court of Human Rights (the "ECHR") (Judge Loukis Loucaides) has set out the problem from a 21<sup>st</sup> Century perspective:-

*"One should not lose sight of the fact that the mass media are nowadays commercial enterprises with uncontrolled and virtually unlimited strength, interested more in profitable, flashy news than in disseminating proper information to the public, in controlling government abuse or in fulfilling other idealistic objectives. And although they may be achieving such objectives incidentally, accidentally or occasionally, even deliberately, they should be subject to certain restraint out of respect for the truth and for the dignity of individuals. [...] Furthermore they should remain legally accountable to the persons concerned for any false defamatory allegations. Like any power, the mass media cannot be accountable only to themselves. A contrary position would lead to arbitrariness and impunity, which undermine democracy itself."*

- ii. In the preface to the *Editor's Code Book*, Paul Dacre stresses the primacy of the law. However, the outrage of *the News of the World* in response to losing the Mosley privacy action filled two entire pages. Its determination to be above any form of regulation (legal or otherwise) could not have been made clearer by this defiant final paragraph of editorial outrage at the decision:-

***"The News of the World will not be gagged by the rich and powerful.***

***Or Judges.***

***Or Courts***

***Or Politicians."***

- iii. The media in general and the press in particular wield enormous power via the virtual monopoly that they have of the dissemination of information. Although journalism has often been referred to as the "*fourth estate of the realm*", Sir Louis Bloom-Cooper QC quotes Oscar Wilde's view of the "*fourth estate*" from *The Soul of Man* where he states that "*at the present moment it is the only estate. It*

*has eaten up the other three. The Lords Temporal say nothing, the Lords Spiritual have nothing to say, and the House of Commons has nothing to say and says it. We are dominated by Journalism."*

- iv. The press has the power to affect government policy, glean intimate details of the lives of the rich and famous by offering huge bribes to their staff to betray their confidence and, if there is no actual information about issues of public interest, the press simply makes it up. It can undertake much of these activities safe in the knowledge that because very few have the means of challenging it legally and there is no effective regulation, there is no sanction to fear. The press is heavily engaged in a campaign to restrict access the courts by those that it has wronged – making the need for effective regulation yet more important.
- v. In its present form, the PCC is structurally and culturally incapable of fulfilling the role as guardian of the interests of the general public against those of the immensely powerful commercial empires that control our press. It was supposed, as determined at the time it was set up in 1991, to have the public's interest as its sole concern. That was because it was decided that if it also bore responsibility for protecting the freedom of the press, that would represent a serious conflict of interest. Plainly any such organisation would also cease to be independent of the entity it was tasked with regulating.
- vi. However a senior figure at the PCC has recently given two speeches at which I was present where the obvious conflict of interest was affirmed as the PCC was described as having a dual role of protecting the public and preserving press freedom. Professor Robert Pinker (International Consultant and founder member of the PCC) made the same point at a recent media conference saying that the "*PCC protects media freedoms*". However no-one who has dealt with it regularly on behalf of claimants seriously doubts the predominance of the PCC's pro-press agenda, as its submissions to Parliamentary Committees make no less clear.
- vii. Lord Puttnam recently told the House of Lords Select Committee on Communication that the PCC was "*essentially a cartel. It is a self-regulatory organisation that will very seldom do anything that will discomfit [the press] or make its life difficult.*" Alistair Campbell, before the same Committee, described the PCC as a "*cosy media club.*" My own experience of dealing with it on a regular basis since its inception suggests that it is indeed a cartel, set up for the principle purpose of ensuring that – contrary to its claimed purpose – press freedom is preserved to the greatest possible degree against any form of effective regulation, and to the massive detriment of the rights of the individual.
- viii. The matter is put beyond doubt by opinion research that we have commissioned which shows that the practice and structure of the PCC is comprehensively at odds with the aspirations of the general public it is supposed to represent. It is apparent that in each case the PCC's modus operandi is set against what the public wants for its regulator and that the interests of the press have been favoured at the expense of those which the PCC is supposed to serve. This is discussed in detail below.
- ix. This paper is written from the perspective of a consumer of the PCC's services and on behalf of the many clients of mine who, despite my best efforts, have conspicuously not been provided with a fair means of making complaints against the press. That has most recently been illustrated by the action that I brought on

behalf of Peaches Geldof, who was only the last in a long line of clients failed by the PCC's failure to adjudicate complaints fairly and impartially.

- x. The allegation could hardly have been more serious against a 19 year old girl. It was one of prostitution. Engaging in monumental dishonesty, the PCC maintained – in the face of a contradictory admission by the very paper that had published the story – that the front page article does “*not carry a specifically inaccurate claim*” (when in fact it carried four), and that its front page did not carry the implication that Ms Geldof was exchanging sexual/personal favours for money.
- xi. The apology/correction of that story, admitting that the article alleged that she was engaged in prostitution, was published on page 2, where only a minute fraction of those who saw the original allegations would actually see it. Whereas the combined area of 2 inaccurate articles was 1149 cm<sup>2</sup>, the correction covered an area of 30cm<sup>2</sup>. This represented approximately 2.6% of the area of the original articles. It would also have only been seen (at most) by the purchasers of the paper, and not the millions of non purchasers of the paper who saw the original article via newsstands and the television. The PCC's failure to provide Ms Geldof with a fair remedy is only the most recent and vivid of its failures to show either fairness or common sense.

## 2. The Importance of an Effective Means of Resolving Complaints Against the Press

- i. I concentrate in this paper on the role of the PCC in adjudicating complaints made against the press about breaches of the PCC Code of Practice (“the Code”), rather on its broader regulatory role. I also distinguish its role as mediator, which generally it does well via its dedicated and courteous staff. In my experience this process only fails when the paper's awareness of the partisan nature of the adjudication process means that they refuse an appropriate remedy knowing that they are likely then to have that unreasonable refusal endorsed by the Commission – as was the case for Ms Geldof.
- ii. The PCC's structural and institutional lack of independence, which is evident from its constitution, personnel and practice, at present therefore fatally compromises any role it has in arbitrating complaints. As I set out below, there is the clearest evidence that it places the interests of its sponsors above those of its charges, which by virtue of its very title, are those who complain about the activities of the press.
- iii. The power of the press to wreck lives is no small issue. I have acted for clients who have had nervous and physical breakdowns, seen their marriages destroyed and even attempted suicide in the face of press onslaughts. One non-celebrity client found that a journalist had interrogated her young downs syndrome son about the state of her marriage to a celebrity. Another celebrity client found that a national newspaper was offering her neighbours substantial sums of money to sign a statement saying that she neglected her children. There are many other such stories, but the recent reports of the Information Commissioner and the jailing of Clive Goodman show that the press exhibits contempt for legal/regulatory restrictions of its activities unless it perceives that a credible sanction is the alternative.

- iv. For 99% of the population, the existence of the right to privacy and reputation – as supposedly guaranteed by Article 8 of the European Convention on Human Rights (the “Convention”) – is illusory because of its inability to fund litigation to protect those rights except via CFA’s (which the press is presently seeking to render unviable). The lack of legal aid coupled with the onslaught of the press against the use of contingency fees, guarantees that it will remain the case that only a tiny proportion of the population can seek the assistance of the courts. For them, an effective regulatory body over the press is essential. But do they have it in the PCC?
- v. It is inevitably difficult for any species of self regulation to inspire confidence. A Commission which has been set up by the press, administering a Code written exclusively by the press, which is funded by the press and whose staff members are ultimately employees of the press is not likely to inspire confidence. If you add to this that 7 of the 17 commissioners are newspaper editors, that there is no right for complainants to attend adjudications, and that there is no substantive right to appeal, then inevitably alarm bells ring.

### 3. The PCC's Structural Bias in Favour of the Press

- i. You are walking down the street and a burly policeman jumps on you and beats you up for no reason. You take exception to this and make a complaint against the policeman. Imagine being told that your assailant has insisted that your complaint of assault is to be adjudicated by a body set up and funded by the police, where the relevant law has been written by the police and where nearly half of the adjudicating panel are serving police officers, most of whom themselves have a well documented record for such crimes. The same body also campaigns for ever greater liberty for the police to act in a way which infringes the rights of the individual without legal liability. So it is with complaints to the PCC.
- ii. Except that the situation is worse at the PCC. 7 of the 17 PCC members (i.e. the editors) know that the decisions that they make in adjudicating complaints will directly impact on their own liberty to publish what they will in the future. Consequently, they have a direct interest in the outcome of the complaint. Not only that, but the remainder of the PCC's adjudicating body appear to lack any direct experience of (for example) oppressive press harassment, intrusion into their private lives etc. The serial failure of the Commission to show fairness or independence presumably derives from the neutral non-press contingent also lacking the requisite balancing bias in favour of the victim, as (in my analogy) the police will have for the perpetrator. But so it is with the PCC, where the editors on the Commission will inevitably have a commercial bias towards the paper.
- iii. In a recent address given to a media law conference, Professor Robert Pinker described “*its dual roles as a defender of press freedoms and of citizens from abuses of those freedoms by the press.*” He repeated this observation a few months later at a subsequent conference I attended and after I had raised this very point with the PCC. It is inconceivable that a body of commissioners can both lobby and campaign on behalf of the press, and also form disinterested judgments on whether it has abided by the terms of its Code, a Code which of course the Commission itself has also written via a committee which has no lay members.

- iv. The presence on the Commission of so many representatives of the press is justified (as I understand it) by the supposed expertise which they bring to the process of resolving complaints. They are also said to be the "peers" whose judgment other parts of the press so fear. But can there be any doubt where their sympathies will lie when being asked to pass judgment on their peers, particularly on issues where their own editorial and commercial interest are directly affected? No credible explanation has ever been offered that I am aware of as to why there is no lay element on the Code committee.

#### 4. The Automatic Presumption of Bias

- i. The rule against bias is applied in two broad categories of case. The first is where an adjudicator has a direct interest in the outcome of the matter or can otherwise by reason of a direct interest be regarded as being a party to the action. An automatic, irrebuttable presumption of bias is thereby raised.
- ii. Until Paul Dacre (editor of *the Daily Mail* and editor in chief of Associated Newspapers which includes *the Daily Mail*, *the Mail on Sunday*, *the Evening Standard* and *the London Metro*) recently stepped down as a member of the PCC to take up the position of chairman of the code of practice committee (the "Committee") (which reviews and revises the voluntary code of standards that the PCC adjudicates) he regularly sat in on adjudications involving his publications. Mr Dacre however had a direct financial and personal interest in the outcome of issues on which he was adjudicating and so should not have had any role on the PCC.
- iii. The sources of financial interest are twofold: not only are 7 of the PCC members on the payroll of their respective publications, but the PCC as an institution is funded by an annual levy paid by the very newspapers and magazines that appear before it. As Mr Dacre observed in his recent speech to the Society of Editors (see below), restrictions on press freedom result in less papers being sold. That means that PCC adjudications directly impact on the profitability of the newspaper group he represents. This is even more plainly the case now that a formal system of precedent has been instigated by the PCC.
- iv. This means that not just Mr Dacre but all press representatives know that every decision that they make in favour of a complainant will mean their own editorial and commercial interests will be directly affected. Not just Mr Dacre's adjudications are therefore plainly biased. As to the direct and immediate personal interests of PCC members, this can be further illustrated by the following example.
- v. I acted for a client who had been romantically linked with a leading parliamentary figure. I made a complaint of harassment on her behalf of when she was pursued by photographers whilst accompanied by her infant child near the home of her elderly parents. I wrote to one title asking them not to publish an infringing photograph taken in circumstances contrary to paragraph 4 of the Code, but it did so nonetheless. Although the editor of that title was not one of the commissioners that decided the complaint, all the editors on the Commission well knew that had they upheld the complaint, their own scope for publishing similar photographs would have been severely restricted, creating a direct personal interest in the outcome of the complaint. Unsurprisingly then, the complaint was rejected.

## 5. Justice Must be Seen to be Done

- i. Even if there is no actual bias, the mere appearance of bias is sufficient to taint a decision where “*the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased.*” I recount below a conversation I had recently with a cabby, who was astonished to learn how the PCC was constituted i.e. that it was not a genuinely independent body. I am sure that the vast majority of “*fair-minded and informed*” observers would also strongly suspect bias on the part of the PCC (as presently constituted) if they knew the truth.
- ii. So not only is the PCC funded by the very newspapers and magazines that appear before it, but 7 of its commissioners are also gainfully employed by those same publications. Moreover, complaints against the commissioners’ counterparts in rival or sister publications are going to be reluctantly upheld for fear of restricting their own liberty to publish.
- iii. If Paul Dacre says that restrictions on press freedom impact on newspaper sales, then newspaper editors on the PCC will inevitably be perceived to have a direct interest in the outcome of adjudications because any reduction in the ambit of what the press can report will have a direct effect on their profitability.
- iv. Those grounds unarguably raise an irrefutable presumption of bias. Even if they did not, then at the least they give rise to a clear perception of bias rendering PCC adjudications unlawful applying the well established principles of natural justice. Such adjudications would also be contrary to the fundamental human right to a fair hearing enshrined in Article 6 of the Convention.
- v. The presence of editors as adjudicators means that on the basis of universally accepted principles of natural justice, a fair result is institutionally impossible. If they are to remain, then the PCC should only be an arbitrator if there is a fully independent system of appeal. This proposal is currently rejected by the PCC.

## 6. Assessing the Effectiveness of the PCC against its own Criteria

- i. We can draw little comfort from the structure, personnel and procedure of the PCC. The PCC itself is however adept at producing reports and statistics which appear to prove its effectiveness as a regulator. But does the Commission really provide an effective service to complainants? How is it to be judged in terms of its results?
- ii. When measuring the effectiveness of any regulatory or judicial body, it is difficult to fairly review value judgments that it makes as part of its work. Who can say whether a judge or adjudicator is right or wrong about a verdict without access to all the information that the judge or adjudicator had to hand when making a determination.
- iii. The difficulty with the PCC procedures is that, rather like those at Guantanamo Bay, no one can attend the adjudication meetings, listen to the debate or read the evidence. Because of the alarming opaqueness in its procedures, the observer is reliant on the summaries of the arguments given in the PCC adjudications which (in my experience) are carefully drafted selectively to support

the adjudication that the Commission has arrived at. Those adjudications do not do justice to the contrary arguments and, in some cases, either omit them altogether or blatantly misrepresent them.

- iv. So what yardsticks can we use to judge the effectiveness of the PCC in upholding the rights of the public against the intrusions and excesses of the press? Here is a reality check on the claims made by the PCC to be both “**fast**”, “**free**” and “**fair**”.

## 7. The PCC is Not Fast

- i. A recent complaint against **the Star** illustrates the complete falsity of the claim by the PCC to be fast. The complaint was made on the day of publication of the offending article. Well over 12 weeks elapsed before there was a substantive response to the complaint, in the sense that the paper accepted the article was misleading or offered evidence to support it. If it were true that the PCC was “**fast**”, the newspaper would have been given a short deadline within which to respond and it would have been possible to adjudicate the complaint within a few days.
- ii. Such a short deadline would present no problem for the compliant newspaper title. The PCC Code stipulates that care should be taken before publication to keep copy accurate. The **Editors’ Code Book** says that before publication a paper should apply the following tests: “*Are there reasonable grounds for believing the piece is accurate? Have proper checks been made? Have the likely complainants been given an adequate opportunity to respond?*” If these precepts were actually heeded by the press, then all that would be required is the production of the material on which the article was based. That should take 24 hours. In fact they very rarely are.
- iii. In the complaint against **the Star** (as in a number of others in my experience) the newspaper was allowed to delay the process by making bad points (which the PCC permitted) to cause delay and expense by simply not summarily dismissing them. The situation was that the newspaper had (as it eventually admitted) published an article which contained not an iota of truth. It engaged in extended obvious chicanery to persuade the PCC not to do what any “**fair**” supervisory entity would do; adjudicate that the newspaper had breached the terms of the PCC Code.
- iv. The PCC declined to take effective action and adjudicate the complaint despite the fact that nearly 90 days after the complaint was made, the newspaper had still not produced a scintilla of corroborative evidence. This is far from an isolated instance. I made a complaint recently on behalf of a celebrity whose privacy was seriously infringed and a whole series of letters to the paper over a period of weeks were ignored. All that the PCC did was add a sentence to the adjudication saying that the failure to respond to my correspondence was “*regrettable.*”
- v. That is the only sanction that has been applied in the 17 years I have been making complaints, despite delay on the part of the papers being endemic. Accordingly, the claim in the **Editors’ Code Book** that the PCC “[...] *takes a stern view of unnecessary delays in righting [...] incontestable errors [...]*” is simply untrue. There is therefore scant justification for the claim that the PCC is “**fast.**”

## 8. The PCC is Not Free

- i. The actions of the press are judged by the Commission applying the Code in a quasi judicial capacity. The Code is accompanied by the *Editors' Code Book* (the "Book") which is over 100 pages long and which attempts to aid in the interpretation of the Code, some of which is not at all easy to construe as the PCC itself concedes. The difficulty in interpreting the Code is evidenced not least by the PCC's apparent inability to do so consistently. It also concedes that its interpretation of its own statute must reflect the movements in the law.
- ii. The PCC also operates a system of "*stare decisis*"; i.e. that there is now a body of "*case law*" which it looks at in considering its adjudications and has now taken to citing previous decisions accordingly. In these circumstances, it is plainly a quasi judicial process. Complainants for whom these adjudications are very important need to make their complaints via individuals who are familiar with the relevant "law" and procedure in order to have a fair chance of that complaint being successful.
- iii. The complainant must therefore have access to expert advice when making a complaint to enjoy equality of arms because at newspapers PCC complaints are dealt with by experts in PCC procedure and media law who have the benefit of decades of experience and training. They deploy procedural points in an attempt to evade the adjudication of complaints. They advance supplementary technical/semantic arguments on behalf of newspapers which I have to address to ensure that my client's complaint is not summarily dismissed (as the vast majority of complaints to the PCC are).
- iv. In these circumstances, it is wholly unrealistic to characterise the PCC as "*free*." For litigants, the real cost of legal process is not the nominal court fees, but the cost of engaging professionals to protect their rights. The PCC is no different except, unlike the courts, complainants to the PCC cannot recover those costs. Consequently, where the PCC knows that complainants are professionally represented yet indulges newspapers in requiring me not only to address the points made by the newspaper, but supplemental points made by the PCC, the cost to the complainant is substantially increased – costs which they cannot recover.
- v. The PCC thereby also permits papers to deploy precisely the same tactic as they would in litigation, namely to grind down the resolve and resources of the complainant by making the journey towards a resolution of the complaint both lengthy and expensive. The claim by the PCC to be "*free*" is therefore also seriously misleading since it has no prospect of being fair unless the complainant has professional assistance for which he/she must pay.

## 9. The PCC is Not Fair

- i. Even with the benefit of professional representation the PCC is plainly not "*fair*" for complainants. The practical consequence is that complainants who are fortunate enough to have both an alternative legal route and the means to pursue it must expend substantial costs to reverse obviously biased adjudications of the PCC. This was the experience of one of my clients who was the subject of the most obviously unjust adjudication by the PCC concerning an article in the *Mirror*

and had to spend around £1million in legal fees to reverse it in the courts because the PCC does not permit an independent appeal. For him the PCC was certainly not “free”; it just added to the cost of obtaining justice.

- ii. A TV presenter/model client of mine made a complaint against **the Independent** where the account in the newspaper suggesting she was a racist was contradicted by 4 witnesses, 3 of whom were independent. The paper could offer no corroboration whatsoever for the article. The **Editors’ Code Book** claims that “*the burden of proof as always in the PCC system falls on the editors.*” Despite this claim, the PCC declined even to adjudicate the complaint. However, when the paper was then presented with the prospect of an independent adjudication of my client’s complaint via the courts, it promptly backed down. Just as **the Mirror** in the above case, **the Independent** knew perfectly well that the PCC was a biased organisation which would endorse obviously bad defences, which bias they could not rely on in the High Court.
- iii. The fairness and independence of the PCC can, however, be most readily judged by how it uses its one sanction (an apology/correction/adjudication). This is accepted in the otherwise thoroughly disingenuous page of the **Review** magazine which addresses the issue of when the size of the correction/apology is simply ignored. This is despite the fact that, as the PCC well knows, it is a key issue for complainants.
- iv. As I set out in more detail below, the PCC’s sole sanction is administered in a way which also could not possibly be characterised as “fair” when infringing articles are permitted by the PCC to be corrected by slithers of text of around 5% the size of the original. In one of those cases, my client, who was the wife of a celebrity and mother of his 3 sons (one of who is disabled), complained about a false story claiming that they had thrown the father out of the family home. The tiny correction was then hidden amongst a page full of adverts.
- v. The proof of the PCC’s bias/unfairness in this respect is unchallengeable because the only beneficiary of such adjudications is the press since it is in the interests of both the complainant and the general public that corrections are (to quote its chairman) “*at least as prominent as the offending article.*” You have to adopt a meaning for the word “*prominence*” which is starkly at odds with its plain and dictionary meaning to exclude the issue of size – as the propaganda arm of the PCC does in its magazine. Had the PCC’s claim to be a “fair” (or “*independent*”) institution had any justification at all, such blindingly obvious instances of unfairness would not be endorsed by the PCC on a regular basis.

## 10. The Issue of Prominence – the Litmus Test of Independence and Fairness

- i. Paragraph 1 of the Code is by far the most commonly relied on provision by complainants to the PCC. It concerns accuracy, which is perhaps the most important value we need in newspapers if they are legitimately to participate in our constitutional process. Sub paragraph (i) sets out the duty on the press to take care not to publish inaccurate material. Sub paragraph (ii) is the PCC’s sole sanction for breaches of sub paragraph (i).
- ii. Sub paragraphs (i) and (ii) of the first paragraph of the Code appear to be straightforward in their meaning. They read as follows:-

" 1 **Accuracy**

*i) The press must take care not to publish inaccurate, misleading or distorted information including pictures.*

*ii) A significant inaccuracy, misleading statement or distortion once recognised must be corrected, promptly and with due prominence, and – where appropriate – an apology published" (emphasis added).*

- iii. A further assessment of the PCC's claim to be "fair" can be based on its own stipulation that corrections should be published with "*due prominence*." A common sense interpretation of those words would be for there to be some equivalence of prominence between the offending article and the correction – not least for the purely practical reason that the more prominent the offending article, the more people will read it. So it must be with the correction. Plainly it would be a mockery of the term "*due prominence*" if the dimensions of corrections were permitted to be a tiny fraction of the offending article in which the appropriate prominence for the news item has already been determined.
- iv. This is where the rubber really hits the road, not least because it is the PCC's sole sanction, it having eschewed any form of financial sanction, including the awarding of professional costs to complainants who have opted for equality of arms with the paper. If the PCC cannot be seen to be fair in the imposition of its sole modest sanction against its creators and funders, then we are entitled to be profoundly suspicious about both its effectiveness and independence generally.
- v. The issue of prominence is therefore the acid test of the PCC's independence from its Fleet Street paymasters, and as such it is enlightening to examine the vested interests which provide the context of the PCC's deliberations on this subject. If an article is inaccurate there are three interest groups who are concerned in determining how visibly redress is given. For two of those three, the greater the prominence given to the correction or adjudication the better. For only one of those groups is it preferable for the prominence given to corrections and adjudications to be as minimal as possible. If that minority interest group takes precedence, then the PCC's cover is comprehensively blown.
- vi. The first of those groups consists of the complainant(s), their family, friends etc, and for whom the more people who read the correction the better. One aspect not addressed by the PCC (but well understood by the law courts), is the fact that a story of any note published by a newspaper will be picked up and repeated by other elements of the media – other newspapers, radio, television, news websites etc. This is particularly so of front page articles. The same cannot be said of retractions. Therefore, an equivalent degree of prominence is an absolute bare minimum for the complainant to be justly served because even then there will be many poisoned by the original false story who receive no antidote.
- vii. So it is with the readership of the paper and the public generally (i.e. those that glean the false information via other media – especially where front page stories are concerned). This is my second group. The more of them that learn the truth the better. They have rights too. The receipt of information is one of the Article 10 rights. One such right is not to remain misinformed by the newspaper to which they have paid money to learn the truth of what is going on in the world. For both

the readership and the complainant, a correction of at least equivalent prominence is essential to ensure, so far as possible, that the same number at least see the correction as did the offending article.

- viii. It is only the newspaper (my third group) onto whose interests such a principle impinges. If their readers are fully informed as to the lack of accuracy for which they are paying, then the newspaper might suffer a financial consequence for not taking sufficient care to get their facts right before publication. This is also the very space that the press sells for profit in the form of advertising which would be lost if used for corrections. The managing editor of a leading tabloid effectively admitted as much in a letter concerning a complaint I conducted recently.
- ix. So here is the acid test as to the PCC's ability to be a true guardian of the rights of complainants and the general public, and its commitment to be "fair." If it flunks the administration of its sole sanction (which is all it has in its armoury to protect the complainant) then the PCC is undoubtedly failing those who have legitimate grievances against the press. If it does so in favour of the very industry it is supposed to be regulating, then the case against for bias is proven.
- x. The **Shorter Oxford Dictionary** defines "*prominence*" as "*standing out so as to strike the attention; conspicuous.*" "*Due*" is defined as "*fitting, proper.*" Any practitioner who debates the issue of "*due prominence*" with lawyers from the newspaper industry will know that their interpretation of that phrase is a correction of a fraction of the dimensions of the offending article (or part of the offending article which is inaccurate). However, common sense dictates that since there are authoritative surveys about how many people see the offending publication depending on its size, place in the newspaper etc, then there must be a cogent rationale for departing from that principle when it comes to the press' obligation to correct inaccuracies under the PCC Code.
- xi. The calculation of prominence is well understood by the press because it is its stock in trade; newspapers sell prominence in the form of advertising. The amount of prominence you buy is set out as a mathematical computation measuring column inches against the amount paid. This computation is set out for the prospective purchasers of prominence in the print press in the form of a rate card. When you buy prominence from a newspaper, it is carefully calculated to measure the amount of people who will be influenced by it which (as both the newspaper and the advertising world knows) depends both on how early in the newspaper the space purchased appears, and how much of it is bought.
- xii. It is with this knowledge that the newspaper industry has always resisted giving anywhere near "*due prominence*" to corrections and apologies in its pages as stipulated by paragraph 1(ii) of the PCC Code. The two most likely reasons for this resistance are commercial judgment and journalistic vanity. The former because any sustainable interpretation of the term "*due prominence*" would result in a newspaper ceding valuable advertising space to comply with its responsibilities under the Code. The latter would require a perceptible admission of error.
- xiii. The following section sets out to analyse how prominence applies to advertising space sold by the press in its publications, followed by an application of the variables that determine effectiveness of advertising space to corrections/apologies.

## 11. When it comes to Prominence, Size Matters.

- i. Although it is generally accepted that *“there is a ‘common sense’ belief that a press ad which has colour, larger size, is positioned on the ‘best’ page, etc, must have an advantage”*, when it comes to objective confirmation of just how much added value these features provide, very little seems to be actually documented. In assessing the likelihood of an advertisement being seen and noted by a reader, studies have considered elements ranging from whether it is on a right hand page versus a left hand page; in colour or black and white; in a large size or a small size; at the front versus the back of a publication; and so on.
- ii. The overwhelming consensus seems to be that the bigger the advertisement, the greater the impact. Two reports in particular establish this; that of the Billetts Consultancy in 2001 and Medialogue in 2005. Research conducted on **the Guardian’s** change in format from a broadsheet to a “Berliner” and its effect on advertising revenue also concluded that *“the driving factor for ad effectiveness is page dominance.”* The classic work in this field, Project Cosine, a study by JWT on newspaper advertising effectiveness confirmed that *“measured by column centimetres (ccm), the level of ad noting increases with size.”*
- iii. Project Cosine also found that there are significant gains from being in the front third part of the paper: *“For both the broadsheets and tabloids, the pure scores for ‘position in paper’ are clear – front third positions outperform the back third, in broadsheets threefold and in tabloids more than double.”* Gallup & Robinson’s Magazine Impact Research Service is reported to have come to a similar conclusion: *“advertising appearing in the first third of a magazine tends to be as much as 45% better at generating recall than ads in the last third.”*
- iv. Obviously the size and positioning of an advertisement within a publication will impact on its effectiveness. Once colour and pictures are added into the equation (a study conducted by the Chisholm Business on behalf of the Newspaper Society found, inter alia, that the most commonly looked at part of an advertisement is the main picture and that colour can greatly improve its effectiveness) the prominence of the majority of apologies published is a farce.
- v. The suggestion that a black and white textual correction, 5% of the size of the offending article in the latter pages of the publication can be considered as an effective remedy where defamatory article featured on the front cover, in colour, with images and headlines is ridiculous; not only does it not accord with common sense but is also contrary to the same principles (established through objective research) that publications apply to their own advantage when selling advertising space. This is nonetheless the repeated approach of the PCC to this issue.

## 12. So what is the Common Sense Solution?

- i. The common sense solution was set out most clearly to me recently by a London cabby (see below); the prominence of a correction should be equivalent to the material it corrects. As I also set out below, this is overwhelmingly the view of the general public.
- ii. This is hardly surprising as it is mere common sense. It also applies the same principles as advertising to the issue of prominence, since it is prominence that you buy in advertising in mathematically calculated quantities. If different criteria

are applied then we are according commercial issues (and the interests of the big business) greater weight than issues of truth and accuracy (and the interests of the general public).

- iii. The other reason why this is plainly the common sense approach is that the newspaper has at the point of publication already determined how important the story is, and therefore where it should be published according to the various grades of prominence for news copy. The amount of column inches, where those inches are located and whether the story will be supported by a picture is a carefully judged editorial decision. It is one however from which newspapers unhesitatingly resile from when it comes to correcting a mistake in the article. The fact that the PCC permits such complete volte faces when it comes to the publication of corrections speaks volumes about its true agenda.
- iv. The Parliamentary Assembly of the Council of Europe has taken the same common sense view on the issue of prominence. It made the following statement concerning the obligations of the press to correct its own mistakes:

*"When editors have published information that proves to be false, they should be required to publish equally prominent corrections at the request of those concerned."*
- v. Even those who are not great fans of the European influence would be hard put to challenge this proposition as it also reflects the views of the general public (as evidenced by our opinion survey). So where does the PCC stand on the issue of prominence? As I will now illustrate, it has said one thing to Parliament via its Chairman, but has acted in an entirely contrary manner.

### 13. What has the PCC said on the issue of prominence?

- i. The approach of the Parliamentary Assembly of the Council of Europe on the issue of prominence was apparently the one unequivocally adopted by Sir Christopher Meyer in his answers to his House of Commons, Culture, Media and Sport Committee in May 2003.
- ii. Sir Christopher was one of the witnesses giving evidence to assist the Committee in deciding whether to recommend greater degrees of regulation of the press. The context of Sir Christopher's words on the subject of prominence was an attempt by the PCC to resist any statutory encroachment upon the present system of self regulation. Sir Christopher made the following explicit and lucid observations on the subject, as recorded in Hansard:

*"When they [the newspapers] do apologise or a correction has to be published or a negative adjudication comes out, these things should be at least as prominent as the original transgression."*
- iii. Pressed on this subject, Sir Christopher Meyer later repeated his assertion:

*"Yes, otherwise it is ridiculous. They should be, as I said, at least as prominent as the original transgression."*
- iv. On the issue of front page "*transgressions*" he had the following to say:

*"What I am saying is this. If we go to formal adjudication, you come out with a formal adjudication, and had there been some hideous transgression on the front page, then I would expect the adjudication to be published, or at least start on the front page, depending on how long the adjudication was going to be. I think that would be entirely reasonable."*

- v. Sir Christopher's observations concerning a "*transgression*" that appears on the front page were also significant. Front page stories create unique problems for the complainant for a number of reasons. Firstly, millions of non purchasers of the newspaper will see at least the headline of the article in news stands, paper shops, libraries, being read by their fellow passengers on the train etc. Millions more will see the front pages held up on late evening news programmes on the evening before they hit the news stands, and the various breakfast news programmes on the following morning. Front page newspaper headlines are reported on the radio, news websites and news digest magazines.
- vi. In these circumstances, the only way there can be any proportionality or fairness in the correction (for there to be any prospect of an equivalent number of people taking it in) is for it to be placed in the same position as the original article. So when Sir Christopher talked about the need for a front page adjudication (or at least one that begins on the front page), this seemed to me to be no more than a common sense acceptance of what was required in those circumstances.
- vii. My new found optimism about the PCC's approach to these issues was however to be dashed shortly after the Hansard account of Sir Christopher's assertions on the subject of prominence was published upon my asking the PCC to adjudicate on the issue of prominence in the context of its chairman's remarks.

#### 14. Has the PCC acted consistently with these statements?

- i. The correct interpretation of the term "*due prominence*" arose as an issue for a complainant only a matter of weeks after Sir Christopher Meyer had made his observations on behalf of the PCC to the Parliamentary Committee. The complaint was made to the PCC after the newspaper had (after some weeks of resistance) eventually conceded that there was no truth in the article at issue.
- ii. As the ***Editors' Code Book*** tells us, and as always happens in practice, it is the editor of the offending newspaper who decides what prominence will be given to a retraction/apology. Since the editor also determines the wording and thereby the length of the apology/retraction, the complainant is entirely at the mercy of the person who has wronged them in the first place in order to set the record straight. This results in the slightly alarming situation of the miscreant stipulating the severity his own sanction.
- iii. In this case, in line with the usual practice of the press in these circumstances, the newspaper offered the complainant a correction which was 6% of the size of the original article (which it had conceded was 100% incorrect). Taking Sir Christopher Meyer at his word, and relying on the ***Editors' Code Book*** statement that the PCC can rule on such an issue, I cited his observations to the Culture, Media and Sport Committee in resisting adjudication by the PCC that the tiny correction offered would comply with the PCC Code stipulations.

- iv. It therefore came as a considerable surprise to me (and my client) to be told via the PCC's adjudication that "*due prominence*" in this case did indeed mean a correction which was a mere 6% of the original article's size. Furthermore, it was clear from the rather acid terms of the adjudication that the Commission did not take kindly to being asked to act in a way consistent with Sir Christopher's representations to Parliament.
- v. A few weeks later, an article which was six pages long starting on the entire front page was adjudged by the PCC to be corrected with "*due prominence*" by means of a few column inches on page two of the relevant newspaper. Neither complainant thought this a common sense interpretation of the term "*due prominence*." Neither adjudication was consistent with what the PCC had said to Parliament via its chairman only a few weeks previously. The proposition that after publishing a completely incorrect advertisement on behalf of an advertiser, a newspaper would then offer to correct the original mistake with a subsequent advertisement which was substantially less than 10% of the original size is ludicrous.
- vi. As the newspaper industry knows, prominence is something which can readily be measured and sold. So far as both complainants and the general public are concerned, it appears they are presently being cheated by the PCC on the issue of "*due prominence*". Nobody more so than Ms Geldof – who despite the then Chairman of the PCC freely accepting to Parliament that her apology should be on the front page, then presided over an adjudication that placed it elsewhere.

#### 15. The Benefits of Corrections/Apologies being of Equivalent Prominence

- i. The effect on a newspaper of the prospect of a genuine sanction for breaches of the PCC Code is dramatic. The threat to a newspaper of a legal action where their actions are not judged by a tribunal of its own making can have a remarkable impact on its desire to correct inaccuracies in its news pages. I took on a front page story of a tabloid newspaper on behalf of a celebrity client that was not only inaccurate, but also defamatory. Faced with a libel action, the newspaper in question suddenly decided that on this occasion the appropriate place to correct an inaccurate front page story was with equivalent prominence (i.e. on the whole of the front page) and that "*promptly*" meant the following day. The value of this to the newspaper was commercial – it 'mitigated' the damage (i.e. the monetary cost of the original libel). This is a stark contrast to the attitude taken by newspapers where there is only the prospect of a mere (cost free) PCC complaint under the current regime.
- ii. Not only would the complainant benefit, but if newspapers are truly held to account for inaccuracies and intrusions into privacy by adjudications which everyone can see, then such activity will be substantially reduced. The reason for that is because when corrections, apologies, and adjudications are published with sufficient prominence, then not only will the complainant have obtained a proper remedy, but equally importantly, the readers will know when newspapers have breached their own code of practice. Readers can then make judgments as to what newspapers they purchase on an informed basis. This will in turn mean that there will be a commercial incentive on the press to comply with the Code.
- iii. The sad reality is that until that becomes the case, the press will take the same view as Rupert Murdoch when he famously (admittedly some years ago) could

not even remember the name of the PCC. For as long as the press itself does not take the PCC seriously, we cannot be safe in the PCC's hands. But this all could be changed (in my view) by the stroke of a pen. If the word "*due*" was replaced in the phrase "*due prominence*" with the word "*equivalent*", then the scope of the PCC to fail complainants would be substantially reduced.

- iv. Better still would be the replacement of the words "*due prominence*" in the PCC Code with the very words used by Sir Christopher in his evidence to the Parliamentary Committee; namely that corrections and adjudications should be "*at least as prominent as the original transgression.*" We would then see a press far more motivated to get things right in the first place, and therefore adopt far higher standards as a result. I believe it would also meet the expectation of the man in the street.
- v. Alas, while the Code Committee is made up entirely of newspaper delegates there is no prospect whatsoever of that happening. However, as I set out below, 96% of the public think that is what it should say.

#### 16. The Perception of the Man in the Street

- i. Recently I got into a taxi and had this remarkable conversation with the cabby. When he learnt that I was a media lawyer, the first thing he said (wholly unprompted) was how outrageous he thought it was that he would read a story that covered say a whole page, and the correction was only the small fraction of the size. He then went on to say that he thought the newspapers should be required to publish an apology/retraction which was at least the size of the offending article.
- ii. When I told him that the PCC was created by the press, funded by the press, appointed by the press, the Code was written by the press, and that seven of the seventeen Commissioners were Editors, he was completely astonished. He thought (and he was confident that all his friends thought likewise) that the PCC was some kind of government organisation and exercised a genuine regulatory role. He then said that it was absurd for the press to regulate itself, since it was plainly no real form of regulation.
- iii. This is almost literally the "Man on the Clapham Omnibus", and it was a truly remarkable confirmation that the general public expects the body that regulates the press to be truly independent, and finds the PCC's failure to ensure that corrections enjoy the same prominence as the offending article to be a clear regulatory failure. It therefore indicates that there may be public support for any campaign to improve the quality of press regulation.
- iv. One of the striking contrasts in the reaction to the decision of Eady J in *Mosley* is the outrage bawled out of the pages of the press (and the tabloid press in particular), as contrasted with the overwhelming majority (around 90%) of those who commented on newspaper blog sites on the outcome. Virtually all of the comment from the general public was in favour of the *Mosley* decision and was in stark contrast to the self interested views expressed by most editors and journalists.
- v. Has the PCC ever invested in a survey to establish what the public really wants in a regulator – rather than just attending to the preferences of the large

corporate entities that fund it and own the papers that it is tasked to regulate? Of course not! If it had, it knows perfectly well that the answers would not be to the liking of its sponsors. So my firm has funded a survey that does answer those questions. The results are startling in their contrast to the form of regulation operated by the PCC.

## 17. A Survey of Public Opinion of the Policies and Practices of the PCC

i. There are a number of respects in which the policies and practices of the PCC appear designed to fulfil the objective for the PCC identified by Professor Robert Pinker (i.e. to protect press freedoms) rather than serve the interests of the general public, whose rights/interests are being infringed by the press. I have identified a number of these above, and in order to prove beyond doubt that the PCC is primarily committed to preserving press freedoms at the expense of the interests of those who have reason to complain against it, I drafted a set of survey questions. I set them out below in full, along with the percentages of the general public who selected from the options which the survey offered them.

ii. The preface to the survey was as follows:-

**“BACKGROUND; The PCC (Press Complaints Commission) is a self regulatory body which deals with complaints from members of the public about the editorial content of newspapers and magazines. The PCC’s sole sanction is to oblige newspapers and magazines to publish agreed corrections or PCC adjudications.”**

iii. The survey was a modest one, and intended principally to provoke a more comprehensive consultation process with the general public in order to establish what it wants in a regulatory body – something which I do not understand that the PCC has ever undertaken. It was undertaken by the Spot On Group and taken from 100 individuals – 50 male and 50 female – which I understand is the minimum number necessary to obtain a statistically significant result. Here then are the questions and percentage figures for the answers which the survey generated:-

1. Should the size and position of corrections/adjudications published by newspapers be:

- |                                      |     |
|--------------------------------------|-----|
| a. Less prominent than the original; | 4%  |
| b. Equal prominence to the original; | 40% |
| c. More prominent than the original. | 56% |

2. Should inaccuracies on the front page be corrected:

- |                       |     |
|-----------------------|-----|
| a. On the front page; | 66% |
| b. On an inside page. | 34% |

3. Should journalists be permitted to speak to children under 16:

- |   |     |
|---|-----|
| a. Only on issues involving their own or another child’s welfare with parental consent; | 31% |
| b. Only with their parents’ consent;  | 67% |
| c. Not at all.  | 2%  |

4. Should the Committee that writes the PCC Code of Practice be comprised of:
  - a. Only representatives from the press; 6%
  - b. Representatives from the press and the general public; 69%
  - c. Representatives from the press and representatives for complainants; 24%
  
5. Should meetings of the Commission to adjudicate complaints be recorded by:
  - a. A transcript; 3%
  - b. A minute prepared by the PCC; 1%
  - c. Both. 96%
  
6. Should a complainant (or his/her representative) be allowed to attend the meeting of the Commissioners which adjudicate their complaint?
  - a. Yes 99%
  - b. No 1%
  
7. Should there be an independent appeal from PCC adjudications?
  - a. Yes 99%
  - b. No 1%
  
8. Should the PCC be able to impose financial sanctions?
  - a. No; 0%
  - b. Yes – a fine for the newspaper; 4%
  - c. Yes – compensation for a successful complainant; 2%
  - d. Yes - awarding professional costs to the complainant; 5%
  - e. A combination of these financial sanctions. 89%
  
9. Should the Commission be comprised of:
  - a. A combination of press representatives and non-press members; 55%
  - b. Press representatives and representatives for complainants; 41%
  - c. Non-press members only. 4%
  
- iv. On the issue of prominence (question 1) only 4% agreed with the PCC's policy that corrections/apologies should have less prominence than the original. Well over 90% thought that they should be at least as prominent as the original, and a striking 56% thought that they should be more prominent than the original.
  
- v. As to question 2, two thirds of those questioned thought that front page infractions should be remedied by front page apologies. This is again in stark contrast to the practice of the PCC – notwithstanding the protestations of Sir

Christopher Meyer when he attended before the Committee in 2003 to give evidence. The practice of the PCC is very different.

- vi. As to question 3, the PCC Code answers with proposition A. Only 31% of the population agree. 69% consider that children should enjoy more protection than the PCC Code provides.
- vii. As to question 4, the PCC considers that representatives of the press should write the Code. Only 6% of the public agree with that. The other 94% think there should be some independent representation on that Committee.
- viii. As to question 5, PCC adjudications are only reported by a minute prepared by the PCC. 99% of the population disagree with that policy, and require both a minute and transcript of the meetings.
- ix. As to question 6, complainants are not allowed to attend adjudications. Only 1% of the public agree with this and 99% think a complainant should be allowed to attend.
- x. As to question 7, the PCC refuses to permit an independent appeal from its adjudications. 99% of the general public disagree with them.
- xi. As to question 8, the PCC refuses to impose financial sanctions. 100% of the population disagree with that policy.
- xii. The only respect in which the PCC is supported is that the Commission should be a mixture of press and non press members (question 8).

#### **18. So does the PCC fulfil the Role of an effective Regulator?**

- i. The PCC was created by the press. It is funded and appointed by the press. The Code of Practice is written by the press, and seven of the seventeen Commissioners are newspaper editors who have a direct commercial interest in keeping restrictions on what they publish to a minimum. Such a body cannot possibly provide a disinterested means of resolving complaints by an individual against the press. Even if it was possible for it to do so, since it is essential that justice is not only done, but seen to be done, no confidence can be had on the part of the general public in an entity which is so obviously merely a sub-division of the commercial press.
- ii. It is difficult in a short paper to set out all the evidence that the PCC is an inadequate and hopelessly biased body. However, as I set out above, the clearest evidence of its innate bias in favour of the press comes from the license that it gives to newspapers to publish apologies/corrections which are a tiny fraction of the size of the offending article (or inaccurate portion of the offending article). The evidence of transparent bias and wholesale failure by the PCC to provide a fair and effective means of complaint is however overwhelming. This means that where complainants are being robbed of their rights, society as a whole is the loser.
- iii. As the expert commentator Roy Greenslade, himself a senior journalist, regularly observes, the PCC achieves its intended function. That is to ensure that there is inadequate and ineffective regulation of the press, which in turn permits appalling

infractions on the rights of individuals such as suffered by the McCanns (until legal action was taken) under the editorship of a PCC Commissioner. This same serial offender against the spirit and letter of the PCC Code was one of those that adjudicated on all the complaints cited above. Hardly surprising that the outcomes were so plainly unfair, as they will continue to be until the PCC is either fundamentally reformed or replaced by an entity that truly is “**fast, free and fair.**”

#### **19. A Summary of the PCC’s Current Failings**

- i. The PCC is structurally and institutionally biased in favour of the press.
- ii. It fails to live up to its claims to be fast, free and fair.
- iii. Its policies and decisions fly in the face of public opinion.
- iv. The PCC’s real agenda emerges most clearly on the issue of prominence where corrections/apologies enjoy only a fraction of the prominence of the offending article. In administering its sole sanction the PCC blatantly places the interests of the press over the public.
- v. It purports to fulfil a dual role of protecting the public from press excess and defending press freedom. These roles are mutually exclusive.
- vi. Its Code is written exclusively by the press removing all independent influence from its core principles, and is therefore heavily press biased.
- vii. Its procedures are opaque, secretive, and the PCC refuses to allow any substantive appeal from its adjudications.
- viii. The PCC’s remit in the 21<sup>st</sup> Century is anomalous.

#### **20. My Recommendations to make the PCC Fast, Free and Fair**

- i. The Mission Statement be revised for a new PCC making it clear that it exclusively serves the interests of the public, rather than the press.
- ii. The Commissioners be entirely composed of individuals without vested interests in the press and that there be an equal number of Commissioners drawn from those who regularly represent those who have suffered as a result of misconduct by the press.
- iii. Hearings be open to complainants, recorded, transcripts made available, and that there be a proper substantive appeal procedure (part of the ASA procedure but absent from the PCC).
- iv. The Code be amended to provide that apologies, corrections and adjudications must be published with at least the same prominence as the offending article, or that part of the offending article which is inaccurate if it is only inaccurate in part.
- v. The new PCC be given the power to make some form of financial provision such as the payment of compensation and reimbursement of professional fees.

- vi. There be a system of fully independent appeal against adjudications.

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